::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
	V2/188/RAJ/2017	**DC/JAM/R-434/2016-17**	**10-02-2017**

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

RAJ-EXCUS-000-APP-057-2018-19

आदेश का दिनांक / Date of Order:	**25.04.2018**	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 ज़ोनल 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 Shyam Construction Co., 10, Amrut Residency, 6, Patel Colony, Opp ; Co-Co Bank 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 असावा 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 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 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. Shyam Construction Co., 10, rut Residency, 6, Patel Colony, Opp. Co-Co Bank, Jamnagar (hereinafter :rred to as the appellant) against Order-in-Original No. DC/JAM/R-I/2016-17 dated 10.02.2017 passed by the Deputy Commissioner, Central :ise & Service Tax Division, Jamnagar (hereinafter referred to as the udicating authority).

Briefly stated, the appellant filed a refund claim for Rs. 15,27,810/- on :ount of retrospective exemption granted to the construction related services vided to the government departments and local authorities as provided in :tion 102 of Finance Act, 1994. On scrutiny of the claim filed by the ellant, it was noticed that there were some discrepancies in the said claim l the claim was liable for rejection. Therefore, show cause notice dated 12.2016 was issued to the appellant proposing rejection of their refund im. The SCN was decided vide OIO No. DC/JAM/R-434/2016-17 dated 02.2017, wherein the adjudicating authority rejected the claim on merit as ll as on the aspect of unjust 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 abated value, it is submitted that the provisions relating to determination of value of service portion involved in the execution of works 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 or a fixed percentage is to be deducted considering the nature of work. Hence they have correctly taken the value of service portion @ 40% on total amount charged for the original work. Therefore, remaining 60% is claimed as abatement on the total amount charged for the material portion. Hence, they have correctly paid service tax in respect of bills submitted for the refund claim.

(iii) The adjudicating authority has contended that out of five R.A. bills, three R.A. bills do not contain dates. In this regard, 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. 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.

(iv) As per the adjudicating authority, they had claimed the abatement of 60% of the total serviceable value by mentioning notification 24/2012-ST in ST-3 returns. As per view of the adjudicating authority the said notification pertains to amendment of service tax valuation

rules and does not provide abatement and hence they have claimed incorrect exemption in their ST-3 returns. In this regard, it is submitted that they had provided works contract service and taxable value is to be calculated as per provision of Rule 2A of Service Tax (Determination of Value) Second amendment Rules, 2012, which were notified vide notification No. 24/2012-ST dated 06.06.2012. Therefore, they have mentioned the said notification in their ST-3 returns.

(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. Moreover, department has carried out the service tax audit of their firm for the period from 2012-13 to 2015-16 on 07.02.2017 and verified all claims made by them in service tax returns, including claim of Cenvat, during those period. This fact can be verified from the copy of the audit report attached. Further, on 21.07.2015, there was a service tax search carried out by the Preventive Department and verified service tax paid by them till the date of the search. However, they have also not found any mistake or raised any SCN in respect of their search proceedings. Thus, their record has been verified twice and found no query. If there was any violation of rule 6 of CCR, 2004, the same would have been mentioned in audit report para or converted to SCN consequent to search. Therefore, they have rightly claimed Cenvat as per rule 6 of CCR, 2004 and there is no violation.

(vi) As per adjudicating authority, major amount of service tax for which refund has been claimed was paid by availing Cenvat credit on the basis of invoices issued by the various sub contractors and these invoices are not valid documents for availing Cenvat credit as provided in rule 9(2) of Cenvat Credit Rules, 2004 read with Rule 4A of Service Tax Rules, 1994. It can be seen from verification of the invoices that they contain name and address of the service provider and service recipient, R.A. Bill number, Description of service provided, Taxable amount of service, service tax payable and net bill amount after deducting TDS, retention money, labour cess and WCT etc. and charging service tax amount. There is one to one correlation between input service bills and the taxable output service bills. They had taken credit of only those input services which directly related in

providing the taxable output service (Government work) for which refund is claimed and submitted all documents to adjudicating authority. Further, payment was also made in time as provided in rule 4(7) of Cenvat Credit Rules, 2004. The sub-contractors are duly registered with service tax department and also making payment of service tax from time to time. In support, they submitted notarized affidavit from respective sub-contractors declaring that they have deposited the service tax on the bills issued to them, into Government Treasury. They also submitted CA certificate certifying such facts. The adjudicating authority has not pointed out any defect from input service bill except the procedural mistake as stated in para 18.1 of OIO. Cenvat Credit Rules, 2004 placed more thrust on substantive provision and less on the procedural provisions. They relied upon the case laws of (i) Toll (I) Logistics Pvt. Ltd. Vs CCE – 2016 (41) STR 80, (ii) Ramdev Food Products (P) Ltd. Vs CCE – 2011 (023) STR 0475, (iii) Lakshmi Automatic Loom Works Ltd. Vs CCE, Coimbator – 2011 (274) ELT 375 and few other citation.

