::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/171/RAJ/2017	**DC/JAM/R-438/2016-17**	**10-02-2017**

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

RAJ-EXCUS-000-APP-052-2018-19

आदेश का दिनांक / Date of Order:	**26.04.2018**	जारी करने की तारीख / Date of issue:	**01.05.2018**

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

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 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 अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
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 **Appellants &** Respondent :-

1.M/s Jamnagar Electric & Machinery Co., Punjab Nation Bank Street, Ranjit Road, Jamnagar,

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/
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) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

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.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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 पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under 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 CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
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) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी 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 उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न॰ 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
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 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 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 यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथोस्थिति अपीलीय नयाधिकरण 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-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट 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 संबन्धित 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.cbec.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.cbec.gov.in

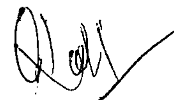
ORDER IN APPEAL

This order arises out of the appeal filed by M/s Jamnagar Electric and Machinery Company, Punjab National Bank Street, Ranjit Road, Jamnagar (hereinafter referred to as "the appellant") against the Order In Original No. DC/JAM/R-438/2016-17 dated 10.02.2017 (hereinafter referred to as the "impugned order") passed by the Deputy Commissioner, Central Excise, Jamnagar (hereinafter referred to as the "Adjudicating Authority").

2. Briefly stated the facts of the case are as under:-

(i) The appellant are registered as service provider and holding service tax registration No. AADFJ4126FST001 and filed refund claim of Rs.3,66,209/- (Service Tax of Rs. 3,36,664/- and interest of Rs. 29,545/-), on account of retrospective exemptions granted to the services provided to the government departments and local authorities, as provided in Section-102 of the Finance Act, 1994, as amended vide Section 159 of the Finance Act,2016. The said claim was filed on 10.11.2016 alongwith documents as detailed at Para-02 of the impugned order. However, the same found lacking with the documents/information as detailed at Para-04 of the impugned order and hence, for the said deficiencies, it appeared that the said refund claim was required to be rejected. Accordingly, a Show Cause Notice dated 22.12.2016 asking them as to why the Refund Application filed by them for Rs. 3,66,209/- should not be rejected under the provisions of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and why the amount if any sanctioned, should not be transferred to consumer welfare fund as per the provisions of section 11B and 12C of the Central Excise Act, 1944 read with section 83 of the Finance Act, 1994.

(ii) The Adjudicating Authority under the impugned order rejected the refund of service tax and interest paid on delayed payment of service tax, totally amounting to Rs.3,66,209/- under the provisions of Section 102 of the Finance Act, 1994 read with Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994, on the various issues Viz. 'Works Contract Services not covered under Section 102 of the Act', 'Claiming of abatement', 'Non-payment of stamp duty', 'non-submission of RA Bill for one of the Contract Valued Rs.5,00,000/-', " Non mentioning of payment of service tax in ST-3 returns', 'no provision for refund of interest' , as well as on the grounds of unjust enrichment. Thus, both on merits as well as on the grounds of unjust enrichment, the claim was rejected under the impugned order.



3. Being aggrieved by the above impugned order, the appellant has filed an appeal followed with written submission dated 28.12.2017, on the grounds as interalia mentioned under.

(i) The appellant claimed the refund in respect of the service tax paid on the contracts of the construction to the Government for which the work orders/agreements have been entered into before 01.03.2015 which are retrospectively exempted from the levy service tax as per the special provisions under Section 102 of the Finance Act, 1994. The appellant duly complied with the provisions of the newly inserted special section 102 to the Finance Act, 1994 read with section 11B of the Central Excise Act, 1944. Therefore, rejecting the claim of the refund of the service tax without considering the under lying law and the document submitted by the appellant, is bad in law.

(ii) The Adjudicating Authority erred on fact and in law in contending that the appellant has provided taxable services and paid the service tax under the Category of "Works Contract Service" which is not falling within the ambit of Section 102 of the Finance Act, 1994.

