



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL 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 |
|---|---|-----------------------------|------------------|
| | V2/12 & 13 | ST/125/2017-18 | 21/04/2017 |
| | /EA2/GDM/2017 | ST/126/2017-18 | 21/04/2017 |

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

KCH-EXCUS-000-APP-070-TO-071-2018-19

आदेश का दिनांक / 10.07.2018 जारी करने की तारीख / 11.07.2018
Date of Order: Date of issue:

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

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 Appellant & Respondent :-

**M/s. Sardar Sarovar Narmada Nigam Ltd. Block No. 12, 2nd Floor New Sachivalay
Complex Gandhinagar- 382010-370 020**

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:-

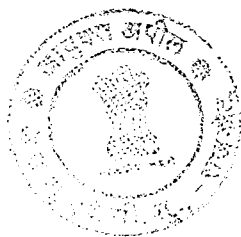
(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं
2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all
matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण
(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 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 demanded/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/-.

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/-.



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- (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 एउ उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति पत्रागित 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 of 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 होंगे। / 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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतक 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 इयूटी 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 समयावधि 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 है 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 पढ़ी 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, not withstanding the fact that the one appeal to the Appellate 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-1 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 आकषित 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 Commissioner, Central Excise & Service Tax, Gandhidham (Kutch) (hereinafter referred to as "the department") has filed present appeals against Orders-in-Original No. ST/125/2017-18 and ST/126/2017-18 both dated 21.04.2017 (hereinafter referred to as "impugned orders") passed by the Assistant Commissioner, Service Tax Division, Gandhidham (Kutch) (hereinafter referred to as "lower adjudicating authority") in the case of M/s. Sardar Sarovar Narmada Nigam Limited, Block No. 12, 2nd floor, New Sachiwalaya Complex, Gandhinagar (hereinafter referred to as "respondent").

2. The brief facts of the case are that Respondent, a limited company wholly owned by the Government of Gujarat, constructing Canal, Dam etc. by giving contracts/agreements to various contractors, had filed refund claim under Section 101 of the Finance Act, 1994 (hereinafter referred to as "the Act), inserted vide Finance Act, 2016 on the ground that no Service Tax was required to be levied or collected during the period from 01.07.2012 to 29.01.2014, in respect of taxable services provided to a government authority or a Board or any Body set up by the Central Government or State Government. The lower adjudicating authority sanctioned refund claims of Rs. 52,90,031/- and Rs. 63,71,014/- respectively vide the impugned orders.

3. Being aggrieved with the impugned orders, the department filed appeal, *interalia*, on the grounds as under: -

(i) The lower adjudicating authority had not correctly observed the provisions of Section 101 of the Act, which provide special retrospective exemption in certain cases relating to the services provided to a government authority or a Board or any Body set up by the Central Government or State Government. The plain reading of Section 101 of the Act establishes that as per Section 101(2) of the Act. if any assessee has already paid service tax in respect of the said services provided during the period from 01.07.2012 to 29.01.2014, then it shall be entitled to refund of service tax paid on the said services in accordance with the law subject to



the satisfaction of unjust enrichment; that the prime object to insert this section was to grant retrospective exemption and to grant refund thereof so arising. Therefore, consequential refund, if any arises, can be granted only under Section 101 of the Act and not under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters. Upon reading Section 101(1), Section 101(2) of the Act and Section 66B of the Act, it is noticed that the exemption is granted from levy and collection of service tax and if paid, for the consequent refund and provisions specify that refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all the material time. Therefore, the person who has charged and collected service tax under Section 66B of the Act is the person eligible for refund. The said provisions of refund to examine other provisions of law as well as principle of unjust enrichment which relates to sanction of the refund of service tax paid to the Government exchequer. The other provisions pertaining to cenvat credit so availed by the service provider on inputs/input services for providing exempted services and provisions of Rule 6 of the Cenvat Credit Rules, 2004 as well as the provisions of unjust enrichment. The objective is to protect the Government revenue and to restrict the assessee for wrong availment of double benefits i.e. one of obtaining refund and other is availment of cenvat credit for providing exempted services, which can only be possible when the assessee who actually paid service tax to Government exchequer come forward and present the refund claim justifying their refund entitlement and ask for refund fulfilling the conditions as stipulated for and if his claim is lawful, the refund would be granted to the person, who has actually paid the said service tax.

(ii) It has been contended that the law has equally imposed obligation upon service provider to charge and collect service tax from the service recipient and to pay the same to the Government exchequer and if service providers fails to pay service tax for the services provided by him, the department shall ask the service provider to pay the same and the service provider only faces the consequences of interest and penalty and not the service recipient and in such situation, it becomes immaterial as to whether service provider has actually charged and collected service tax from

service recipient or otherwise. The revenue can only be protected and checks framed under the Act and Rules can be examined, only if the person who has actually paid service tax be allowed to claim refund of service tax so paid. Therefore, the person who can seek refund of service tax must be the person, who made payment of service tax to the Government exchequer.