(vii) Out of total amount of the service tax pertaining to government work claimed as refund amounting to Rs. 15,27,810/-, they have paid the service tax of Rs. 57,319/- through challan and Rs. 14,70,491/- has been paid through the claiming the Cenvat of input service credit pertaining to the work. At the time of payment of service tax, the services provided to the concerned government organizations was taxable and hence, service tax had been paid to the sub-contractors pertaining to this work was claimed as Cenvat. Now, introduction of section 102 to the Finance Act, 1994 through Finance Act, 2016, they have to claim the refund of service tax in respect of the government contract entered into before 01.03.2015. It is their view that as per Entry No. 29(h) to Mega Exemption Notification 25/2012-ST dated 20.06.2012, service tax is exempted in case of sub-contractor providing services by way of work contract to another contractor providing works contract service which are exempted. Hence, if the service tax on works contract is exempted in case of main contractor, it is exempted in the hands of sub contractor also. Although there is no direct exemption has been provided to sub contractor however, there is indirect exemption available to sub contractor. With introduction of section 102 to the Finance Act, 1994, such services are again exempted with retrospective effect and under this section, they have to claim the refund of service tax in respect of the

government contract entered into before 01.03.2015. Therefore, as per entry No. 29(h), the service of the sub-contractor are also exempted. Accordingly, they are allowed the refund of the service tax paid on the bills raised to their sub-contractors. Therefore, whatever Cenvat has been utilized at the time of payment of service tax, is also to be refunded accordingly and not to be reversed. Thus, the refund of service tax will be as good as reversal of Cenvat. Without prejudice to the above, for any technical reason, if the refund pertaining to the Cenvat credit claimed in respect of input services cannot be entertained to pay in cash as refund, the same may be ordered to be restored to their Cenvat account.

(viii) 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.

(ix) The adjudicating authority has observed that as per conditions of contract forming part of bidding documents the price quoted is inclusive of all taxes and hence burden of tax has been passed on. 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).

(x) 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

(xi) 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.

(xii) 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.

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

I have carefully gone through the entire case records, SCN & OIO issued d contentions raised by the appellants in written submission as well as ntentions 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 nance 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 pellant, I find that some of the grounds raised by the adjudicating authority rejection of refund are frivolous and procedural in nature. For example the servation that R.A. bills do not contain date. In this regard, I find that the pellant have submitted enough evidences on the basis of which such date n 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 mention of notification number for claiming abatement. I find at the appellant have shown that the notification number was shown in ST-3 urns to mention Rule 2A of the valuation rules. Therefore, I hold that solely these grounds refund claim cannot be rejected.

Now, coming to the issue as to whether works contract service is covered der section 102 of the Finance Act, 1994 or otherwise, I find that services ated to construction, renovation, repair, installation, etc. are covered under e category of works contract service when the contract is not only for service

but the contract involves material as well as service. In such cases, abatement for the portion of material is granted and remaining amount is charged to service tax. Even otherwise, as correctly contended by the appellant, works contract was eligible for exemption under mega exemption notification No. 25/2012-ST and therefore there cannot be any doubt regarding eligibility of the appellant for benefit envisaged under section 102 of the Finance Act, 1994 merely because they were providing works contract service.

8. I further find that the adjudicating authority rejected the claim for non compliance with the rule 6 of the Cenvat Credit Rules, 2004; it is observed by the adjudicating authority that during the relevant period, the appellant had provided exempted service and Cenvat was also availed but no reversal under rule 6 of Cenvat Credit Rules, 2004 has been made. The appellant is contending that they had maintained separate records for Cenvat credit taken of input service and thus they have fulfilled the obligation of rule 6 of CCR, 2004. They have also argued that during the period departmental audit was also conducted and preventive had also conducted search operation but no one has pointed out that they have not followed rule 6 of CCR, 2004. In this regard, I find that it might be true that the appellant were maintaining separate records for input/input services used in providing exempted services and taxable services upto insertion of section 102 in the Finance Act, 1994 but the question here is – whether the appellant was eligible for taking and utilizing credit of input service for the construction related output service provided by them to government authorities, when such services were exempted with retrospective effect. I find that the appellant had tried to justify taking utilizing such credit by resorting to Sr. No. 29(h) of notification No. 25/2012-ST, stating that the said serial number provides exemption to sub-contractor when sub-contractor is providing works contract service to main contractor, whose service is exempted. In this regard, I find that since sub-contractor is not providing service directly to government department but providing service to main contractor, though such services can be treated as exempted in view of the retrospective exemption provided under section 102, *ibid*, it cannot be said that sub-contractor is eligible for refund under section 102 of the Finance Act, 1994. Further, if at all the sub-contractor is desirous of getting refund by treating the services provided by them to the main contractor under Sr. No. 29(h) of notification No. 25/2012-ST, they have to file refund application under section 11B of the Central Excise Act, 1944 and not under section 102 of the Finance Act, 1994. Therefore, the logic presented by the appellant that allowing refund of amounts paid through Cenvat credit would tantamount to reversal of