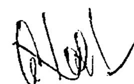
(iii) The Adjudicating Authority erred on fact and in law by contending that the appellant has not specified as how and under what provisions the deduction @60% is claimed while paying the service tax on these services and thereby, failed to give proper justification that the amount was correctly paid towards the services provided to the government during the period 01.04.2015 to 29.02.2016 in respect of contract entered into prior to 01.03.2015, in as much as no correlation details in respect of services charged and service tax paid thereon.

(iv) The Adjudicating Authority erred on fact and in law by contending that the claim failed in proper re-conciliation with RA Bills and the relevant contract agreement, only on the basis of the facts that the appellant submitted Certificate dated 01.05.2015 issued by the service receipient Government organisation instead of the bill in respect of services provided for Rs.5,00,000/- to Indian Navy.

(v) The Adjudicating Authority erred on fact and in law in contending that none of the contract agreements contained details of stamp duty paid thereon and it is mandatory criteria prescribed under section 102 of the Finance Act, 1994.

(vi) . The Adjudicating Authority erred on fact and in law in contending that ST-3 Returns for the period from April-2015 to September-2015, no service tax payment appeared in respect of the service tax declared in the said return.

(vii) The Adjudicating Authority has erred in law and fact regarding the non-admissibility of the refund claim of the interest of Rs.29,545/- on the delayed payment of Service Tax which is admissible as per Section 11B of Central Excise Act, made applicable to service tax vide Section 83 of Finance Act, 1944.



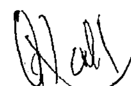
(viii) On unjust enrichment it is contended that -

- The Adjudicating Authority has erred in fact and in law by rejecting the claim of refund of service tax on the grounds that in the agreement/tender with MES specifically provides for the reimbursement of new levies and the amount of refund is not lying as 'Service Tax Receivable' in the Balance Sheet. Against that the appellant submitted the Certificate from MES(Service Recipient) confirming that no refund of service tax on respective bill given to the appellant.
- The Adjudicating Authority has erred in fact and in law in not considering the relevant documents submitted by the appellant on time to time which includes Affidavit of the Appellant firm, CA Certificate and Certificate of service recipient Government Organisation in order to prove that the appellant has neither charged nor been reimbursed nor the burden of service tax has been passed on to the service recipients and contended that the appellant failed to prove that the incidence of duty has not been passed on to any other person and thereby, failed to pass the Doctrine of 'Unjust enrichment'.
- Without prejudice to any of the grounds of appeal stated as above, the appellant contended that when the appellant has proved with the documentary proofs about the payment of the service tax out of its pocket only and the incidence of tax not passed on to any other person, now the onus is on the Adjudicating Authority to prove with evidences that the same has been passed on to the other person. However, no such evidences were adduced or forth coming from revenue showing that the appellant had passed incidence of tax to the service recipient, and hence, the appellant is entitled for the refund.

4. Hearing was held on 28.12.2017 wherein Shri Bharat R. Ozha, Chartered Accountant appeared on behalf of the appellant and reiterated the grounds of appeal and also submitted additional submission dated 28.12.2017 for consideration.

5. I have carefully gone through the facts of the case on records, grounds of the appeal memorandum, written submission and oral submission made at the time of personal hearing. I take up the appeal for the final decision.

6. The appellant claimed to have entered into agreement with the various Government Departments like Military Engineering Services, Air Force Station, Jamnagar and Indian Navy, Valsura, Jamnagar to provide works contract services, the details of the works



undertaken for the Government under the said agreements are as under.

