::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

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/187/RAJ/2017	**DC/JAM/R-436/2016-17**	**10-02-2017**

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

RAJ-EXCUS-000-APP-053-2018-19

आदेश का दिनांक / Date of Order:	**23.04.2018**	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 Tarang Constructions, 19-20, Indraprasth, Near Pancheshwar Tower Jamnagar,

इस आदेश(अपील) से व्यथित कोइ 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 अंतगेत 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 छुट (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 भुटान 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 इयूटी 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 यथास्थिति 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

The present appeal has been filed by M/s. Tarang Constructions, 19-20 raprasth, Near Pancheshwar Tower, Jamnagar (hereinafter referred to as appellant) against Order-in-Original No. DC/JAM/R-436/2016-17 dated 02.2017 passed by the Deputy Commissioner, Central Excise & Service Tax ision, Jamnagar (hereinafter referred to as the adjudicating authority).

Briefly stated, the appellant filed a refund claim for Rs. 7,15,447/- on ount of retrospective exemption granted to the services provided to the ernment departments and local authorities as provided in Section 102 of ance Act, 1994. On scrutiny of the claim filed by the appellant, it was iced that there were some discrepancies in the said claim and the claim was le for rejection. Therefore, show cause notice dated 22.12.2016 was issued the appellant proposing rejection of their refund claim. The SCN was decided e OIO No. DC/JAM/R-436/2016-17 dated 10.02.2017, wherein the udicating authority rejected the claim on merit as well as on the aspect of just enrichment. Hence the present appeal.

The appellant are contending mainly on the following grounds:

(i) According to adjudicating authority, "works contract service" is not falling within the ambit of section 102 of the Finance Act, 1994. In this regard, it is submitted that w.e.f. 01.07.2012, when service tax regime shifted from specified services to the negative list based service, the levy of service tax under specified category become redundant and all services covered under the definition provided in section 66B are taxable. Further, as per definition of "works contract service" provided in section 65B(54) of the Act, they have provided construction with material to Gujarat Council of Elementary Education under Sarva Siksha Abhiyan Mission, Gandhinagar, for which refund is claimed. Works contract service is not a category but it is to be defined because of its very nature of inclusion of the material while providing the service and exclusion of service tax liability 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 material, it categorised as works contract as per section 65B(54) to specify that this construction service has been provided with material. So, works contract service is

not a separate category in the new regime of service tax but a different method for valuing the service due to inclusion of material value. Therefore, the service provided by them to government organisation for which refund is claimed, duly fall within the ambit of section 102 of the Act. Moreover, such construction related works contract services was also covered under entry No. 12(a), (c) and (f) of the Mega exemption notification 25/2012-ST which was deleted through Finance Act, 2015.

(ii) Regarding payment of service tax on the cum-tax value, it is submitted that they have paid tax complying section 67(2) of the Finance Act and Service Tax (Determination of Value) Second amendment Rules, 2012. At the time of entering into contract prior to 01.03.2015, service tax was exempted for construction service provided to Government vide notification No. 25/2012-ST and hence it is obvious that service tax has not been considered while estimating contract price. Thereafter, exemption was withdrawn and becomes taxable. Now, as per clause stated in Tender documents the rates are inclusive of service tax and hence there was neither scope to charge service tax on the R.A. bills raised and reimbursed/recovered of this new levy of service tax from service recipient. Therefore, the service tax has been paid from their pocket only. Hence, they have paid service tax considering inclusive method as per section 67(2) of the Act. And as per valuation rule 2A(ii), they are eligible for deduction of 60% in respect of material and there is no dispute regarding the fact that they have provided construction service with material and for original work. They relied upon the case law of CCE Vs Advantage Media Consultant – 2008 (010) STR 0449 and various other CESTAT judgments relying on the cited case law.

(iii) In respect of payment of Rs. 2,82,913/- which had been paid under accounting code 00440290 which pertains to construction service, it is submitted that they have already clarified the fact of this matter on 06.12.2016 at the time of providing clarification/explanation alongwith additional documents required by service tax division, Jamnagar. They had made this payment under accounting code inadvertently as 00440290 instead of correct code of works contract in the challan. However, in the ST-3 return for the first half of FY 2015-16, the taxable services and resultant service tax has been duly stated under the service head works contract and there is no other service head at all in the ST-3 return. Further, it is not duty of the

adjudicating authority to find out any defect in the working of service tax already paid. As per section 102, the adjudicating authority has to consider only that service tax paid by them and claimed as refund, would not have been so paid, if the sub-section (1) of section 102 of the Act had been in force at the time of provision of service.