(iii) The person who claims for refund of the tax, the same should have been shown/recorded as "Tax receivable", failing to which mean that tax has become part of cost and therefore, indirectly the incidence of tax has been passed on. In present case, no such aspect was appearing to have been verified. The lower adjudicating authority has not verified the aspect of non-availment of Cenvat Credit on common inputs by the service provider which may otherwise be a non-compliance with the condition set out in Rule 6(2) of Cenvat Credit Rules, 2004, in absence of which the aspect of unjust enrichment may not be considered as complete otherwise. It appears from the Certificate of Chartered Accountant that the incidence of service tax is for the period from 01.07.2012 to 31.03.2016 whereas entitlement for refund is for service tax for the limited period of 01.07.2012 to 29.01.2014. The Chartered Accountant who has issued the Certificate dated 14.02.2017 is not an authorized auditor of the company records under IT Act and Certificate has been issued by him without checking all relevant documents of service provider and the Respondent and the certificate is apparently an opinion based on merely assumptions and this may not serve the very purpose of strict compliance with the doctrine of unjust enrichment.

(iv) It is contended that Respondent had reimbursed service tax after completion of FY 2012-13 and FY 2013-14 and service providers had paid service tax to Government exchequer in March/April, 2015. The impugned order does not specify as to when the value of said services provided to Respondent and payment of service tax made to Government account were reflected in periodical ST-3 returns filed by service providers and in which returns the Respondent had declared about the same in their periodical ST-3 returns as regard to portion of service tax payable by them under reverse charge mechanism.

(v) Service providers had not at all charged service tax in the Bills raised by them during the material time but had been claimed and collected after 29.01.2014. Thus, for claiming refund of service tax when service providers were not entitled, there is no scope to stretch the scope of his entitlement of refund till raising claim by Respondent as reimbursement made by them to service providers. The lower adjudicating authority could have considered the claim itself as not sustainable on this ground.

4. The respondent has submitted written submissions dated 4.6.2018 stating that respondent is a Government Company wholly owned by Gujarat Government, which is mainly formed to undertake project of dam across the river Narmada, power house, irrigation work, etc; that respondent had availed Works Contract Service as defined under Section 65B(44) read with Section 65(h) of the Act and reimbursed 50% of total service tax to service providers as per Notification No. 30/2012-ST dated 20.6.2012; that respondent filed refund claims under Section 101 of the Act as per instructions contained in Para 1.1 of Chapter 9 of CBEC's Excise Manual of Supplementary Instructions, 2005; that lower adjudicating authority has sanctioned refund claims after verification of payment of service tax by the service providers as evident from Para 11 of the impugned orders; that doctrine of unjust enrichment is verified by the lower adjudicating authority by verifying service tax returns filed by the service providers during material time as evident from Para 18 of the impugned orders.

4.1. Personal hearing in the matter was attended to by Ms. Labdhi Shah, Chartered Accountant who reiterated the findings of the lower adjudicating authority and submitted written submissions to say that the grounds of two appeals of department are not correct; that service providers M/s. K.K.Sorathia & M/s. Bhimji Velji Sorathia have given certificate/declaration that Respondent can claim refund under Section 101 of the Act and service providers would not seek refund from Central Excise, Kutch; that on this disclaimer, Respondent are authorized to obtain refund.

Findings:

5. I have carefully gone through the facts of the case, the impugned orders, grounds of appeals, written submissions as well as further submissions made by the Respondent and further submissions made by the Respondent. The issue to be decided in the present appeals is whether the impugned orders passed by the lower adjudicating authority sanctioning the refund under Section 101 of the Finance Act, 1994 is correct, legal & proper or not.

6. I find that the Respondent is a Limited Company, wholly owned by the Government of Gujarat and engaged in execution of various projects like construction of Dams, Canal, etc. of the Government of Gujarat through contractors following open tendering process. It is a fact that they received the services of construction of canal provided by the contractors, namely, M/s. K.K. Sorathia & M/s. Bhimji Velji Sorathia, during the period from 01.07.2012 to 29.01.2014, who charged and collected service tax from the Respondent at the applicable rate. Consequently, the Central Government under Section 101 of the Act (inserted vide Section 156 of the Finance Act, 2016) provided retrospective exemption from levy and collection of service tax for the services provided to an authority or a Board or any other body set up by an Act of Parliament or a State Legislature; or established by the Government, with ninety per cent or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of canal, dam or other irrigation works. The respondent filed refund claims of Rs. 52,90,031/- and Rs. 63,71,014/- which were sanctioned by the lower adjudicating authority after examining the claims and satisfying himself about the correctness of the claim. For ready reference, I would like to reproduce Section 101 of the Finance Act, 1994 (inserted by the Finance Act, 2016), which is as under: -

Section 101 - Special provision for exemption in certain cases relating to construction of canal, dam, etc. —

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of July, 2012 and ending with the 29th day of January, 2014 (both days inclusive) in respect of taxable services provided to an authority or a board or any other body —

- (i) set up by an Act of Parliament or a State Legislature; or
- (ii) established by the Government,

with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of canal, dam or other irrigation works.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.