Name of Service Recipient	Contract No.	Type of Work
Military Engineering Services (MES), Garrison Engineer (AF), Air Force Station, Jamnagar	CE[AF]G/JAM/30 of 2013-14 dated 17.09.2013	Provision of over ground orr with blast protection at 24 end between BP No. 37 and 38 at Air Force Station, Jamnagar
	CWE (AF) BHUJ/JAM/90 OF 2014-15 dated 15.01.2014	Special repair to Samrat auditorium hall at Air Force Station, Jamnagar
Garrison Engineer (I) Navy, Indian Navy Station, Valsura, Jamnagar	CE(NW)/KOCHI/40 OF 2013-14 dated 14.02.2015	Addition/Alteration and Special Repairs to certain Sailor in living accommodations (Bldg No. P – 266, P – 267 and P – 322 at Indian Navy Station (INS), Valsura, Jamnagar

The above mentioned services provided to the Government in relation to the construction work, was exempted vide entry 12(a) and 12(f) 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 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 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 or a structure meant predominantly for use as educational, clinical, art or cultural establishment became taxable. Accordingly, the appellant claimed to have paid service tax on bills raised from 01.04.2015 for abovementioned services (under the category of Works Contract Services) provided to various government departments under the contract claimed to have entered into with them prior to 1st March, 2015. Such service tax is aggregating to Rs. 3,36,664/- on bills raised during the period from 01.04.2015 to 29.02.2016 and interest amounting to Rs. 29,545/-), on delayed payment of such service tax under the above mentioned contracts. 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 bills raised 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 withdrawn of the exemption entry of

Notification no. 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 appellant claimed refund of Rs.3,66,209/- (Service Tax of Rs. 3,36,664/- and interest of Rs. 29,545/-), 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.

7. I find that there is no dispute that the provisions of Section 102 of the Finance Act, 1994 provided for the refund of service tax paid in respect of service 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 appellant is the construction 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. However, the Adjudicating Authority under the impugned order had rejected the said refund claim both on merits as well as on the grounds of unjust enrichment. The appellant had vehemently contended as interalia mentioned at Para-3 above. Thus, issue for decision before me is to decide whether the refund rejected by the Adjudicating Authority under the impugned order is legally sustainable or not. Now, I take up each issues on which refund is rejected under the impugned order, for decision.

8. The Adjudicating Authority at para-15 of the impugned order has observed that the appellant provided taxable service and paid service tax under the category of "Works Contract Service" which is not falling within the ambit of Section 102 of the Finance Act, 1994; that the said Section 102 ibid provides for refund of service tax paid in respect of specified services viz. construction, erection, commissioning, installation, completion, fitting out , repair, maintenance, renovation or alteration for the purpose of as specified under the said Section 102 ibid and when the service provided by the appellant is under the category of "Works Contract Service", which is not falling within the ambit of Section 102 of the Finance Act,1994, the Adjudicating Authority held that the refund is not admissible.

8.1 The appellant has vehemently contended in its appeal memorandum and additional submission on this issue. I find force in the contention of the appellant on this issue. I find that up to 30.06.2012, the service tax was leviable considering the category of that respective service, however, w.e.f. 01.07.2012 when the service tax regime shifted from "Specified Services" to the "Negative List based Service" (an hence, all other services are

taxable), the levy of the service tax under 'Specified Category' is became redundant. Further, On the basis of the Tender and other relevant Documents available on records, it is undisputed fact that the appellant had provided the construction services with material to the Government Department for which the refund is claimed. Thus, any type of Construction related Services as specified under Section 102 of the Act and provided to the Government or the Government Organisations is to be covered under Section 102 of the Act. In the new regime of the service tax applicable from 01.07.2012, the Works Contract Service is not a 'Category' but it had been defined because of its very nature of inclusion of the material while providing the service and therefore, exclusion of service tax on that 'Material' part included in it. Therefore, service of 'Construction, Commissioning, Installation, Completion, Fitting out, Repair, Maintenance, Renovation, Alteration etc. stated in Section 102 of the Act, when provided with the material, it has been suitably categorised as 'Works Contract' to specify that 'this construction services has been provided with Material and thus, as per the Valuation Rules, the service tax would be applicable only on the 'Service Part' of the construction work. So the 'Works Contract Service' is not a separate Category in the new regime of the service tax but a different method for valuing the Service due to inclusion of the 'Material Value' with the labour while providing the services. Therefore, the services provided by the appellant to the Government Organisations for which the refund is claimed, duly fall with the ambit of Section 102 ibid. Thus, I hold that the rejection of refund claim on this ground under the impugned order is not sustainable and is bad in law.