dit, is not acceptable. I find that without following the prescription of rule 6 he Cenvat Credit Rules, 2004, no refund can be granted under section 102 the Finance Act, 1994. In this regard, I agree with the views of the udicating authority and hold that on this count, rejection of refund by the udicating authority is proper and is required to be upheld.

One more issue to be discussed is with regard to documents on the basis which Cenvat credit was availed by the appellant. It is found by the udicating authority that the invoices issued by the sub-contractors of the ɔellant were not proper invoices as per rule 4A of the Service Tax Rules,)4 and therefore availment of credit is not correct as per rule 9(2) of the ıvat Credit Rules, 2004. The appellant is contending that most of the ıuired details are available on such invoices and for remaining details, the ɔ-contractors have filed affidavit stating that they are registered with the vice tax department and have paid the service tax as shown in their oices. In this regard, I find that when it is already held by me in the egoing para that the claim of refund filed by the appellant is not admissible not following the requirement of rule 6 of the Cenvat Credit Rules, 2004, I rain from going into this matter.

. Now, coming to the issue of unjust enrichment, I find that the ıudicating authority has held that the burden of tax has been passed on by : appellant to their service recipient as the contract contains a clause that : rates quoted by the contractor (appellant) shall be deemed to be inclusive of the taxes. The appellant are contending that at the time of execution of ıtract, service tax was exempted and hence SOR did not include service tax rtion and accordingly they have not charged service tax from service :ipients. Further, they have also enclosed C.A. certificate, besides affidavit :d by them. On perusal of the language used in the said section 102 of the ıance Act, 1994, it is clear that retrospective exemption and refund has been ınted to construction services provided to government departments only in ses where contract was entered into before 01.03.2015. The rationale behind .s particular date is very clear. Before 01.04.2015, such services were :mpted vide notification No. 25/2012-ST dated 20.06.2012, however, vide tification No. 06/2015-ST dated 01.03.2015 some entries in the notification /2012, *ibid*, were deleted, resulting into end of exemption from service tax on : construction service provided to government departments. Thus, it is clear at any contract entered into between service provider and government partment (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 certainly 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.

11. 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 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 since the contracts for construction were executed before 01.03.2015, naturally the SOR would not include service tax portion in it. Therefore, I am inclined to accept the argument of the appellant. However, it is also recorded by the adjudicating authority at Para 21 of the OIO that – "*scrutiny of balance sheet for F.Y. 2015-16 with audit report reveals that an amount of Rs. 51,91,234/- is outstanding in the balance sheet under schedule to the balance sheet 'Sundry Debtors' as receivable from Gujarat Council of Primary Education. This means that the amount is receivable from the concerned government department and not lying as 'Service Tax receivable'. Further, M/s. Oza & Thakrar, Chartered Accountants have certified vide certificate dated 28.01.2017 that amount of service tax Rs. 15,27,810/- in respect of construction work carried out for various government departments and the said amount has been paid as Rs. 57,319/- through the challan and Rs. 14,70,491/- by way of utilizing Cenvat credit. However, the said certificate is silent whether the service tax said to have been paid has been expensed out or outstanding as 'Service Tax receivable' in the books of account.*"

nd that the appellant have not put forth any counter argument on this ling of the adjudicating authority. Thus, I find that the appellant have failed rove that burden of service tax has not been passed on to any other person l therefore, I agree with the findings of the adjudicating authority that the trine of unjust enrichment is attracted in the present case. Therefore, I hold t the appellant is not eligible for grant of refund on account of unjust ichment also.

In view of the above, I find that the appellant 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 as well as not ved that burden of tax has not been passed on to any other person.

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

सत्यापित,

01/05/2018

प्रवीण पोपट
अधीक्षक (अपील)

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

No. V2/188/RAJ/2017

R.P.A.D.

's. Shyam Construction Co.,
, Amrut Residency,
Patel Colony,
p. Co-Co Bank,
mnagar.

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.