(Emphasis supplied)

6.1 The department has contended that consequential refund, if any arises, can be granted only under Section 101 of the Act and not under Section 11B of the Central Excise Act, 1944 made applicable to service tax matters and that the person who has charged and collected service tax under Section 66B of the Act is the only person eligible for refund and no one else. I find that the contentions raised by the department are not correct as Section 101 of the Act did not prescribe the manner of presentation of refund claim and also did not provide anywhere in the said Section that only the person who has charged and collected service tax under Section 66B of the Act is eligible for refund of service tax. It is settled position of law that the refund of Central Excise duty or Service Tax should be governed under the provisions of Section 11B of the Central Excise Act, 1944 as these have been made applicable to service tax by virtue of Section 83 of the Act and Section 11B(1) of the Central Excise Act, 1944 stipulates that any person who borne the incidence of duty/tax can claim for refund of the duty/tax. I also find that Section 101 grants retrospective exemption to the specified services provided to an authority or a Board or any other body set up by an Act of Parliament or a State Legislature; or established by the Government. It is a fact that the services provided during

the period when they were taxable, the service provider had charged and collected service tax from the service recipient i.e. the Respondent and service providers had deposited into the Government account in cash. Section 101(2) provides for refund of service tax paid from 01.07.2012 to 29.01.2014 and there is no dispute in this case that the Respondent as service recipient has borne the burden of service tax. Hence, in my well-considered view, the Respondent cannot be deprived of substantial benefit provided by the Government to them with retrospective effect and the arguments of the department that the consequential refund arising out of insertion of Section 101 of the Act can be granted only under Section 101 of the Act and not under Section 11B of the Central Excise Act, 1944 and person who has paid service tax to the Government exchequer is only the person eligible to claim refund are illogical and cannot be allowed to sustain.

6.2 The department has further contended that the person who claims for refund of service tax should show these amounts as "Tax receivable" in their books of account and if not done so would mean that tax has become part of the cost and therefore, the incidence of tax should be considered to have been passed on; that the service providers had collected and deposited service tax only after expiry of period of retrospective exemption specified in Section 101 of the Act. I find that the respondent being service receiver paid service tax to the service providers and the service providers had deposited it into Government account and there is no denial of this fact. It is also a fact that the Respondent is a wholly owned Gujarat Government Limited Company engaged in the execution of various projects of construction of Dams, Canals, etc. for and on behalf of the Government of Gujarat. It is also a fact that the service providers have provided Works Contract service to the respondent when service tax was not exempted during the period from 01.07.2012 to 29.01.2014. The respondent has submitted specific letters of service providers that the Respondent reimbursed service tax to them and they have no objection, if the refund is claimed by the Respondent. The Respondent has also submitted certificates dated 15.11.2016 and dated 14.02.2017 of Shri Harish B. Patel, Chartered Accountant that incidence of service tax reimbursed by the


Respondent to the service providers has been borne by the Respondent. The Respondent has clarified that they have not availed cenvat credit of service tax reimbursed to service providers and that they are not providing any services on which service tax is leviable. Hence, I find that Respondent has sufficiently established that they have borne the incidence of service tax and not passed on to any other person. Therefore, the contentions made by the department in the present appeals are not tenable at all.


9. In view of above factual and legal position, I do not find any reason to interfere with the impugned order. Hence, I uphold the impugned orders and reject the appeals.

९.१. विभाग द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeals filed by the department stand disposed of in above terms.

सत्यापित,


ए. एम. पोपट
अधीक्षक (अपील्स)


(कुमार सतोष)
आयुक्त (अपील्स)

By Regd. Post AD

To,

| | |
|---|---|
| (i) The Commissioner, CGST & Central Excise, Gandhidham (Kutch) | (i) आयुक्त, केंद्रीय वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, गांधीधाम (कच्छ) |
| (ii) M/s. Sardar Sarovar Narmada Nigam Limited, Block No. 12, 2 nd floor, New Sachiwalaya Complex, Gandhinagar | (ii) मे. सरदार सरोवर नर्मदा निगम लिमिटेड, ब्लॉक न. १२, दूसरी मंजिल, नया सचिवालाया कोम्प्लेक्स, गांधीनगर |

Copy for information and necessary action to:

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information please.
2. The Assistant Commissioner, CGST & Central Excise, Urban Division, Gandhidham (Kutch).
3. Guard File.

