केंद्रीय कर आयुक्त (अपील)
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX
केंद्रीय उत्पाद शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015
7th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
079-26305065 टेलेफैक्स 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

.क फाइल संख्या (File No.) : **V2(ST)274/A-II/ 2016-17** /3079 to 3083
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 118-17-18**
दिनांक (Date): **23/10/2017** ,जारी करने की तारीख (Date of issue): 24-10-17
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-VI), अहमदाबाद, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक _----------से सृजित
Arising out of Order-In-Original No ._**SD-06/Refund/20/AC/Vatsal/16-17**__**Dated**: **27.01.2017** issued by: Assistant Commr STC(Div-VI), Ahmedabad.

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Vatsal Construction Co.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है |

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी 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-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो |

In case of any loss of goods where the loss occur 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

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है |

Cont...2

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गत:–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से

रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number 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 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयंन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस सन्दर्भ में ,इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, 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."

ORDER-IN-APPEAL

M/s Vatsal Construction Co., Sardar Patel Mall, A-5/B, 2nd floor near Diamond Mill, Nikol Gam road, Post: Thakkarnagar, Ahmedabad (hereinafter referred to as 'the appellant') has filed the present appeal against **Order-in-original No.SD-06/Refund/20/AC/Vatsal/16-17 dated 27/01/2017** (hereinafter referred to as 'the impugned order') passed by Assistant Commissioner, Service Tax, Division-VI, Ahmedabad (hereinafter referred to as 'the adjudicating authority').

2. The appellant had filed a Refund claim on 27/10/2016 for an amount of **Rs.42,39,861/-,** being Service Tax paid for the period of **01/04/2015 to 29/02/2016** in respect of service provided by way of construction of classrooms at different primary schools by entering into six agreements with the State Project Director, S.S.A. Mission, Gandhinagar and one agreement with Ahmedabad Municipal Corporation. The appellant had paid Service Tax on these seven projects w.e.f. 01/04/2015 under the category of 'Works Contract' considering the same as original works. In the Budget of 2016, Section 102 was inserted in Finance Act, 2016 granting retrospective exemption to the said service and allowing refund of Service Tax paid during the period of 01/04/2015 to 29/02/2015 within the period of six months from the date of assent of Hon'ble President on Finance Bill 2016, which was granted on 14/05/2016. During scrutiny of the refund claim, the appellant was asked to submit by 2811/2016 various documents in original evidencing payment of Service Tax, incidence of tax not passed on to the recipient etc. as the documents submitted by the appellant with the claim were neither original nor were they duly attested by authorized person. However the appellant failed to respond. Therefore, a Show Cause Notice F.No.SD-06/04-28/Refund/Vatsal/16-17 dated 02/12/2016 (hereinafter referred to as 'the SCN') was issued to the appellant proposing to reject the refund claim of Rs.42,39,861/-, which was decided by the adjudicating authority *vide* the impugned order. The adjudicating authority has held that as per Section 102, refund application was to be submitted within 6 months of the enactment of Finance Act, 2016 on 14/05/201 and the appellant having filed the claim on 27/10/2016 had filed the claim well within the time limit. He has also held that the agreements were all signed before 01/03/2015 and appropriate stamp duty had been paid before the date thereby fulfilling the condition of Section 102 of Finance Act, 2016. Further, the adjudicating authority has held that the State Project Engineer of Gujarat Council of Elementary Education and Additional City Engineer of Ahmedabad Municipal Corporation had submitted letters dated 01/12/2016 and 02/12/2016 respectively stating that they had not paid any Service Tax to the appellant during the period covered under the refund application corroborating the declaration of the appellant that no incidence of Service Tax was passed on to the recipient and the same had been shown as 'Service Tax receivables' in its financial statements. The adjudicating authority has thus confirmed in the impugned order that 'unjust enrichment'

