O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

सत्यमेव जयते

सत्यमेव जयते

Email: cexappeals-bhavnagar@gov.in

अपील आदेश संख्या :

अपील / वाद संख्या / Appeal / Stay No.	फाईल संख्या / File No.	दिनांक / Date
V2/84/BVR/2017	V/1-01/15	06.02.2017

1. Appeal filed by Commissioner

BHV-EXCUS-000-APP-146-2018-19

आदेश का दिनांक / Date of Order	19.06.2018	आदेश जारी करने की तारीख / Date of Issue	26.06.2018

Passed by Shri P. A. Purave, Commissioner, CGST & Central Excise, Rajkot(Gandhidham)

[illegible] Commissioner, CGST & Central Excise, Rajkot(Gandhidham) [illegible] Appeal No. V/1-01/15, filed by the Commissioner, केन्द्रीय उत्पाद शुल्क एवं सेवा कर अपील आयुक्तालय, राजकोट [illegible] Order-in-Original No. [illegible] dated [illegible] passed by the Assistant Commissioner, Central Excise, Gandhidham-Kandla [illegible]

In pursuance to Board's Circular No. 1053/2/2017-CX dated 17.10.2017 read with Circular No. [illegible] dated [illegible], Shri P. A. Purave, Commissioner, CGST & Central Excise, Rajkot(Gandhidham) has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed before him under Section 35A of Central Excise Act, 1944 and Section 84 of the Finance Act, 1994.

[illegible] Assistant Commissioner, Central Excise, Gandhidham-Kandla [illegible]

Arising out of above mentioned Order-in-Original issued by Additional / Joint Commissioner / Deputy / Assistant Commissioner, Central Excise / Service Tax, [illegible] Commissionerate / Gandhidham-Kandla:

2. अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :

M/s Gujarat Energy Transmission Corpn. Ltd. Construction Division Near Nirmal Hotel, Amul Bajipur Highway, Anand-388 001

इस अपील/अपील को दायर करने वाले व्यक्ति निम्न दिये गये पते पर अपील आदेश की प्रतियां प्राप्त करने के हकदार हैं
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following manner.

(A) केन्द्रीय उत्पाद अधिनियम, 1944 की धारा 35B एवं वित्तीय अधिनियम, 1994 की धारा 83 के तहत सेवाकर नियमावली, 1994 के नियम 9(2) के अंतर्गत निम्नलिखित जगह की जाने वाली अपील :
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Section 86 of the Finance Act, 1994 to the west regional bench

(B) अपीलकर्ता अथवा प्रतिवादी को यदि किसी आदेश द्वारा पीड़ित महसूस हो तो वह सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय अधिकरण (पश्चिम क्षेत्रीय पीठ) के समक्ष, जो [illegible] में स्थित है, अपील दायर कर सकता है।
The appeal lies before the Customs, Excise & Service Tax Appellate Tribunal (West Regional Bench) at [illegible]

(C) उपरोक्त अपील प्रपत्र सं. [illegible] में अपील की जानकारी दी जानी चाहिए। अपील के साथ जहां संलग्न आदेश की प्रति होनी चाहिए, वहां इसकी एक प्रति होनी चाहिए। अपील के साथ रु. [illegible] का शुल्क संलग्न होना चाहिए।
The appeal in Form No. [illegible] should be filed in duplicate. It should be accompanied by a copy of the order appealed against and a fee of Rs. [illegible]

[illegible] Commissioner, CGST & Central Excise, Rajkot(Gandhidham) [illegible] Appeal No. V/1-01/15 [illegible] Order-in-Original No. [illegible] dated [illegible] other than the Commissioner on [illegible]

(iii) [illegible] 2001, [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.5000/-, 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 Asstt. Registrar of branch of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(B) [illegible] 1994, [illegible]

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. 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/-.

(ii) [illegible] 1994 [illegible]

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

(iii) [illegible]

(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.

(c) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India :
इस आदेश की पावती संलग्न करनेवाली सनदों में, जिन्हें आवेदक इसके अतिरिक्त, ऊपर की गई धारा 129E के परन्तुक के अधीन जमा करेगा, निम्नलिखित शुल्क टिकट लगाए जाएंगे, जिन्हें तत्पश्चात्, रद्द किया जाएगा, अर्थात् :-
A revision application lies to the Government of India. Revision Application Unit, Ministry of Finance, Department of Revenue, New Delhi-110001 in such cases, as mentioned in the proviso to sub-section (1) of the Section 129E ibid.