9. Further, the Adjudicating Authority at para-14 of the impugned order has observed that the appellant provided taxable service under the category of "Works Contract Services" and availed abatement/deduction on the value of the taxable service so provided during the relevant period ; that the appellant had not mentioned under what provisions, they have claimed abatement @60% ; that the appellant failed to give proper justification in respect of the amount paid towards the service provided to the Government during the period 01.04.2015 to 29.02.2016 for the contract entered prior to 01.03.2015, in as much as no correlation details in respect of services charged and service tax paid thereon had been submitted and thus, failed to justify the service tax for which refund is being claimed, was already paid towards the services covered under Section 102 ibid.

9.1 The appellant has vehemently contended on this issue that they had provided the 'Construction Service' in nature of 'Works Contract' and hence, they have raised the bills under Works Contract Service to the respective Government Organizations for the contract entered into prior to 01.03.2015 and paid service tax over and above the amount of bill raised by complying the Service Tax (Determination of Value) Second amendment

Rules, 2012; that the detailed working for taxable value of service provided, abatement claimed and the service tax refund claimed on it is as under:

Service recipient	Package No / Agreement No.	Bill Date	Amount of Bill	Value of Service Portion (Note – 1)	Amount of Service Tax (Inclusive of Cess)	Interest on delayed payment of Service Tax	Total amount for which refund is claimed	Service Tax Payment Date
Air Force Station, Jamnagar	CE[AF]G/JAM/30 of 2013-14 dated 17.09.2013	07.05.2015	31,00,000	12,40,000	1,53,264	16,628	1,69,892	02.02.2016
	CWE (AF) BHUJ/JAM/90 OF 2014-15 dated 15.01.2014	06.05.2015	5,00,000	3,50,000	43,260	4,693	47,953	02.02.2016
Indian Navy Station, Valsura, Jamnagar	CE(NW)/KOCHI/ 40 OF 2013-14 dated 14.02.2015	04.08.2015	14,30,000	10,01,000	1,40,140	8,224	1,48,364	02.02.2016
Total			**50,30,000**	**25,91,000**	**3,30,940**	**29,545**	**3,66,209**	

9.1.1 From above, I find that the appellant had claimed to have paid service tax on the abated value of Rs. 25,91,000/- and thus, availed abatement of 60% for invoice dated 07.05.2015 and 70% for invoices dated 06.05.2015 and 04.08.2015. I find that provisions relating to determination of value of service portion involved in the execution of work contract are contained in Rule - 2A of Service Tax (Determination of Value) Second Amendment Rules, 2012 (Notification 24/2012 – ST dated 06.06.2012). As per the said rule, either the value of the material included in the provision of the service is to be deducted as provided in sub- section (i) or a fixed percentage is to be deductible considering the nature of the work, as per sub section (ii), to determine the Taxable Service Portion. I find that the appellant has taken the value of service portion @ 40% and 30% as applicable on the total amount charged for the work of construction. Thus, the appellant has claimed the abatement and paid the service tax accordingly in respect of the bills submitted for the Refund Claim and the observation made by the Adjudicating Authority that in the absence mentioning of the relevant provisions under which abatement claimed, the appellant has failed to justify that the amount was paid towards the service provided to the Government during the period 01.04.2015 to 29.02.2016 in respect to contract entered prior to 01.03.2015, is not sustainable in the eyes of law. Thus, I hold that the rejection of refund claim on this ground under the impugned order is not sustainable and is bad in law.

10. Further, with regards to the issue of stamp duty, I find that the Adjudicating Authority at para-11 of the impugned order has observed that the refund claimed by the appellant pertains to the period from 01.04.2015 to 29.02.2016 in respect of services provided to

government authorities; that none of the contract agreement contains details of stamp duty paid thereon; that the payment of stamp duty is mandatory criteria prescribed in Section 102 ibid.