was not applicable in the instant case. It has further been held by the adjudicating authority that the claimant was also eligible for the refund of Service Tax charged and collected by the sub-contractor for the execution of the said projects as the work contract service rendered by the sub-contractor stood exempted under entry 29(h) of the mega exemption Notification 25/2012 as the services rendered by the appellant stood retrospectively exempted vide the said Section 102 and as the incidence of tax paid by the sub-contractor was borne by the appellant. However, based on observation by the auditors during pre-audit that the appellant had availed CENVAT credit to the tune of Rs.18,25,194/- in respect of the said projects, which was ineligible as the impugned credit was used for providing exempted services, the adjudicating authority has held that the appellant was required to reverse the amount of Rs.18,25,194/-. He has thus **sanctioned the refund claim amount of Rs.24,14,667/-** and **rejected refund claim of Rs.18,25,194/-** out of the total claim amount of Rs.42,39,861/-.

3. Aggrieved by the impugned order, the appellant has filed the instant appeal, *inter alia*, on the following grounds:

1) The adjudicating authority had erred by rejecting refund claim of Rs.18,25,194/- by travelling beyond the scope of the SCN dated 02/12/2016 that did not contain any proposal to reject the refund to the extent of Rs.18,25,194/- out of the total refund claim of Rs.42,39,861/-. The SCN was issued asking the appellant to show cause as to why the refund claim of Rs.42,39,861/- should not be rejected as the appellant had not submitted the required documents. Once the required documents were submitted even before the receipt of the SCN, the rejection of refund claim to the extent of Rs.18,25,194/- merely based on audit objection, without giving any opportunity to the appellant to rebut the contentions of audit observation is in clear violation of the principles of natural justice. The refund is rejected on the ground that the appellant was required to reverse the amount of Rs.18,25,194/- in terms of Cenvat Credit Rules, 2004 (CCR, 2004), which was not a contention in the SCN and hence the impugned order has clearly travelled beyond the scope of the SCN. It is settled law that the adjudicating authority cannot travel beyond the allegation made in the SCN. The appellant relies on decision of Hon'ble Supreme Court in the case of CCE vs Toyo Engineering India Ltd. – 2006 (201) ELT 513 (SC) holding that the benefit of project import was deniable to the assessee in as much as it was a ground mentioned in the SCN. In the instant case the SCN did not envisage rejection of refund on the ground of CENVAT credit availed by it but the refund is rejected on the ground that the claimant is not eligible to take credit of Rs.18,25,194/-. The appellant also relies on decision in the case of Ultratech Cement Ltd. vs CCE – 2011 (22) STR 289 (Tri.-Mum), wherein it was accepted that department cannot be permitted to raise any issue beyond the scope of the SCN. In the case of Polyspin Ltd. vs CCE – 2010 (19) STR 827 (Tri.-Chen.) also it was held that an adjudication order proceeding to deny refund on the ground not raised in the SCN is not permissible in law and hence the orders travelling beyond the scope of the SCN were set aside. The appellant prays to set aside the impugned order in so far as it rejects the refund claim to the extent of Rs.18,25,194/- relying on these decisions and judicial discipline.

2) Rejecting refund of Rs.18,25,194/- merely based on observation of pre-audit section is without application of mind because a careful reading of the impugned order till paragraph 23 shows that adjudicating authority has recorded compete satisfaction about sanction of refund of entire claim amount of Rs.42,39,861/- and has also recorded detailed working of applicable refund claim, showing that on application of mind the adjudicating authority had proposed sanction of full refund claim of Rs.42,39,861/-. However, from paragraph 24 of the impugned

