



::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.
V2/218/RAJ/2017

मूल आदेश सं /
O.I.O. No.
DC/JAM/R-457/2016-17

दिनांक /
Date
07.03.2017

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

RAJ-EXCUS-000-APP-068-2018-19

आदेश का दिनांक /
Date of Order: 27.04.2018

जारी करने की तारीख /
Date of issue: 03.05.2018

03.05.2018

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 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 Vraj & Vaj Construction, A-20, Indradeep Society, Opp : Vikas Gruh Road Jamnagar,

इस आदेश(अपील) से व्याथेत कोई व्यक्ति निम्नालोखत 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 अपीलों 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 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 है 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 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 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 है 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 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" 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 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। जहाँ 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 पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण 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, 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. Vraj & Vaj Construction, A-20, Indradeep Society, Opp. Vikas Gruh Road, Jamnagar (hereinafter referred to as the appellant) against Order-in-Original No. DC/JAM/R-457/2016-17 dated 07.03.2017 passed by the Deputy Commissioner, Central Excise & Service Tax Division, Jamnagar (hereinafter referred to as the adjudicating authority).

2. Briefly stated, the appellant filed a refund claim for Rs. 27,02,346/- (which was later on revised to Rs. 4,26,811/- which included service tax of Rs. 4,05,166/- and interest of Rs. 21,644/-) on account of retrospective exemption granted to the construction related services provided to the government departments and local authorities as provided in Section 102 of Finance Act, 1994. On scrutiny of the claim filed by the appellant, it was noticed that there were some discrepancies in the said claim and the claim was liable for rejection. Therefore, show cause notice dated 22.12.2016 was issued to the appellant proposing rejection of their refund claim. The SCN was decided vide OIO No. DC/JAM/R-457/2016-17 dated 07.03.2017, wherein the adjudicating authority rejected the claim on merit as well as on the aspect of unjust enrichment. Hence the present appeal.

3. 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 Garrison Engineer (I) Navy, Porbandar and Garrison Engineer (AF), Air Force Station, Jamnagar, 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) 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.
- (iv) The adjudicating authority has contended that they have not submitted copy of contract agreement with stamp duty payment, which is requirement of section 102. In this regard, it is submitted that in the work of Garrison Engineer (I) Navy, Jamnagar and Air Force Station, Jamnagar, the contractor have to submit e-tender by



following their technical procedures. The work is allotted to that contractor whose rates are lower compare to others. There is no such requirement to enter into any formal agreement in the work of Navy and Air Force and they are issuing 'Contractor's Order Sheet' on acceptance of tender, which provides date of commencement of work and date of completion as required by the adjudicating authority. Further, section 102 states payment of stamp duty, where applicable. Thus, the criteria for payment of stamp duty given in the section is to confirm the date of contract and the same is confirmed with contractor's order sheet issued by the government.

- (v) 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 they have submitted refund application only for 3 R.A. bills and not 5 R.A. bills. Further, they have not carried out work for agreement No. DIR/KUT/ACR/838 nor claimed service tax refund for such agreement. All the three R.A. bills on which refund is claimed, contain dates which can be verified from R. A. bills submitted.
- (vi) 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. However, the adjudicating authority has not given show cause notice for defects raised like category of the service not covered under section 102 of the Act, absence of notification number under which abatement is claimed, undated or altered/modified R.A. bills, etc. and without providing an opportunity of being heard in respect of such defects/objections, they directly passed the rejection order of service tax refund. Hence, it is against the principal of natural justice and beyond the authority of law, which is not tenable in the eyes of law. Under Finance Act, 1994, for detailed scrutiny of the service tax assessment of an assessee, there are provisions for service tax inquiry and the concerned authority has power for scrutiny of service tax return also. Thus, the various observations made by the adjudicating authority are not under the purview of the adjudicating authority while granting refund claim.
- (vii) The adjudicating authority has observed that on scrutiny of balance sheet of FY 2015-16 that the amount of Rs. 62,40,598/- is