(ii) यदि माल का किसी राज्यक्षेत्र के भण्डार से, जहां उसे माल वितरित किया जाना था, किसी व्यक्ति द्वारा क्षति या हानि कारित हुई है, तो उस व्यक्ति द्वारा, जिसे ऐसी हानि या क्षति हुई है, या उसके अभिकर्ता या प्रतिनिधि द्वारा, उस राज्यक्षेत्र के भण्डार के स्वामी के नाम में, जिसमें माल वितरित किया जाना था, अपील की जाएगी ।
In case of any loss or injury, whether destruction or not, to goods in a warehouse or in transit to the warehouse of any consignee in the territory in which the goods are consigned to be delivered, an appeal shall lie against the order of the proper officer by the consignee or his agent or representative in the name of the owner of the warehouse in the territory in which the goods are consigned to be delivered.

(iii) जहां माल के पश्चात् किसी व्यक्ति द्वारा क्रय किया गया है, वहां उस व्यक्ति द्वारा, जो ऐसे क्रय के समय माल का स्वामी था, अपील की जाएगी ।
In case of sale of goods or any other property, after the same has been delivered by the consignee, to any person, an appeal shall lie against the order of the proper officer by the person who was the owner of the goods at the time of such sale.

(iv) उन्हें उपधारा (1) के अधीन अपील किए जाने पर, उपधारा (2) के अधीन अपील किया जाएगा ।
In case of appeal preferred under sub-section (1), appeal shall be preferred under sub-section (2).

(v) दूरभाष अधिकरण के दो सदस्य पीठ के समक्षा के लिए जो पहली तारीख नियत की जाए उस तारीख से या उस तारीख के बाद जो तारीख पक्षकारों को सूचित की जाए, सात दिन के भीतर अपील फार्म सं. EA-3 में चार प्रतियों में की जाएगी और उसके साथ (जिसमें इस धारा के अधीन अपील करने वाले व्यक्ति से भिन्न व्यक्ति की दशा में उसके द्वारा अपील किए गए आदेश की एक प्रति भी होगी) उस आदेश की चार प्रतियां भी होंगी जिसके विरुद्ध अपील की गई है ।
Appeal to be filed before Bench of two members of Telephone Tribunal within seven days of receipt of this order or from such date as may be notified to the parties, in Form No. EA-3 in four copies and shall be accompanied by four copies of the order appealed against (one of which shall be certified copy) and copies of the order of the adjudicating authority and of the order of the appellate authority, if any, in addition to the copies required to be filed under section 129A(2).

(vi) अपील प्राधिकरण के समक्ष अपील करने के लिए अपेक्षित फीस की रकम, जहां ऐसी रकम एक लाख रुपए या उससे कम है, एक हजार रुपए होगी, जहां ऐसी रकम एक लाख रुपए से अधिक है किन्तु पांच लाख रुपए से अधिक नहीं है, पांच हजार रुपए होगी और जहां ऐसी रकम पांच लाख रुपए से अधिक है, वहां दस हजार रुपए होगी ।
In case of appeal to the Appellate Tribunal, the fee of one thousand rupees where the amount involved in Rupees One Lakh or less, five thousand rupees where the amount involved is more than one lakh but not exceeding five lakh rupees and ten thousand rupees where the amount involved is more than five lakh rupees.

(vii) इस धारा के अधीन अपील के साथ अपील करने वाला व्यक्ति उस आदेश के विरुद्ध अपील करने के लिए, जिसके अन्तर्गत शास्ति अधिरोपित की गई है, उस शास्ति के दस प्रतिशत का संदाय करेगा, जहां शास्ति के संदाय पर ही अपील करने का विनिर्दिष्ट अपराध के लिए दण्ड के रूप में शास्ति अधिरोपित की गई है ।
In case of appeal under this section, the appellant shall deposit ten per cent of the duty demanded or penalty levied therein, where the penalty levied is the only amount in dispute.