order it is clear that merely based on observation of pre-audit section that the appellant had utilized credit to the tune of Rs.18,25,194/- is rejected. When the appellant availed CENVAT credit, the output service was taxable and therefore, the provisions of Rule 6(1) of CCR, 2004 would not come into play. Rule 6(1) is applicable only when input services are utilized for providing exempt services. When the appellant had availed CENVAT credit, the input services were clearly used for providing taxable output service and hence the credit availed becomes indefeasible. In the instant case the input services for which credit has been availed are undisputedly input services in terms of Rule 2(1) of CCR, 2004 and the right to avail credit in respect of such input services accrues the minute they are received accompanied by invoice. The same have also clearly been used for rendering the output service, as without the services of sub-contractors, the service of construction of Government or local authority would not have been rendered. Hon'ble supreme Court in the case of Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd. – 1999 (112) ELT 353 (SC) have held that there is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken and the credit that has been validly taken where its benefit is available to the manufacturer without any limitation in time or otherwise is indefeasible. Section 102 (2) of the Finance Act, 1994 clearly mandates 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 material times. In case of the appellant, the service tax collected is Rs.42,39,861/- on total bill amount of Rs.7,64,88,300/- as categorically recorded in paragraph 19 of the impugned order. When Service Tax collected is Rs.42,39,861/-, this very amount is to be refunded in terms of clear mandate of section 102(2) of the Finance Act, 1994. The appellant prays for holding that in absence of any provision in section 102(2) of the Finance Act, 1994 to allow refund after reversal of CENVAT credit, the admissible refund to the appellant should be Rs.42,39,861/-, which is the service tax collected from it. In the impugned order, even while holding that the appellant is eligible for refund or Service Tax charged and collected by the sub-contractors for execution of the said Government project, rejection of refund claim to the extent of Rs.18,25,194/- in blatant violation of principles of natural justice is not legal or proper. The appellant encloses a copy of Order-in-original No. R/80/2016 dated 12/01/2017 issued by Assistant Commissioner, Service Tax Division, Bhavnagar in case of M/s Krishna Construction Co. and draw kind attention to paragraph 8 thereof where it has been held that after recording detailed discussion it is concluded that the claimant is eligible for refund of CENVAT credit utilized for paying service tax by the. Service tax provisions relating to Section 102 is applicable uniformly across Bhavnagar and Ahmedabad. When Bhavnagar division of Service Tax sanctions and pays refund in respect of CENVAT credit utilized for paying Service Tax, rejection of such refund claim by Ahmedabad region is not legal or proper and hence he appellant prays that the impugned order is not legal or proper in so far as it rejects the refund claim to the extent of Rs.18,25,194/-

4. Personal hearing was held on 04/10/2017 when Dr. Nilesh V. Suchak, C.A. and authorized representative for the appellant on behalf of the appellant. The learned C.A. reiterated the grounds of appeal. He pointed out to Bhavnagar O.I.O. at page 55 of the appeal where such credit has been allowed. He also filed written submissions dated 04/10/2017.

5. I have carefully gone through the impugned order and the grounds of appeal filed by the appellant. As regards the refund claim of Rs.42,39,861/-, the adjudicating authority has held in paragraph 17 to 23 that the works contract services provided in all the contracts by the appellant are specifically covered under Section 102 of the Finance Act, 1994; that all the agreements for the said projects were signed before 01/03/2015 and appropriate stamp duty had been paid before that date as required in Section 102

ibid and that the service recipients namely Gujarat Council of Elementary Education and Ahmedabad Municipal Corporation had submitted letters stating that they had not paid any Service Tax to the appellant and on the basis these letters, the adjudicating authority has concluded that the incidence of duty had not been passed on to the recipients by the appellant. The dispute arises consequent to the pre-audit of the refund claim, where the auditors had observed that the appellant had claimed CENVAT credit of Rs.18,25,194/- out of the total refund claim of Rs.42,39,861/. The adjudicating authority has rejected the refund quantum of Rs.18,25,194/- that was availed as CENVAT credit and utilized by the appellant for providing services that became exempt by virtue of Section 102 of the Finance Act, 1994. The appellant is aggrieved by the rejection of the refund quantum of Rs.18,25,194/- and claims that is eligible for refund of the entire amount of Rs.42,39,861/.