- outstanding under the head 'loans, Advances, Deposits and Other Current Asset - Schedule 8'. In the said Schedule - 8 or in any other Schedule, no such account head "Service Tax Refundable" is found. Thus, as per the Balance Sheet, Service Tax amount has been charged to the customers or expensed out and burden of service tax has been passed on. In this regard, it is submitted that the adjudicating authority has not appreciated the fact that the service tax amount which is claimed as refund has already been shown under the head 'loans, Advances, Deposits and Other Current Asset - Schedule 8' in audited balance sheet as on 31.03.2016. The figure is included in the amount shown outstanding in the Accounts of 'GE(AF-1) Jamnagar S.Tax' and 'GE(Porbandar) S.Tax'. Thus, the contention of the adjudicating authority is not correct and made without verifying the records submitted by them. They have also submitted certificate of the chartered accountant showing the details of the service tax and its payment made by them through challans, besides affidavit signed by all the partners stating that service tax paid out of its pocket only and not collected from the service recipient as well as not passed on the same to the other period. They relied upon the case laws of Krishna Homes Vs CCE - 2014 (34) STR 881 (Tri-Del.), CCE (Appeal), Bangalore Vs KVR Construction - 2012 (26) STR 195 (Kar.), Monnet International Ltd. Vs CCE, New Delhi - 2017 (3) GSTL 380 (Tri-Del.)
- (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. Bhūmi Procon Pvt. Ltd. by Assistant Commissioner, Vadodara - I.
- (ix) Further, when the refund application has been filed duly supported by a Chartered Accountant's certificate that the incidence of tax has not been passed on to the customer, the appellant is entitled to the refund. They relied upon the case laws of (i) CCE & C, Guntur Vs Crane Betal Nut Powder Works - 2011 (274) ELT 113, (ii) General



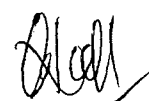
Commodities Pvt. Ltd. Vs CST, Bangalore – 2010 (18) STR 460, (iii) TTK Textiles Ltd. Vs CCE, Madurai – 2015 (315) ELT 511 (Madras), (iv) Santosh Patil Vs CCE Raigad – 2013 (41) STT 90 (CESTAT Mumbai) and (v) Gujarat Boron Derivatives (P) Ltd Vs CC, Ahmedabad – 2013 (42) GST 235.

- (x) In respect of claim of interest on delayed payment of service tax which was retrospectively exempted, the same was rejected on the ground that there is no specific provision under the section 102. In this regard, it is submitted that section 11B of Central Excise Act, 1944 has been made applicable to service tax vide section 83 of the Finance Act, 1994. The said section contains refund of interest also. They relied upon the case law of CM Envirosystems (P) Ltd. Vs CCE – 2010 (020) STR 0533.

4. Hearing in the matter was held on 23.02.2018, which was attended by Shri Bharat R. Ozha, C.A. He reiterated the submissions of appeal memo, submitted additional submission for consideration.

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

6. I find that the adjudicating authority has rejected the claim on merit as well as on account of application of doctrine of unjust enrichment. On going through the order passed by the adjudicating authority and submissions of the appellant, I find that some of the grounds raised by the adjudicating authority for rejection of refund are frivolous and procedural in nature. For example the observation that R.A. bills do not contain date. In this regard, I find that the appellant have submitted that out of 5 R.A. bills they have claimed refund in respect of 3 R.A. bills only and that all the three bills contain date. Therefore, so far as the refund amount pertains to amount of service tax paid between 01.04.2015 to 29.02.2016, such refund cannot be rejected on the ground that R. A. Bills do not contain date. Next such observation is mention of notification number for claiming abatement. I find that the appellant have shown that the notification number was shown in ST-3 returns to mention Rule 2A of the



valuation rules. Therefore, I hold that solely on these grounds refund claim cannot be rejected.

7. Now, coming to the issue as to whether works contract service is covered under section 102 of the Finance Act, 1994 or otherwise, I find that services related to construction, renovation, repair, installation, etc. are covered under the 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. Further, the adjudicating authority has held that since the appellant has not submitted copy of agreement with stamp duty payment, refund is not admissible. The appellant has contended that in case of work of Garrison Engineer, online tender is floated and there is no need for separate contract and that they have submitted 'Contractor's Order Sheet' from which date can be verified. In this regard, I find that section 102 of the Finance Act, 1994 specifies that the contract should be entered into before 01.03.2015, however, it is not necessary to enclose copy of contract with the refund claim, if the date of contract can be ascertained from any other document. In the present case, the appellant have stated that they have been awarded the work on the basis of their online bid and that there was no need to enter into any contract separately and that the date of contract can be ascertained from the work order (Contractor's Order Sheet). Thus, when the condition of entering into contract before 01.03.2015 is satisfied and there is no need to pay stamp duty in case of online tender of the government, rejecting the claim on this ground cannot be justified. Therefore, I hold that the claim can't be rejected on this ground when other documents are available from which date of contract can be ascertained.