(iv) The adjudicating authority has contended that out of three R.A. bills, two R.A. bills do not contain dates and contract value is Rs. 1,37,61,328/- whereas the total amount received by them is Rs. 1,34,856/-. In this way R.A. bills and corresponding contract agreements do not prove it beyond doubt that the services were provided to the Government organisations in respect of the documents pertaining to contract agreement only. In this regard, it is submitted that they have already provided clarification in this regard that cost of work as per accepted vide agreement dated 02.02.2015 was determined on the basis of estimated quantity at the contract rate while issuing the Tender. However, at the time of execution of work, actual quantity used may differ from estimated quantity. Moreover, as per condition of the contract, after completion of work, final measurement was taken quantifying actual quantity used and on the basis of such measurement, final bill was prepared considering actual quantity used at contract rate. Therefore, it is obvious that the actual bills under a work order may be higher or lower than the estimated value of contract. In respect of R. A. bills, it is submitted that in case of government work, they are not required to issue any such invoice to government authority. The service recipient i.e, particular government department prepare R.A. bills after taking measurement of work done. They have submitted full R.A. bill including Main Abstract Sheet containing the details with respect to description of item, quantity, rate per unit and total amount. First page of Main Abstract contains date. Moreover, government has deducted TDS from the bills of 2015-16 and payment of the same has been received in this year. They have accounted for the same in their audited books of account and paid income tax accordingly. Adjudicating authority could confirm such facts independently from Form 26AS at the time of adjudicating the case. From copy of ledger account it can be seen that all bills for which service tax paid and claimed as refund are related to FY 2015-16 only. Therefore, there is no question regarding the date/period of the bills for which refund has been claimed.

(v) According to adjudicating authority, they have availed Cenvat credit without following the provisions of rule 6 of the Cenvat Credit Rules, 2004. In this regard, they submitted that they have maintained separate books of account for Cenvat credit taken of input service and thus, complied with rule 6 of CCR, 2004. Further, Cenvat credit taken is of very nominal amount of Rs. 4,065/-. The matter before the adjudicating authority was in respect of refund claim and not the assessment of correctly payment of service tax. Therefore, in any case the adjudicating authority has to consider the claim after verifying the fact of payment of service tax and in any case, if there would be any difference of opinion regarding eligibility of Cenvat credit, the refund claim has to be considered after deducting such Cenvat amount.

(vi) The adjudicating authority has contended that they had declared the exempted service to the tune of Rs. 1,16,28,512/- under the category of works contract under notification No. 25/2012-ST Sr. No. 29a. This exemption pertains to services provided by a sub-broker or an authorised person to a stock broker and does not pertain to works contract service. And hence, it is found that they have not assessed and paid service tax under correct notification. In this regard, it is submitted that during the year 2015-16, they have only provided works contract service. This can be verified from details of ST-3 returns already submitted. During October-2015 to March-2016, they had provided sub contract service amounting to Rs. 1,16,28,512/- to Standard Buildcon whose work contract service was exempted under notification 25/2012. They carried out their work as a sub contractor with material and hence the same is showing as exemption under entry No. 29(h) of the notification No. 25/2012-ST. The adjudicating authority has also not verified ST-3 properly showing the exemption claimed under entry No. 29(h) of notification 25/2012-ST and not under entry 29(a) which has not connected at all to the work undertaken by them.

(vii) It is not the duty of the adjudicating authority to find out any defect in the working of the service tax already paid. As per section 102 of the Act, while granting of refund of service tax under the said section, the adjudicating authority has to consider only that whatever service tax paid by them and claimed as refund, would not have been so paid, if the sub-section (1) of section 102 of the Act had been in force at the time of provision of service. Under Finance Act, 1994, for detailed scrutiny of the service tax assessment of an assessee, there are

provisions of service tax audit and the concerned authority has powered for scrutiny of service tax return also. The fact that service tax audit of the relevant year has already been done by the department and therefore adjudicating authority has limited power to reject the refund claim with the facts and underlying law. Thus, the various observations made by the adjudicating authority are not under the purview of the adjudicating authority while granting refund claim.