(viii) अपील प्राधिकरण के समक्ष अपील, फार्म सं. EA-4 में की जाएगी और उसके साथ (जिसमें इस धारा के अधीन अपील करने वाले व्यक्ति से भिन्न व्यक्ति की दशा में उसके द्वारा अपील किए गए आदेश की एक प्रति भी होगी) उस आदेश की चार प्रतियां भी होंगी जिसके विरुद्ध अपील की गई है ।
Appeal to be filed before Appellate Tribunal in Form No. EA-4 in quadruplicate and shall be accompanied by four copies of the order appealed against (one of which shall be certified copy) and copies of the order of the adjudicating authority and of the order of the appellate authority, if any, in addition to the copies required to be filed under section 129A(2).

(ix) अपील प्राधिकरण के समक्ष अपील करने के लिए अपेक्षित फीस की रकम, जहां ऐसी रकम एक लाख रुपए या उससे कम है, एक हजार रुपए होगी, जहां ऐसी रकम एक लाख रुपए से अधिक है किन्तु पांच लाख रुपए से अधिक नहीं है, पांच हजार रुपए होगी और जहां ऐसी रकम पांच लाख रुपए से अधिक है, वहां दस हजार रुपए होगी ।
The appeal to the Appellate Tribunal shall be accompanied by a fee of one thousand rupees where the amount involved in Rupees One Lakh or less, five thousand rupees where the amount involved is more than one lakh but not exceeding five lakh rupees and ten thousand rupees where the amount involved is more than five lakh rupees.

(x) अपील प्राधिकरण के समक्ष अपील करने वाला व्यक्ति उस आदेश के विरुद्ध अपील करने के लिए, जिसके अन्तर्गत शास्ति अधिरोपित की गई है, उस शास्ति के दस प्रतिशत का संदाय करेगा, जहां शास्ति के संदाय पर ही अपील करने का विनिर्दिष्ट अपराध के लिए दण्ड के रूप में शास्ति अधिरोपित की गई है ।
In case of appeal under this section, the appellant shall deposit ten per cent of the duty demanded or penalty levied therein, where the penalty levied is the only amount in dispute.

(xi) उपरोक्त के अतिरिक्त वित्त अधिनियम, 1994, के प्रावधानों के संबंध में सीमा शुल्क अपील अधिकरण के समक्ष अपील करने के संबंध में व्यापक और अतिरिक्त प्रावधानों के लिए वित्त अधिनियम, 1994 की धारा 86 देखी जाए ।
One copy of application or O.I.O. should be given free of charge in case the appeal is filed to the Commissioner (Appeals) or Tribunal as the case may be, 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 Commissioner (Appeals) or Tribunal as the case may be, 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 Commissioner (Appeals) or Tribunal as the case may be is filed to avoid scrutiny of the order.

(xii) उच्च प्राधिकारी को अपील करने के लिए, जहां तक हो सके, उपरोक्त रूप में अपील करने के संबंध में पूर्वोक्त सभी बातों का ध्यान रखा जाए ।
Appeal to the higher authority should be filed in the manner as mentioned above generally in respect of other matters.

(xiii) अपील प्राधिकारी के समक्ष अपील करने के संबंध में अधिक जानकारी के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in देख सकते हैं ।
For elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s Gujarat Energy Transmission Corporation Ltd., Construction Division Office, 220 KV Substation Compound, N.H. No. 8 A, Limbdi 363421, Surendranagar, Gujarat (hereinafter referred to as the 'appellant') have filed the appeal against OIO No. 4/DC/2018 dated 08.02.2017 (hereinafter referred to as impugned Order) of the Assistant Commissioner of Service Tax Division, Bhavnagar (hereinafter referred to as 'lower adjudicating authority').

2. The briefly stated facts of the case are that the appellant had filed an application for refund of Rs.61,83,316/- and the same was received by the office of the lower authority on 11.11.2013 for the Service Tax paid by the appellant for erection of electrical substation and transmission line work. After scrutiny of the documents submitted by the appellant SCN dated 02.12.2016 was issued to the appellant calling clarification on various points. The SCN was adjudicated and the refund claim filed by the Appellant was rejected by the lower authority vide the impugned order.