10.1 On this issue, the appellant contended vehemently that in the work of Military Engineering Services (MES) and Indian Navy Service (INS), the contractor have to submit e–tender by following their technical procedures and the work is allotted to the contractor whose rates of contract are lower compare to others and then, the respective authority accepts such e-tender on behalf of the President of India and provides the work order (named as "Contractor's Order Sheet) to the respective contractor; that this work order shall be sole repository of the contract as specifically stated in the Contractor's Order Sheet. The appellant also contended that there is no such requirement to enter into any formal agreement in the work of Navy and Air Force and they are issuing the 'Contractor's Order Sheet' on acceptance of Tender and therefore, there is no requirement to payment of stamp duty on such 'Order Sheet'. I find force in this contention of the appellant. Further, careful reading of the Section 102 ibid of Act which clearly state in Sub-section (1) that " ***.... Under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date".*** Hence, the Section clearly state that the stamp duty is to be paid where it is applicable and it is not mandatory to pay stamp duty if it is otherwise not payable in view of the circumstances narrated above. Further, I find that the purpose of insertion of this criteria of payment of Stamp Duty given in the Section, is to confirm the date of contract entered with Government to ensure that the same is prior to 01.03.2015 only and I find from the records available in the present case and also in the findings under the impugned order that the refund claimed in the present case is in respect of contracts entered before 01.03.2015 only. Hence, I hold that the said observation of the Adjudicating Authority is not sustainable in eyes of law.

11. On the contention in respect of services provided for amount of Rs.5,00,000/- to Indian Navy based only on Certificate dated 01.05.2015, I find that the Adjudicating Authority at Para-13.1 of the impugned order observed and held that in respect of claim for CA No. CE(NW) Kochi/40 of 2013-14 , no RA bill has been produced and instead a Certificate dated 01.05.2015 issued by the Lt. Col. Garrission Engineer has been produced and hence the claim failed in proper reconciliation with RA bills and relevant contract agreements.

11.1 The appellant contended that the above work was carried out in the Month of April, 2015, under one old contract of FY 2013-14 and being a small work, no separate RA bill issued in this regard. However, Garrison Engineers has issued a certificate dated 01.05.2015. The appellant has also claimed to have submitted the working of the service

tax, copy of the contract/agreement dated 15.01.2014 for allotting this work and a separate challan of Rs. 47,953/- specifically stating the service tax of this bill only, for the proof of payment of service tax in respect of this bill amount and thus, contended that these are sufficient evidences to establish the fact that during the period under consideration, the appellant has executed the construction work for the Government under the contract entered into before 01.03.2015 and paid the service tax on the bill amount of Rs. 5,00,000/-; that therefore, the facts, which are required for grating the refund, is covered in the certificate and hence, the bill would not be a matter of defect. Considering the above facts, the appellant contended that there is no any material defect regarding rejecting of the refund of Rs. 47,953/- paid on the serviceable amount of Rs. 5,00,000/- has been stated in the order except the submission of certificate instead of formal bill; that it is purely a non-follow up of procedure only and not a technical or legal issue for rejecting the refund claim; that the adjudicating authority has not considered the law and the fact in this regard and mechanically acted which is not tenable in the eyes of law.

11.2 I find that refund in respect of work done under said contract, the appellant has not put forth the RA bills and instead placed the Certificate dated 01.05.2015 after holding that being **a small work, no separate RA bill issued in this regard**. I failed to understand that how the work amounting to Rs. 5,00,000/- can be considered as small work for which no RA bills which are required to be issued invariably as per the practise in the government system of contract work, have not been issued. Further, I refer to the copy of the said Certificate dated 01.05.2015 which very categorically mentions that *"The amount of work done from 1st April 2015 to 30th April,2015 is* ***approx.*** *Rs.5,00,000/-.."* Thus, the amount is shown not exact but approximate. Further, the challan dated 02.02.2016 as claimed by appellant as to evidencing the payment of Service Tax of Rs. 47,953/-, does not give any reference to the said work done. Thus, in view of the facts and discussion herein above, I do not find any infirmity in the impugned order rejecting the refund on this issue.