(viii) The adjudicating authority has observed that as per clause 45.1, stated under clause 3 related to conditions of contract forming part of bidding documents and calculation sheet given with the refund application wherein they have first calculated cum-tax value of gross receipts as if it is inclusive of service tax then after, they have calculated the abatement @60% on such cum tax gross value so as to arrive at taxable value. As per adjudicating authority, this type of calculation itself shows that the value of contract was inclusive of service tax and hence, burden of the service tax has already been passed on to the customer. It is submitted that the adjudicating authority has concluded without considering all the other documents submitted by them at the time of adjudication proceedings, which proves that the burden of tax has not been passed to others. As per normal costing principles, when the price of any tender is to be calculated, it includes cost of material, labour, other expenditure to be incurred to complete the work, all taxes which are prevailing at the time of entering into contract and profit margin, then after the rate (SOR) is quoted for a tender. At the time of entering into the above stated contract before 01.03.2015, service tax was exempted on such service, therefore it cannot be said to be included in rate/price, merely on the basis of wording mentioned in the tender documents. In almost all contracts works awarded by the government, the rate (Standard Schedule of Rate – "SOR") would include all the costs to be incurred by the contractor for that particular contract and they stated in the rates clause with the tag 'inclusive of all taxes'. As the service tax was exempted till the announcement of withdrawals of exemption entries in Budget 2015, the government contractors would have not considered the service tax at all, as their cost of contract while quoting the rates (SOR) of contracts tendered. If this clause is interpreted as per adjudicating authority, than no one could become eligible for refund under the government contract and the provision

made in section 102 of the Act would be redundant. (Relied upon case law of Cimmoc Ltd. Vs Collector of Central Excise, Jaipur).

(ix) They relied upon the following case laws in support of their contention that their case is not hit by bar of unjust enrichment:

(a) CCE & ST, Bhavnagar Vs Modest Infrastructure Ltd. – 2012 (37) STT 505

(b) EPE Process Filters & Accumulators (P.) Ltd. Vs CCES, Hyderabad – 2017 (80) Taxmann.com 286

(c) Krishna Homes Vs CCE – 2014 (34) STR 881

(d) Welspun Gujarat Stahal Rohren Ltd. Vs CC(I) Nhava Sheva – 2014 (306) ELT 513

(e) Vyankatesh Real Estate Developers Vs CCE, Nagpur – 2015 (50) GST 761

(f) CCE, Surat – II Vs Binakia Synthetics Ltd. – 2013 (294) ELT 156

(g) Jageti & Co Vs CST – 2012 (26) STR 4115

(x) In case of M./s. Shanti Construction Co. in respect of SCN No. 237/2014-15, wherein the assessee has provided construction service for the construction of Police Staff Quarters and construction of Eklavya Model Residential School to Gujarat State Police Housing Corporation (a government organization), wherein even though there is contract clause containing rates are "inclusive of all taxes", the Hon. Principal Commissioner, Rajkot granted exemption for said service as the same is provided to Governmental Authority.

(xi) In the following refund orders (OIO), considering the above legal position, the refund has been granted in respect of such construction works provided to government authority which was exempted till 31.03.2015 and on which service tax paid in FY 2015-16, which has been later on claimed as refund under section 102 of the Act.

(a) OIO No. 182/Ref/ST/AC/2016-17 dated 07.03.2017 passed in case of M/s. Anand Associates by Assistant Commissioner, Ahmedabad – III.

(b) OIO No. 06/Ref/ST/AC/2017-18 dated 11.05.2017 passed in case of M/s. K. R. Savani by Assistant Commissioner, Ahmedabad – III.

(c) OIO No. Div-I/ST/59/Ref/2016-17 passed in case of M/s. Bhumi Procon Pvt. Ltd. by Assistant Commissioner, Vadodara – I.

4. Hearing in the matter was held on 28.12.2017, which was attended by Shri Bharat R. Ozha, C.A. He reiterated the submissions of appeal memo, submitted additional submission dated 28.12.2017 for consideration.

I have carefully gone through the entire case records, SCN & OIO issued l contentions raised by the appellants in written submission as well as ıtentions raised during hearing. I find that the issues to be decided in the sent case are – (i) whether appellant is eligible for refund of service tax paid them during 2015-16 on account of introduction of Section 102 of the ıance Act, 1994, and (ii) whether the appellant has passed on the burden of vice tax or not.