3. The appellant had provided various Services viz. erection work order, consisting of eight sub orders for electrical substation and transmission lines on behalf of M/s. Sardar Sarovar Narmada Nigam Limited (SSNNL), wholly owned Gujarat Government Public Undertaking Company for the purpose of operating pumping station nearby water canal for ease of flow of water from Narmada Dams. The appellant had received payment in installments from July-2002 to March-2009 and the entire work was completed from December-2007 to October-2009 (24.10.2006). The appellant has paid the service tax Rs. 55,74,620/- with interest Rs.6,08,472/- thus totaling to Rs. 1,11,10,332/- on 21.03.2014 after finalization of the bills. After payment of the above Service Tax it came to the knowledge of the appellant that there was some typographical error in the calculation and payment of Service Tax, hence they filed a refund application for Rs.61,27,276/- with the lower authority on 27.05.2015 and the same was rejected at the relevant time. Thereafter, it came to the notice of the appellant that they were not supposed to pay service tax in light of exemptions granted by various Notifications viz. 45/2010 dated 20.07.2010, Notification 7/2010 dated 27.02.2010 and CBEC Circular No. 123/5/2010-TRU dated 24.05.2010 vide which transmission of electricity was exempted. Moreover, the appellant had also claimed that as per insertion of Section 101 of the Finance Act, 1994 vide Finance Bill, 2016, the exemption was granted in certain cases relating to construction of canal, dam etc. and the same was earlier provided vide Notification No. 7/2009-ST dated 23.02.2009, Notification No. 32/2014-ST dated 30.01.2014 and Notification No. 25/2012-ST, CBEC Circular No. 113/10/2009-ST dated 15.09.2009 also.

4. The lower authority rejected the refund claim of the appellant on the grounds that: the refund claim was time barred in light of the provisions of Section 11B of the Central Excise Act, 1944 made applicable to Service Tax under Section 83 of the Finance Act, 1994; that services provided by the appellant were for Year 2007 to 2008 and the exemption period under Section 101 of the Finance Act, was 01.07.2012 to 29.01.2014, thus the refund claim of the appellant was rejected in light of Section 11B of the Finance Act, 1994; that the appellant had only quoted Point of Taxation Rules and Notification No. 25/2012 dated 20.06.2012 etc. in their reply, but did not explain clearly how they were eligible for refund under the said provisions; that the liability of the appellant was to pay Service Tax which was on receipt basis till the introduction of Point of Taxation Rule, 2011; that the appellant had received the amount Rs.1,39,11,844/- from service recipient in different installments starting from Year July 2002 to March,2008 on the liability to pay the service tax also started from the period 2002 to 2008, as they had started receiving the amount for completion of work in

installments but they had not paid the service tax at that time that non-mentioning of bills has no relation to the taxability of service provided by the appellant. that appellant had never contested department for clarification from the period Year 2012 to 2014 for knowing taxability of the services provided by them the appellant has wrongly interpreted the concept of "payments of service tax on receipt basis", which was incorporated & made effective from the year 2015; that the appellant had not provided any authorized documentary evidence to prove that they had borne the service tax burden themselves and have not passed on the burden of service tax to any other person. hence the refund claim is inadmissible.

6 Being aggrieved by the impugned order the appellant preferred the present appeal on the grounds that:

(i) the impugned order is bad in law and on facts.

(ii) the lower authority erred in law and on facts has rejected the appellant's claim of refund of Rs.81,32,378/- which had arisen due to service tax paid on the services which was non taxable services during the period of provision of service by treating the refund application as inappropriate due to various reasons.

(iii) the lower authority has rejected the refund application treating the same as time barred in light of Section 11B of Central Excise Act, 1944 which is made applicable to Service Tax under Section 83 of the Finance Act, 1994; that the applicant had filed refund application after realizing that services rendered during the period would not attract service tax; that the service tax was paid by misinterpretation of law; that as the payment made was not required by law, the limitation clause would not be applicable in this case. Further the appellant relied on the case of Nataraj and Vaipat Associates Vs. ACST [2010] 249 ELT 307 in which assessee paid service tax which was not payable at all. It was held that time limit does not apply to amount which is not service tax and the High Court can order refund and the same view was taken in KVR Construction Vs. CCE [2010] 25 STT 431 (Kar.HC).

(iv) that the lower authority has not considered the justification in true spirit and rejected the refund.

5. Subsequently, in pursuance of Hon'ble Notification No.25/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No.05/2017-ST dated 16.11.2017, the instant appeal has been taken on hand for passing Order in Appeal.

7. Personal Hearing in the matter was granted and held on 25.01.2018. Shri Dinesh G. Raghatate, Authorized representative and Shri Shreyash Tripathi, Account Officer of appellant appeared and reiterated the submission already made in the case and also submitted additional submission at the time of personal hearing, which has been taken on record.

