



::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

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/131/RAJ/2017	मूल आदेश सं / O.I.O. No. 27/ST/REF/2017	दिनांक / Date 25-01-2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-055-2018-19

आदेश का दिनांक / Date of Order:	20.04.2018	जारी करने की तारीख / Date of issue:	01.05.2018
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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 धारा ८५, 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 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग 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 Anand Infrastructure, 201, Virat Palace - II, Shaktinagar, Opp. Parimal School, Kalawad Road, Rajkot,

इस आदेश(अपील) से व्याथित 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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असारवा 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक हैं तो क्रमशः 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 सार्वजनिक 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 नियमावली, 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक हैं तो क्रमशः 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 सार्वजनिक 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 fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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 नियमावली, 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 प्रतियों 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" में 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 अर्जी एवं अपील को लागू नहीं होगा। /

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 मामलों 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 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 क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /

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।

जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पंढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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, notwithstanding 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. Anand Infrastructure, 201, At Palace - II, Shaktinagar, Opp. Parmial School, Kalawad Road, Rajkot (hereinafter referred to as the appellant) against Order-in-Original No. ST/REF/2017 dated 25.01.2017 passed by the Assistant Commissioner, Tax Division, Rajkot (hereinafter referred to as the adjudicating authority).

Briefly stated, the appellant filed a claim of refund of service tax to the tune of Rs. 26,60,940/- on the ground that they are providing services in the nature of construction service, works contract service to various government, local authorities etc. These works are falling at Sr. No. 12 of notification No. 2012-ST dated 20.06.2012. However, the said exemption from payment of service tax was withdrawn on certain services vide notification No. 06/2015-ST with effect from 01.04.2015. They paid service tax on activities carried out by them on or after 01.04.2015. However, the exemption withdrawn was restored vide notification No. 09/2016-ST dated 01.03.2016. The said notification read with section 102 of the Finance Act, 1994 enabled them to file refund claim for service tax paid during 01.04.2015 to 29.02.2016 and accordingly they filed refund claim. During scrutiny of the claim certain discrepancies were noticed and therefore show cause notice No. V/18-156/ST/Ref/2016-17 dated 12.2016 was issued for rejection of the refund claim filed by the appellant. The SCN was decided vide OIO No. 27/ST/REF/2017 dated 25.01.2017 by the adjudicating authority and the claim for refund was rejected mainly on the ground that the incidence of tax has been passed on the government department for whom appellant carried out various works, as per the language in contracts with such government departments. Being aggrieved the appellant filed the present appeal.

The appellant is contending the rejection of their refund claim, mainly on following grounds:

- (i) The adjudicating authority has not considered the relevant documents filed by them, viz., affidavit of the appellant firm, CA certificate and certificate from some service recipient government departments in order to prove that they have neither charged nor reimbursed nor the burden of service tax has been passed on to the service recipients and therefore they are eligible for refund.
- (ii) Regarding the clause in contract "deemed to be inclusive of all taxes", it is submitted that the taxes which were not leviable at the time of

entering into the contract and later imposed, it cannot be interpreted to include such taxes in the rate/value of the contract when the same were again exempted with insertion of a special provision (section 102 of the Finance Act, 1994).

- (iii) The adjudicating authority has erred on facts and law in contending that the certificates received from some service recipient government department are ambiguous in language. Thus, the doctrine of unjust enrichment is wrongly applied.
- (iv) The CA certificate is clearly showing the bill wise payment of service tax, matching with the challan of its payment and therefore, the finding of the adjudicating authority that CA certificate does not state the basis and not mentioned about the incidence of service tax has been passed on to any other person or not, is not correct.
- (v) They have shown the refund claim as receivable in their audited balance sheet of FY 2015-16, which confirms that the incidence of tax is not passed on to any other person.

4. Personal hearing in the matter was held on 28.12.2017, which was attended by Shri Bharat R. Ozha, C.A. He appeared and reiterated the submission of appeal memo including additional submission dated 28.12.2017 for considering the issue in their favour.

5. In their additional submission dated 28.12.2017, it was contended that:

- (i) Most of the work entrusted by government department was completed during FY 2014-15 and only some final stage work was completed in FY 2015-16. It is clear from copy of R.A. bill that they have not charged service tax on the service provided during FY 2015-16.
- (ii) As can be seen from working of the service tax amount during 2015-16, the entire tax amount of Rs. 26,60,940/- was borne and paid out of its pocket. Such amount is reflected in ST-3 returns of relevant period.
- (iii) 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

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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) On withdrawal of exemption service tax became chargeable even on that government contract which were entered into before Budget 2015 and was exempted. As a result, the payment of the service tax on the work undertaken during 01.04.2015 to 29.02.2016 would be an extra burden for the contractors and that is too approximately 5.06% of the gross value of the contract.