I find that the adjudicating authority has rejected the claim on merit as ll as on account of application of doctrine of unjust enrichment. On going ough the order passed by the adjudicating authority and submissions of the ɔellant, I find that some of the grounds raised by the adjudicating authority rejection of refund are frivolous and procedural in nature. For example the ɜervation that R.A. bills do not contain date. In this regard, I find that the ɔellant have submitted enough evidences on the basis of which such date ı be ascertained. Therefore, so far as the refund amount pertains to amount service tax paid between 01.04.2015 to 29.02.2016, such refund cannot be ected on the ground that R. A. Bills do not contain date. Next such servation is wrong mention of accounting code and wrong mention of serial mber of notification. I find that the appellant have shown that the ɔounting code was inadvertently shown wrong and that both the accounting le and serial number of exemption notification are correctly mentioned in ɜir ST-3 returns. Therefore, I hold that solely on these grounds refund claim nnot be rejected.

Now, coming to the issue as to whether works contract service is covered ıder section 102 of the Finance Act, 1994 or otherwise, I find that services ated to construction, renovation, repair, installation, etc. are covered under ɜ category of works contract service when the contract is not only for service ıt the contract involves material as well as service. In such cases, abatement the portion of material is granted and remaining amount is charged to rvice tax. Even otherwise, as correctly contended by the appellant, works ntract was eligible for exemption under mega exemption notification No. ı/2012-ST and therefore there cannot be any doubt regarding eligibility of the ɔellant for benefit envisaged under section 102 of the Finance Act, 1994 ɜrely because they were providing works contract service.

8. Another issue is regarding calculation of service tax. It is found by the adjudicating authority that the appellant had treated their contract value as cum tax value and paid service tax as if the amount received by them from service recipient was including service tax. The appellant have contended that as per section 67(2) of the Finance Act, 1994, they have taken cum tax value to determine their tax liability, as they have not charged service tax from service recipient government department. I fail to understand why the adjudicating authority has raised this issue with reference to refund application filed by them. This type of issues (including the three issues discussed above) should have been checked at the time of scrutiny of their ST-3 returns. Further, even if the appellant would have calculated service tax on gross amount received (of course, after abatement provided for works contract service) they would have become eligible for refund on that much amount. Therefore, I find that this issue should not affect the refund claim filed by the appellant.

9. Now, coming to the issue of compliance with the rule 6 of the Cenvat Credit Rules, 2004, the adjudicating authority has found that the appellant was providing both taxable as well as exempted services and did not maintain separate records for the services and therefore appellant is not eligible for refund as claimed. The appellant on the other hand, are contending that they have maintained separate records and fulfilled the criteria of rule 6(3) of the Cenvat Credit Rules, 2004. In this regard, I find that during the material period, viz., from 01.04.2015 to 29.02.2016, the services provided by the appellant to the government department were not exempted and therefore, they were paying service tax on such services. However, vide section 102 of the Finance Act, 1994, the exemption has been extended retrospectively. Therefore, it can be said that the services provided to government department, for which the appellant have claimed refund, were exempted and as per Cenvat Credit Rules, 2004, no Cenvat credit of input/input services can be availed by the appellant for such exempted services. I find that the appellant have availed and utilised credit of Rs. 4,065/- pertaining to services of Chartered Accountant. I find that such services are common to taxable as well as exempted services and therefore rule 6 of Cenvat Credit Rules, 2004 will come into picture. Though the appellant have argued that they have maintained separate records for exempted and taxable services, no evidence is produced by them. I find that before granting refund, it is necessary to ensure that the appellant have complied with the requirements of rule 6 of Cenvat Credit Rules, 2004. In this case, I find that the appellant have not fulfilled such requirement and therefore, on merit, no refund under section 102 can be granted to them.

Now, coming to the issue of unjust enrichment, I find that the udicating authority has held that the burden of tax has been passed on by appellant to their service recipient based on following:

(a) The contract contains a clause that the rates quoted by the contractor (appellant) shall be deemed to be inclusive of all the taxes.