8 I find that in case of instant appeal the impugned order was received by the appellant on 10.02.2017 and date of filing of appeal is 11.04.2017. Hence, the appeal has been filed within the stipulated time period and there is no delay in filing the appeal. Since the issue is regarding rejection of refund claim, no pre-deposit is required. Hence, I proceed to decide the Appeal.

9. I have carefully gone through the records placed before me, appeal memorandum and the various submission made orally as well as in writing during the

personal hearing. I proceed to decide the appeals on merits. The issue to be decided is whether the appellant is eligible for refund of Service Tax paid by them on the services provided by them for the advances received by them and services provided & work completed by them for the period July-2007 to March-2008 and December-2007 to October-2009 respectively.

10. On going through the impugned order, I find that lower authority has discussed each and every aspect of the case in detail.

11. I find that the chronology of the events in the instant case is also strange. The appellant had received advances from their service receiver for the period July-2007 to March 2009, the work was completed in the phased manner during the period December-2007 to October 2009, Service Tax was paid on 31.03.2014, thus for a long period of July-2007 to March-2014 no service tax was paid by the appellant. I find that during the said period, there were various amendments, which were carried out in the Finance Act in respect of services provided for erection of electrical substation and transmission line work.

12. The main ground of appellant's Refund application is that the Services provided by them were exempted or on which service tax was not payable at that material time or subsequent time. In this regard, I find that the appellant has mentioned at 5th sub para of Para-1 of their submission to Show Cause Notice dated 20.12.2016 that while finalizing the bills, the matter was considered as general and regular bills of erection, commissioning etc. and service tax was charged and paid. Thus, it is clear that the appellant has already charged and collected the Service tax from their service receiver and then paid the same to the exchequer though belatedly but paid only after charging and collecting the same.

12. Moreover, I find that the lower authority has clearly mentioned at para 12 of the impugned order "During the entire process the claimant has also not provided any certified documentary evidence to prove that they have borne the service tax burden themselves and have not passed on the burden of service tax to any other person. Hence, on the ground also refund claim is inadmissible". It shows that the Service Tax was first charged and collected by the appellant and subsequently deposited in the Govt. account.

14. I find that the decision of Hon'ble High Court of Kerala in the case of M/S.THEVAN ROADWAYS LTD. Vs CCE, CHE-II, [2012 (28) S.T.R. 202 (Ker.)] is squarely applicable in the instant case. Para-8 & 9 of the same are reproduced below:-

> *"8. After hearing respective counsel and after perusal of records, we find that Section 11B upon the application to refund presumption under Section 123. When Section 11B(2) is read along with Section 123, it is apparent that the Parliament has acted upon the normal course followed in all commercial transactions and, therefore, there is a presumption that expenditure incurred by persons like appellants has been recovered by them while selling their products. Because of this normal business practice, the passing burden of tax is considered to be exception & therefore, Section 11B(2) requires persons claiming refund to produce along with the application for refund documentary or other evidence showing that incidence of such duty had not been passed by him to any other person. Here, the findings concurrently recorded show that the appellant did not submit any such documentary or other material along with the application under Section 11B(2). Such finding is not complete.*
>
> *9. The judgment of Karnataka High Court in the case of C.C.E. Bangalore-II v. Karnataka State Agro Corn Processing Ltd., (supra) shows that in para 9 of judgment of*

Hon'ble Judges of the Hon'ble Apex Court in the matter of Jaiprakash Industries Limited v. Union of India & Ors. reported in 1997 (3) SCC 538 = 1997 (89) E.L.T. 247 (S.C.) has been looked into and a finding has been recorded that there cannot be any unjust enrichment by State Government. The said objection of department was therefore, not accepted. The facts there show that food products manufactured by assessee were supplied to various departments of Government and while clearing these articles, assessee raised invoice and collected excise duty for making it over to Central Government. Thereafter it was found that the assessee was not liable to pay Central Excise duty. It then sought refund and the refund claimed was rejected. Appeal against it was also rejected vide OIA 617, Chennai. Then assessee filed further appeal of the assessee. After that appeal was allowed, the assistant Commissioner examined the case and rejected refund on the ground of unjust enrichment. Then again appeal before Tribunal which ordered refund. This order of refund was questioned before the High Court. The entitlement to refund had already crystallized and merely on the refund was being rejected on the ground of unjust enrichment it is therefore, clear that case then is in peculiar facts. The ratio of judgment of the Hon'ble Apex Court delivered then in the case of State of Maharashtra v. Swastika Enterprises & Others Private Limited, reported in (2002) 3 SCC 235, clearly states the law that neither tax leviable, nor tax collected is entitled to retain such duty. The above judgment of Karnataka High Court, therefore, has no application to present facts. The principle of unjust enrichment in foregoing referred case is needs to be applied."