9. The adjudicating authority has also held that since section 102 of the Finance Act, 1994 does not allow refund of interest paid on delayed payment of service tax, no refund on this count can be granted. On the other hand, the appellant is contending that section 11B of the Central Excise Act, 1944 allows refund of interest paid and therefore they are eligible for refund of the same. In this regard, I find that the impugned order is passed in view of the provisions of



Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994 read with Section 102 of the Finance Act, 2016. The provisions of Section 11B *ibid*, which very categorically provides for refund of any service tax and interest, if any, paid on such duty/tax. Hence, refund of interest, paid on such service tax which are admissible for refund under the said Section 102 *ibid*, is also available under the said Section 102 *ibid* read with provisions of Section 11B of the Central Excise Act, 1944 as made applicable to service tax matter under Section 83 of the Finance Act, 1994, provided the refund of service tax itself is admissible under the said provisions.

10. Now, coming to the issue of unjust enrichment, I find that the adjudicating authority has held that on scrutiny of balance sheet of FY 2015-16 that the amount of Rs. 62,40,598/- is outstanding under the head 'loans, Advances, Deposits and Other Current Asset - Schedule 8'. In the said Schedule - 8 or in any other Schedule, no such account head "Service Tax Refundable" is found. Thus, as per the Balance Sheet, Service Tax amount has been charged to the customers or expensed out and burden of service tax has been passed on. The appellant is contending that the service tax amount which is claimed as refund has already been shown under the head 'loans, Advances, Deposits and Other Current Asset - Schedule 8' in audited balance sheet as on 31.03.2016. The figure is included in the amount shown outstanding in the Accounts of 'GE(AF-1) Jamnagar S.Tax' and 'GE(Porbandar) S.Tax'. On going through the documents, I find that Garrison Engineer (AF), vide letter dated 22.02.2017, addressed to the appellant on the subject "Refund of Service Tax to Contractor", stated that "*Since the amount was reimbursed to you due to service tax levied by the service tax department on payment made and now as per Union Budget 2016-17, the service tax has been restored for the work concluded prior to 01 Mar 2015*". Thus, it is clear from the said letter that Garrison Engineer has reimbursed the service tax paid by the appellant during 2015-16 and therefore, I find that any argument that they have shown the same as receivable in their balance sheet or that there is C.A. Certificate, would not help them. I find that the burden of service tax has been passed on to the service recipient in this case and therefore the appellant is not eligible for payment of refund.

11. Further, with regard to a Chartered Accountant's Certificate, I find that the said certificate dated 28.01.2017 issued by M/s Oza & Thakrar, C.A. states that "*We have verified the Service Tax Return filed and the relevant*



documents for the period of 01.04.2015 to 31.03.2016 and on the basis of our verification and the explanation and information furnished to us, we hereby certify that M/s ...has paid service tax (including Cess) aggregating to Rs. 4,05,167/- along with interest amounting to Rs. 21,664/- in respect of Construction work carried out for various governmental departments and the said amount has been paid through challan. The total amount of service tax alongwith interest has been borne by our client and it has been neither been collected nor passed on to any other party....”

From the above Certificate it transpires that the same is issued on the basis of verification of ST-3 Returns and relevant documents (Not specified) instead of on the basis of financial records/Books of Account especially the Balance Sheet. Thus, I find that this Chartered Accountant's Certificate relied upon by the appellant, on the above facts also, is of no help to them. In view of these facts, reliance placed on various decisions of the higher judicial forum in support of their above contention, is also of no help to them.

12. In view of the above, I find that though the refund is admissible on merits, the same cannot be granted to the appellant as they have passed on the burden of service tax to the service recipient.

13. Accordingly, I reject the appeal filed by the appellant and uphold the Order passed by the adjudicating authority with regard to aspect of unjust enrichment.

सत्यापित,
प्रवीण पोषट
अधीक्षक (अपील्स)

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

F. No. V2/218/RAJ/2017

By R.P.A.D.

To,
M/s. Vraj & Vaj Construction,
A-20, Indradeep Society,
Opp. Vikas Gruh Road,
Jamnagar.

Copy to:

- 1) The Chief Commissioner, CGST, Ahmedabad.
- 2) The Commissioner, CGST, Rajkot.
- 3) The Assistant Commissioner, CGST, Division _____, Rajkot.
- 4) The Assistant Commissioner (Systems), CGST, Rajkot.
- 5) The Superintendent, CGST, AR - _____, Rajkot.
- 6) Commissioner (Appeals), CGST, Rajkot.
- ✓) Guard File.