12. On the contention that no service tax payment appeared in respect of the service tax declared in the ST-3 Returns for the period from April-2015 to September-2015, I find that as mentioned at para-02 of the SCN dated 22.12.2016, the appellant has with the refund application dated 10.11.2016 given the copy of ST-3 Returns for the period from April,2015 to March,2016. Further, the appellant was asked to produce certain information/documents as detailed at para-4 of the said SCN wherein it was mentioned that the claimant has not submitted any evidence to the effect that the refund claim is part of the Service Tax Returns filed. Hence, after considering the facts in the ST-3 returns, the Adjudicating Authority at Para-16 and 16.1 of the impugned order of the impugned order has observed that " in ST-3 for the April-15 to Sept.-15, net abated value of taxable service "works Contracts Service" is Rs. 42,78,000/- on which total service tax Rs. 5,65,261/- has been

declared as payable...... However, as per ST-3 return, total amount paid is Rs. 1,796/- which also includes payment of Service Tax Rs.1,097/- paid on Goods Transport Services. Thus, as per ST- 3 return, no service tax payment appears to have been made in respect of the services declared." And thus at Para-16.1 of the impugned order held that the appellant failed to prove that the challans produced alongwith the refund claim pertains to Service Tax on the services provided to government during April-2015 to September,2015.

12.1 The appellant on this issue contended that they had filed the original return of Service Tax ST-3 for the period from April-15 to Sept. -15 on 24.10.2015, declaring only Transportation Service under RCM and paid the service tax of Rs. 1,738/- with interest of Rs. 58/- (aggregating to Rs. 1,796); that then after, it came to its knowledge to pay the service tax on its Government work as such work was exempted till FY 2014-15 and being a new levy through the Finance Act, 2015 applicable w.e.f. 01.04.2015; that the gross bill amount of the services provided to the Government was of Rs. 74,40,000/- and after deducting the applicable abatement of 60%/30% on this gross bill amount, the taxable value was of Rs. 42,78,000/-and the service tax payable on the same was of Rs. 5,65,267/-; that the service tax return can be revised within 90 days from the date of original return filed and also dilemma was there in respect of the service tax to be payable on the Defence Depts.; that therefore, the appellant has first revised the return on 22.01.2016 by showing the service tax of Rs. 5,65,261/- as payable to keep the time limit of revising the return and then made the payment of the same on 02.02.016 through four challans; that this fact was also communicated to the respective Rage Superintendent along with submission of copy of the challans of Rs. 5,65,267/- vide letter of the appellant dated 20.02.2016 submitted on 23.02.2016. And hence contended that there is no case of non payment of the service tax on the Works Contract Service of Rs. 42,78,000/-.

12.2 I find that the observation of the Adjudicating Authority is based on the details mentioned in the ST-3 returns. However, facts of revising of the said ST-3 returns by the appellant and then after payment through challans have been not made known to the Adjudicating Authority. I find that in the written reply to said SCN , the appellant has not mentioned anything about the revising of the ST-3 returns for the relevant period. However, when this issue was copped up in the findings and lateron in the impugned order, the appellant has put forth the above submission with relevant documents in support of their contention. Thus, there is no findings on this aspects in the impugned order by the Adjudicating Authority. Therefore, I find it appropriate that this issue needs to be looked into and examined and verified by the Adjudicating Authority so as to ascertain the facts that the service tax refund claimed is correlated that with the details in ST-3 returns and the challans produced by the appellant claiming the payment of service tax thereon.

12.3 In view of the facts and discussion herein above, I feel it appropriate that this issue needs to be re-examined in light of my above observation so as to ascertain the facts that

the service tax refund claimed is correlated that with the details in ST-3 returns and the challans produced by the appellant claiming the payment of service tax thereon. 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 appellant. The appellant 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 said issue a fresh. These findings of mine are supported by the decision of the Hon'ble High Court of Gujarat in the Tax Appeal No.276/2014 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 46 (Tri.– Mumbai).