6. The appellant has not denied or disputed the fact that it had availed the CENVAT credit of Rs.18,25,194/- or that this credit was used in relation to services exempted under Section 102 of Finance Act, 1994 applied retrospectively. The only contention in the grounds of appeal is that the appellant was eligible to avail the impugned credit at the time when it was availed. It is pertinent to note that the admissibility of CENVAT credit has not been disputed or denied in the impugned order. The exemption in the instant case is by virtue of the provisions of Section 102 of Finance Act, 1994 that grants exemption for the period 01/04/2015 to 29/02/2016 (both days inclusive) in respect of specified services such as construction, renovation etc. meant for use other than for commercial purpose and rendered under works contract to the Government or a local authority or a Government authority in respect of specified institutions such as schools, clinical establishment etc. Further, sub-section (2) of Section 102 of Finance Act, 1994 provides for refund in lieu of the said retrospective exemption. The refund amount of Rs.42,39,861/- filed by the appellant in accordance with the provisions of Section 102(2) of the Finance Act, 1994 includes the amount of Rs.18,25,194/- that has already been availed and utilized by it as CENVAT credit. In such a situation, if the entire refund claim amount of Rs.42,39,861/- is sanctioned as claimed in the instant appeal, then the appellant stands to gain the undue benefit with regards to the amount of Rs.18,25,194/- twice over - firstly in the form of CENVAT credit availed and utilized and thereafter in the form of refund. This double benefit is neither justified nor is legally tenable.

7. In the grounds of appeal, the appellant has placed stress on the phrase ***'refund shall be made of all such service tax which has been collected'*** appearing in Section 102(2) of the Finance Act, 1994. For the sake of reference, Section 102(2) of Finance Act, 1994is reproduced as follows:

> (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 the material times.**

From the above it is clear that the phrase *'refund shall be made of all such service tax which has been collected'* is followed by the fundamental provision that enables refund, which reads: ***'but which would not have been so collected had sub-section (1) been in force at all the material times'***. Thus the refund in the instant case becomes liable for sanction on the basis of a deeming fiction that Section 102(1) of Finance Act, 1994, stipulating that *'no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation'*, **was in force *at the material time***. The material time in the present case is when the appellant had availed and utilized the CENVAT credit of Rs.18,25,194/- for providing the services specified in Section 102(1) of Finance Act, 1994. The basic tenet of CCR, 2004 regarding avoidance of cascading effect of taxation is not attracted in a situation where sub-section (1) of Section 102 of Finance Act, 1994 was in force and the appellant was not eligible to avail the impugned credit as its service covered in the refund claim was exempted at the material time. Therefore, on considering the instant case in terms of Section 102(2) of Finance Act, 1994, it is seen that ***'all such service tax which has been collected'*** does not include the quantum of CENVAT credit of Rs.18,25,194/- and the same is not liable for refund. The entire refund amount of Rs.42,39,861/- claimed by the appellant cannot be considered as total service tax collected because Rs.18,25,194/- pertains to CENVAT credit that was not available at the material time by virtue of the fact that the service concerned provided by the appellant was exempted under Section 102(1) of Finance Act, 1994. It is reiterated that sanction of refund of Rs.18,25,194/- is not correct or legally sustainable because it results in undue double benefit to the appellant at the cost of Government exchequer. The appellant's plea for sanction of refund of entire amount of Rs.42,39,861/- is rejected.

8. The appellant has not reversed the impugned credit of Rs.18,25,194/- before filing the refund claim or thereafter. Similarly, the rejection of the claim of Rs.18,25,194/- ordered by the adjudicating authority does not entail any encumbrance on the appellant to reverse the CENVAT credit of Rs.18,25,194/-. Hence there is no loss or injury accruing to the appellant by the rejection of the CENVAT quantum of refund in the impugned order. In the landmark judgment in the case of **MAFATLAL INDUSTRIES LTD. vs UNION OF INDIA – 1997 (89) E.L.T. 247 (S.C.),** Hon'ble Supreme Court has laid down the principle that as per the Law of Restitution, ***"the very basic requirement for claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him. If that is not done the action for restitution or refund should fail."*** For the purpose of clarity, Paragraph 118 of this decision is reproduced as follows:

"118. The principles discernible from the above discussion has been succinctly stated by Endrew Burrows in his book - The Law of Restitution (1993), at page 16 thus :

> "It is *the* major theme of Birks' work that this phrase ambiguously conceals two different ideas in the law of restitution. The first, and most natural meaning, is that the defendant's gain *represents a loss to the plaintiff* : in *Birks' terminology a 'subtraction from' the plaintiff.* The second, and less obvious meaning, is that the defendant's (Emphasis gain has been acquired by committing a wrong against the plaintiff." supplied)

The person claiming restitution should have suffered a *"loss or injury"*. In my opinion, in cases where the assessee or the person claiming refund has passed on the incidence of tax to a third person, how can it be said that he has suffered a loss or injury ? How is it possible to say that he has got ownership or title to the amount claimed, which he has already recouped from a third party? **So, the very basic requirement for a claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him; in other words, he has not passed on the liability. If it is not so done, the action for restitution or refund, should fail."**

Applying the above ratio to the facts of the present case, the appellant has not claimed any loss or injury to itself by the action of the adjudicating authority rejecting the claim of Rs.18,25,194/- already availed and utilized as CENVAT credit. No evidence has been adduced showing that appellant had suffered any loss or injury emanating from the impugned order. Therefore, there is no merit in the plea of the appellant made against the rejection of the CENVAT quantum of credit in the impugned order.

9. The appellant has relied on O.I.O. No. R/80/2016 dated 12/01/2017 issued by the Assistant Commissioner, Service Tax Division, Bhavnagar in the case of M/s Krishna Construction Co., where it was held that M/s Krishna Construction Co. was eligible for the refund on a similar set of facts as in the instant appeal. However, it is seen that O.I.O. No. R/80/2016 dated 12/01/2017 has not attained finality as the department has reviewed this order and an appeal has been filed against the same before Commissioner (Appeals), Rajkot on 17/03/2017 as intimated by Superintendent, Service Tax Division, Bhavnagar. One of the grounds of departmental appeal in the case of M/s Krishna Construction Co. is that they had availed and utilized CENVAT credit for payment of Service Tax during the period April-2015 to September-2015 & October-2015 to March-2016. Therefore, the reliance placed by the appellant on O.I.O. No. R/80/2016 dated 12/01/2017 to plead that there was no uniform application of Section 102 by the department is misplaced and not factually correct.

8. The appellant has also pleaded that it was denied opportunity to present its defence against the observation of the pre-audit in respect of the CENVAT credit of Rs.18,25,194/- before the impugned order was passed. It is on records that the appellant had filed defence submissions and also attended personal hearing before the adjudicating authority to plead its case. Further, the appellant has not referred to any

fresh evidence that needs to be considered by the adjudicating authority, other than those considered and discussed in the above findings. Therefore, no purpose would be served to revisit the case on the grounds of natural justice, especially when the exchange of correspondence referred to in the impugned order and the appeal memorandum clearly point to the fact that the observations regarding the details of the impugned CENVAT credit availed by the appellant were derived from the documents provided by the appellant during the processing of the refund claim as well as on the basis of its submissions before the adjudicating authority. In view of the fact that the impugned CENVAT credit of Rs.18,25,194/- availed by the appellant has not been denied in the impugned order, the rejection of the refund quantum does not amount to denial of any substantive benefit to the appellant. In view of the above discussions, the appeal filed by the appellant is rejected.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
'The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date:23/10/2017

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.

To

M/s Vatsal Construction Co.,
Office No. H-301, Shridhar Flora Complex
Amar Jawan Circle,
Nikol Gam – Kathwada Road, Near S.P. Ring Road, Nikol
Ahmedabad - 380 049.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T (System), Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: II, Ahmedabad (North).
5. Guard File.
6. P.A.