- iv) In section 102 of Finance Act, 1994 introduced from 01.03.2016, there is also a refund provision of all such service tax which has been collected but which would not have been so collected had the above provision been in force at all the material time. Thus, by insertion of section 102, the said service became exempted from the payment of service tax with retrospective effect as if the provision of exemption was in force at the material time.
- v) Besides bills for relevant period, ledger account of service recipient, copies of challans, CA certificate and affidavit by all partners of the appellants, they have also submitted letter dated 30.12.2016 received from the Office of the Executive Engineer, Road & Building Division, Rajkot confirming that service provided through two agreements to Government of Gujarat for civil construction work in which no service tax was paid separately and the service tax is not included in the SOR for the referred work. It was also confirmed that there is no separate agreement entered between the appellants and them and the work order executed is itself an agreement for the two works carried out by them. They have also submitted letters received from Gujarat Council of Elementary Education, SSA, stating the above facts of non-payment of service tax separately and will not also pay in future and the service tax is not included in the SOR for the referred work. They had also requested adjudicating authority to cross verify the fact for not receiving service tax on any of the bills for which refund was claimed, through an independent inquiry to the respective government department.
- vi) 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

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- (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
- (vii) 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.
- (viii) 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.
- (ix) The findings of the adjudicating authority regarding applicability of section 12B of the Central Excise Act, 1944, it is stated that the presumption under section 12B is rebuttable one. They relied upon the case law of EPE Process & Accumulators (P) Ltd. Vs CCES, Hyderabad - 2017 (80) Taxmann.com 286.
- (x) They also relied upon the case law of CC Vs Maruti Udyog Ltd. - 2003 (155) ELT 523 to contend that since they have shown the amount as "receivable from revenue authorities", which is also acknowledged by the adjudicating authority in OIO, they are eligible for the refund.

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- (xi) The adjudicating authority has relied upon the case laws of Concrete Movers Vs Commissioner of Service Tax, Mumbai and Mind Edutainment Pvt. Ltd. Vs Commissioner of Service Tax, New Delhi. However, peculiar facts and circumstances of their case and the facts of the cases as quoted by the adjudicating authority are different and hence not applicable to their case.

I have carefully gone through the OIO, grounds of appeal and further submission alongwith documents as well as contentions raised during personal hearing. I find that the only dispute in the present case is – whether the incidence of tax paid by the appellant during 01.04.2015 to 29.02.2016 has been passed on the government department (service recipient) or not and consequently whether the appellant is eligible for the refund or otherwise.

On perusal of the language used in the said section 102 of the Finance Act, 1994, it is clear that retrospective exemption and refund has been granted to construction services provided to government departments only in cases where contract was entered into before 01.03.2015. The rationale behind this particular date is very clear. Before 01.04.2015, such services were exempted by notification No. 25/2012-ST dated 20.06.2012, however, vide notification No. 06/2015-ST dated 01.03.2015 some entries in the notification 25/2012, were deleted, resulting into end of exemption from service tax on the construction service provided to government departments. Thus, it is clear that any contract entered into between service provider and government department (service recipient) before 01.03.2015 would not include service tax portion in the contract value. However, any contract entered into after 01.04.2015 would mainly consider service tax portion in the contract value (SOR). Therefore, retrospective exemption and refund granted under section 102 of the Finance Act, 1994 read with notification No. 09/2016-ST dated 20.06.2016 (granting exemption to construction related services provided to government department from 01.03.2016) was made applicable to the contracts entered into before 01.03.2015. Thus, intention of the government is very clear and the same should not be defeated without specific findings on fact.

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

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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 since the contracts for construction were executed before 01.03.2015, naturally the SOR (Standard Schedule of Rate) would not include service tax portion in it. Therefore, I am inclined to accept the argument of the appellant. This inclination is also as based on the fact that the R.A. bills do not mention service tax in it and the fact that some of the government departments for whom the appellant had provided construction service during 01.04.2015 to 29.02.2016, have stated that they have not paid service tax separately to the appellant. I have also gone through the balance sheet for FY 2015-16 wherein an amount of Rs. 26,60,940/- has been shown as "service tax refund receivable - ST dept." From these documents it is clear that the incidence of tax has not been passed on the service recipients. I also find that in the same balance sheet, the appellant have shown Rs. 44,60,204/- as "service tax refund receivable - Govt. Dept.", which means that service tax paid for the services provided to government departments under contracts executed after 01.04.2015 is shown to be receivable from respective government departments (service recipients). Thus, it is clear that in cases where the appellant was not able to charge service tax from service recipients due to the fact that contract/agreement was made before 01.04.2015, when service tax was exempted under notification No. 25/2012-ST dated 20.06.2012, they have claimed refund under newly introduced section 102 of the Finance Act, 1994.

9. The adjudicating authority has also recorded findings that the appellant have not submitted invoices issued under rule 4A of the Service Tax Rules and the RA bills also do not mention service tax. I find that this finding is in favour of the claim of the appellant that they have not charged service tax from the government departments (service recipients). The other observation of the adjudicating authority like certificate issued by the government departments (service recipients) are ambiguous, does not seem to be correct as the adjudicating authority has not pinpointed the ambiguity and therefore I am not



lined to accept the same. Other interesting aspect in the present case is that though it is found by the adjudicating authority that this is a case of unjust enrichment where incidence of tax has been passed on to the service recipient and provisions of section 11B and 12 B of the Central Excise Act, 1944 are invoked, the amount of refund is not ordered to be deposited to the Consumer Welfare Fund. Normally, in the circumstances where it is found that burden/incidence of duty/tax has been passed on the buyer/recipient of service, refund under section 11B of the Act is sanctioned and ordered to be deposited in Consumer Welfare Fund. Anyway, the appellant is not contending this issue on this ground and hence I refrain from going further in the matter.

In view of the above, I find that the appellant is eligible for refund of service tax Rs. 26,60,940/- under section 102 of the Finance Act, 1994 and the same is required to be set aside. Accordingly, I set aside the OIO and allow the appeal with consequential relief.

सत्यापित,
2/1/2018
प्रमाण पोस्ट
अधीक्षक (अपील्स)

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

No. V2/131/RAJ/2017

R.P.A.D.

s. Anand Infrastructure,
1, Virat Palace - II, Shaktinagar,
2. Parmial School,
3. Lawad Raod,
Rajkot.

Copy 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.
The Commissioner (Appeals), CGST, Rajkot.
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