13. On the issue of unjust enrichment, the appellant contended as interalia mentioned at para-3-(ix) above. I find that on this issue of doctrine of unjust enrichment, the Adjudicating Authority at Para `22 to 24 of the impugned order has observed as under :

(i) the Scrutiny of the Balance Sheet for the F.Y.2015-16 reveals that an amount of Rs.88,90,494/- is outstanding in the balance sheet under the head "Loans, Advances, Deposits & Other Current Assets- Schedule-8. Further, under Schedule-8 or in any other schedule, no such account head "Service Tax Refundable" is found. Thus, as per balance sheet, Service Tax amount has already been charged to the customers or expensed out and burden of service tax has been passed on.

(ii) agreement with MES specifically provides for reimbursement of the new levies and the amount of refund is not lying as 'Service Tax Receivable' in the balance sheet. Therefore, it can be safely concluded that the service tax amount has already been recovered from MES. Thus, the Service Tax components stands recovered from the customer by way of including the same in the rates quoted; by way of reimbursement from the government organisation; or by way of expending out in the profit & loss account.

(iii) in the certificate dated 28.01.2017 of Chartered Accountant , it is not certified that the amount of service tax has not been charged to the customers or has not been expensed out.

Thus, the Adjudicating Authority concluded that the appellant failed to prove that the incidence of duty has not been passed on to any other person as required under Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 and thus, on this issue of doctrine of unjust enrichment, the refund claim was rejected under the impugned order.

13.1 I find that with regard to the issue of refund in the case of contract with MES, agreement/tender with MES specifically provides for reimbursement of the new levies by MES to the appellant. Further, the Scrutiny of the Balance Sheet by the Adjudicating Authority for the F.Y.2015-16 reveals that an amount of Rs.88,90,494/- is outstanding in the balance sheet under the head "Loans, Advances, Deposits & Other Current Assets-Schedule-8; that under Schedule-8 or in any other schedule, no such account head "service Tax Refundable" is found. These facts have neither been rebutted by the appellant before me nor any concrete evidences placed before me by the appellant against the said facts. Further, I find that the appellant in its additional submission contended that " *what is required to be seen by the adjudicating authority is whether there is unjust enrichment or not and there is no need to look treatment of this amount in books of account by the appellant; that how the treatment of this amount made in the books of account is also not the requirement of Section 102 of the Act or Section 11B of the Act*"- Reliance is placed on the decision of the Hon'ble CESTAT, Ahmedabad in the case of M/s Gujarat Baron Derivatives (p) Ltd-2013(29) STR 443 .

13.2 Further, with regard to a Chartered Accountant's Certificate, I find that the said certificate dated 25.12.2017 issued by M/s Oza & Thakrar, C.A. states that " We have verified the Service Tax Return filed ..... and the relevant documents for the period of 01.04.2015 to 31.03.2016 and on the basis of our verification and the explanation and information furnished to us, We hereby certify that M/s ...has paid service tax (including Cess) aggregating to Rs. 3,36,664/- along with interest amounting to Rs. 29,545/- in respect of Construction work carried out for various governmental departments and the said amount has been paid through challan. The total amount of service tax alongwith interest has been borne by our client and it has been neither been collected nor passed on to any other party...."

From the above Certificate it transpires that the same is issued on the basis of verification of ST-3 Returns and relevant documents (Not specified) instead of on the basis of financial records/Books of Account especially the Balance Sheet, which shows different picture as discussed herein above. Thus, apart from the observation of the Adjudicating Authority as mentioned at para-22 of the impugned order, I find that this Chartered Accountant's Certificate dated 25.12.2017 relied upon by the appellant, on the above facts also, is of no help to them. In view of these facts, reliance placed on various decisions of the higher judicial forum in support of their above contention, is also of no help to them.