(b) The appellant have paid service tax on cum-tax value which shows that service tax is included in the contract value and stands recovered from service recipient.

e appellant are contending that at the time of execution of contract, service was exempted and hence SOR did not include service tax portion and ordingly they have not charged service tax from service recipients. Further, y have shown the amount as refund receivable from department and they ve also enclosed C.A. certificate to the effect that burden of service tax has t been passed on to any other person, besides affidavit filed by them. On usal of the language used in the said section 102 of the Finance Act, 1994, is clear that retrospective exemption and refund has been granted to nstruction services provided to government departments only in cases where ntract was entered into before 01.03.2015. The rationale behind this rticular date is very clear. Before 01.04.2015, such services were exempted le notification No. 25/2012-ST dated 20.06.2012, however, vide notification . 06/2015-ST dated 01.03.2015 some entries in the notification 25/2012, *d*, were deleted, resulting into end of exemption from service tax on the nstruction service provided to government departments. Thus, it is clear that y contract entered into between service provider and government department rvice recipient) before 01.03.2015 would not include service tax portion in e contract value. However, any contract entered into after 01.04.2015 would rtainly consider service tax portion in the contract value (SOR). Therefore, rospective exemption and refund granted under section 102 of the Finance t, 1994 read with notification No. 09/2016-ST dated 20.06.2016 (granting emption to construction related services provided to government department m 01.03.2016) was made applicable to the contracts entered into before .03.2015. Thus, intention of the government is very clear and the same ould not be defeated without specific findings on fact.

. I find that the adjudicating authority has recorded the findings that ntracting cost/amount of the project would include/involve all type of taxes, nich were leviable on the work awarded to the appellant by the service

receiver and therefore the plea of the appellant that there was exemption from payment of service tax, so it cannot be said that the service tax was included in the bid, is not reasonable because both the parties were aware about exemption of service tax at the time of contract/agreement then there should not be any clause regarding service tax. Therefore, it has been recorded by the adjudicating authority that burden of taxes has already been passed on to the service receiver and thus, no provision for reimbursement. On the other hand, it is contended by the appellant that if the clause "inclusive of all taxes" is interpreted in the way as interpreted by the adjudicating authority, then no one could become eligible for refund under the government contract and the provision made in section 102 of the Act would become redundant. I have considered both the propositions. I find that merely on the basis of the term "inclusive of all taxes" used in the contract, it cannot be concluded that the burden of service tax has been passed on to the service recipient because at the time of entering into contract, service tax was exempted. However, I find that the adjudicating authority has, at Para 21 recorded that "*Scrutiny of Balance sheet under the head "Loans, Advances, Deposits & Other Current Assets – Schedule 5". Under Schedule – 5, Service Tax Refund Receivable (2015-16) Rs. 7,15,447/- is forming part of other current assets. Further, M/s. Oza & Thakrar, Chartered Accountants have certified vide certificate dated 28.01.2017 that amount of service tax Rs. 7,15,447/- in respect of construction work carried out with government and paid through challan. The total amount of service tax alongwith interest has been borne by the claimant and it has neither been collected nor passed on to any other party.*" I find that though the above finding is recorded in the impugned OIO, the adjudicating authority is silent about why these facts cannot be taken into consideration for deciding unjust enrichment. Instead, he has referred the terms of contract and calculation of service tax on cum-tax value. I find that as discussed above, the term used in the contract cannot be basis to hold that burden of tax has been passed on to any other person. Similarly, calculation as per section 67(2) of the Finance Act, 1994 cannot be basis to hold that burden of tax has been passed on to any other person. For deciding one has to refer to treatment given to such amount in the balance sheet, i.e., whether expensed out or shown as receivable. Since, the adjudicating authority has categorically shown in Para 21 of the impugned order that the amount is shown as receivable in the balance sheet, it has to be held that burden of tax has not been passed on to any other person.

12. In view of the above, I find that though the appellant have not passed on the burden of service tax to any other person, they are not eligible for refund

ler section 102 of the Finance Act, 1994 as they have not followed cedure prescribed under rule 6 of Cenvat Credit Rules, 2004.

Accordingly, I reject the appeal filed by the appellant and uphold the ler passed by the adjudicating authority.

सत्यापित,
प्रवीण पोपट
अधीक्षक (अपील)

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

No. V2/187/RAJ/2017

R.P.A.D.

s. Tarang Constructions,
-20 Indraprasth,
ar Pancheshwar Tower,
nnagar.

py to:

The Chief Commissioner, CGST, Ahmedabad.
The Commissioner, CGST, Rajkot.
The Assistant Commissioner, CGST, Division _____, Rajkot.
The Assistant Commissioner (Systems), CGST, Rajkot.
The Superintendent, CGST, AR – _____, Rajkot.
Commissioner (Appeals), CGST, Rajkot.
Guard File.