15 Thus, from the above, it is clear that 'Not passing of burden of taxes' to consumer is an exception, and in that view, person claiming refund has to produce documentary or other evidence showing that incidence of such duty had not been passed by him to any other person. I find that in the instant case, the appellant have themselves informed that the Service tax was charged and collected by their It is also affirmed in the above order that Neither tax levier (State) nor tax collector is entitled to retain such duty.

16. The appellant has contended that they had first refund application after realizing that services rendered during the period would not attract service tax but the lower authority has rejected the refund application treating the same as time barred in light of Section 11B of Central Excise Act, 1944, which is made applicable to Service Tax under Section 83 of the Finance Act, 1994 since the service tax was paid by misinterpretation of law as the payment made was not required by law hence the limitation clause would not be applicable in this case. I find that the appellant has collected and paid the service tax belated, though not required at that material time. Since, the Service Tax has already been collected by the appellant, Section 73A) stipulates that any amount collected as Service Tax is to be paid to the Government forthwith.

17 Further the appellant relied on the case of Nataraj and Venkat Associates Vs. ACST (2016) 249 ELT 357 in which assessee paid service tax which was not payable at all. It was held that time limit does not apply to amount which is not 'service tax' at all the High Court can order refund and the same view was taken in KVR Construction Vs. CCE (2010) 25 STT 458 (Kar HC). I find that the Hon'ble Madras H.C. has reversed the above mentioned Judgment in the Writ Petition files by the Department i.e. Assistant Commissioner of S.T. Chennai Versus Nataraj and Venkat Associates reported in 2015 (40) S.T.R. 31 (Mad.). The text of para 8 is reproduced below:-

"8. From the materials available on record, it is seen that the assessee were collected the Service under the Head of service "Works Service Tax" through ST-3 challans which are purported for payment of Service Tax only and on such, the claim of the respondent that the payment was only deposit and not Service Tax, cannot be entertained. Further, a tax, be it, direct or indirect, is intended for immediate expenditure for the common good of the state and it would be unfair to penalize its appropriation after it has been in whole or in part expended, which would often be the case in mere payment of such sum. Therefore, it is impracticable for the authorities to refund applications once the limit beyond time even if it is proved under a mistake of law. Therefore, the authorities have

rightly rejected the claim of the respondent and the appeal has not been taken note of by the learned Magistrate."

18. Thus, from the above Judgment, it is amply clear that even if the Service Tax has been paid by the appellant under a mistake, refund for the same is governed by the time limit prescribed under Section 11B of Central Excise Act, 1944, which is made applicable to Service Tax under Section 83 of the Finance Act, 1994. In the instant case, the Service Tax was paid by the appellant on 31.03.2014 whereas refund claim application was filed on 11.11.2016 i.e. beyond prescribed time limit for filing refund claim. Thus, the above judgment is squarely applicable in the instant case and I hold that the lower authority's action is justified in rejecting the refund claim being time barred vide the impugned order.

19. In view of the above, I hold that the impugned order issued by the lower authority is just and proper and reject the appeal filed by the appellant.

(P. A. Vasave)
Commissioner (Appeals) /
Commissioner
CGST &Central Excise,
Kutch (Gandhidham)

F. No. V.2/93/BVR/2017 Date 15.03.2018

By R.P.A.D.

To,
M/s. Gujarat Energy Transmission Corporation Ltd.,
Construction Division Office,
220 KV Substation Compound,
N.H. No. 8-A, Limbdi,
Surendranagar-363421

Copy to

1) The Principal Chief Commissioner, CGST &Central Excise, Ahmedabad.
2) The Dy./Asst. Commissioner, Central Excise, Rural Division, Bhavnagar.
3) The Dy. / Asst. Commissioner (Sys.), H.Q. Bhavnagar – for uploading on website.
4) Guard File.