13.3 Further, I find that the appellant in its additional submission contended that " *what is required to be seen by the adjudicating authority is whether there is unjust enrichment or not and there is no need to look treatment of this amount in books of account by the appellant; that how the treatment of this amount made in the books of account is also not the requirement of Section 102 of the Act or Section 11B of the Act*"- Reliance is placed on the decision of the Hon'ble CESTAT, Ahmedabad in the case of. in the case of M/s Gujarat Baron Derivatives (p) Ltd-2013(29) STR 443. However I

do not find force in the contention of the appellant for which I rely on the decision of the Hon'ble CESTAT, Mumbai in the case of M/s MADHUCON BINA PURI Versus COMMR. OF CUS. (PREVENTIVE), MUMBAI - 2015 (320) E.L.T. 458 (Tri. - Mumbai) wherein it is 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 submission 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, R&I, New Custom House, Ballard Estate, Mumbai-III. 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."

From above, though CA Certificate is produced in this case but in view of the facts and discussion at Para-13.2 above, the same is found to be of no help to the appellant, and thus, the effect of the said transaction in the Books of Accounts/Balance Sheet is crucial in deciding the issue of unjust enrichment. I find that the appellant have neither rebutted nor placed any concrete evidences before me against the said facts as mentioned at Para-13.1 above. Hence, I reject this contention of the appellant

13.4 On the contention that the Certificate dated 09.01.2017 from the EE, Military Engineer Services, Garrison Engineer [Air Force], Jamnagar and Certificate dated 29.01.2017 from EE, Military Engineer Services, Air Force Station Jamnagar confirmed that service provided through two agreements to the Air Force, Jamnagar, in which service tax was not included in Contract Amount (CA) as contract entered prior to 01.03.2015 and claim was submitted but not refunded, I find that the Adjudicating Authority has referred to those two certificates as mentioned at para-23.2 of the impugned order. The appellant has also produced the copies of the said Certificates with their

Additional Submission dated 28.12.2017 However, I find that the said two certificates are not clear and found to be ambiguous in as much as the terms used like 'concluded', as well as the phrases of words "Claim was submitted but not refunded" does not support the contention of the appellant. On the contrary, the said phrases of words "Claim was submitted but not refunded" leads me to conclude that the burden of service tax has been passed on to the service recipients. Thus, this contention based on said two certificates is of no help to the appellant.

13.5 In view of the facts and discussion herein above, I uphold the impugned order rejecting the refund claim of service tax on the grounds of unjust enrichment.

14. Further, with regards to interest, I find that the Adjudicating Authority at Para-18 of the impugned order held that as there is no specific provision under the Section 102 or Notification No. 9/2016-ST for refund of interest paid on delayed payment of service tax, refund of interest is not admissible. The appellant contended that Section 11B of Central Excise Act, which is in respect of refund, has been made applicable to service tax vide Section 83 of Finance Act, 1944, very specifically provides that "Any person claiming refund of any duty of excise **and interest, if any, paid on such duty** may **make an application for refund of such duty and interest, if any, paid** on such duty...." Further, contended that when the service tax in the present case itself is liable for the refund as per section 102 of the Finance Act, 1994 then it is very much obvious that the interest paid on such service tax is also liable to refund.

14.1 I find that the impugned order is passed in pursuance to the 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 read with Section 102 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 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 admissibility of refund of service tax in the present case on the issue non mentioning of service tax payment in respect of the service tax declared in the ST-3 Returns for the period from April-2015 to September-2015, as discussed in forgoing paras at 12 above, 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.

15. In view of the facts and discussion herein foregoing paras, I uphold the impugned order in above terms and disposed off the appeal filed by the appellant accordingly.

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

सत्यापित,
प्रवीण पोपट
अधीक्षक (अपील्स)

BY R.P.A.D.

To,
M/s Jamnagar Electric and Machinery Company,
Punjab National Bank Street,
Ranjit Road,
Jamnagar.

Copy to:-

1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, CGST, Rajkot.
3. The Commissioner (Appeals) Rajkot.
4. The Deputy Commissioner, CGST, Jamnagar.
5. The Assistant Commissioner (Systems), CGST, Rajkot.
6. Guard File.
7. P.A. File.