

क फाइल संख्या : File No : **V2(ST)277/A-II/2016-17**

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-324-17-18**

दिनांक Date : **23/02/2018** जारी करने की तारीख Date of Issue 17/3/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **SD-04/REF-69/AK/2016-17** Dated **05.01.2017**

Issued by **Assistant Commr STC**, Service Tax, Div-IV, Ahmedabad

ध अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

**M/s. Arpan Infratech
Ahmedabad**

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

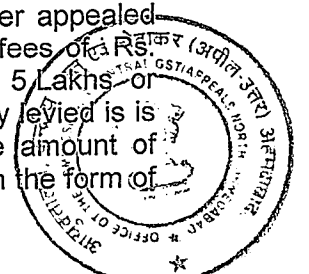
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) 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 accompany ed 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 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.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर

आयुक्त, सहायक / उप आयुक्त अथवा अधीक्षक केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. 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.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है -

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

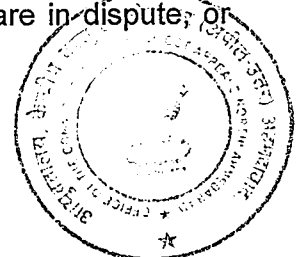
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

4(1) इस संदर्भ 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।

4(1) 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.



- (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 ड्यूटी क्रेडिट 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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 :-

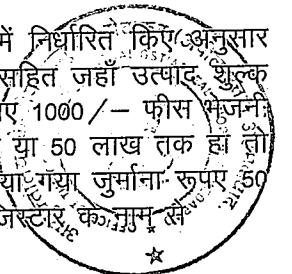
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 मैटल हॉस्पिटल 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 न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक है तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से भेजनी होगी।



रेखांकित 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. Registrar 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 आदेश 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 है।

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 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 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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 is 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 अपील 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।

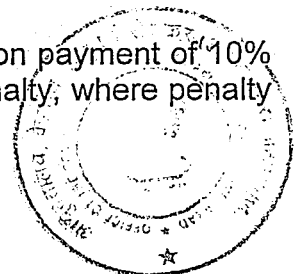
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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

This order arises out of an appeal filed by M/s. Arpan Infratech, SF/4, Aamrapali Axiom, Near Bopal-Amli Cross Road, S.P. Ring Road, Bopal, Ahmedabad-380058 (in short 'appellant') against OIO No.SD-04/REF-69/AK/2016-17 dated 05.01.2017 (in short 'impugned order') passed by the then Assistant Commissioner, Service Tax Division-IV, Ahmedabad (in short 'adjudicating authority')

2. Briefly stated that the appellant filed refund claim of Rs.9,59,527/- (which includes Rs.10,427/- interest on delayed payment of service tax and Rs.3,211/- Swachh Bharat Cess) under Section 102 of the Finance Act, 1994 on the ground that they had been awarded contract for construction of Academic building for Sir BPTI Polytechnic, Bhavnagar on works contract basis by M/s. Backbone Enterprises Ltd, Rajkot (Principal contractor) vide sub-contract agreement dated 14.11.2014. Since the said contract involved the execution of original works contract, the appellant availed exemption from payment of service tax in terms of Notifn. No.25/2012-ST dated 20.06.2012 Entry No.12A. Consequent to re-introduction of the said exemption retrospectively w.e.f. 01.04.2015, vide Section 102 of the Finance Act, 1994 the appellant filed the subject refund claim. The appellant being sub-contractor was also not liable to service tax in terms of Clause 29(h) of Mega Exemption Notifn No.25/2012ibid. On being pointed out that cenvat credit of service tax is inadmissible in case of output service becomes exempted in terms of Rule 6 of the Cenvat Credit Rules, 2004, the appellant agreed to deduct Rs.1,78,662/- pertaining to principal contractor. The appellant also submitted certificate dtd.24.10.2016 issued by M/s. Rajj & Co., Chartered Accountant certifying that the claimant has borne the amount of refund towards service tax out of its own fund and the burden of said amount has not been passed over to the service recipient. During pre-audit of subject refund claim, it was observed that the claimant has collected the amount of service tax from the service recipient since the invoices are inclusive of service tax and doctrine of unjust enrichment shall apply. The adjudicating authority vide impugned order sanctioned Rs.7,67,227/- but ordered to credit the said amount to the Consumer Welfare Fund under provisions of Section 12C of the Central Excise



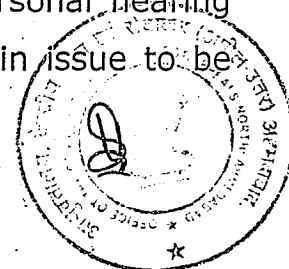
Act, 1944 and rejected Rs.10,427/-(interest) and Rs.3,211/- SBC on the ground that said Section 102ibid gives exemption to basic service tax only.

3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, *inter alia*, submitted that:

- (a) in terms of provisions of Section 2(1)(d) of the Service Tax Rules, 1994 read with Notifn. No.30/2012-ST dated 20.06.2012, the service provider and service receiver is liable to pay 50% service tax. Accordingly, they have paid Rs.9,45,889/- out of their pocket and not charged from the principal contractor. Similarly, the principal contractor has also paid Rs.9,49,100/- under RCM and has deducted the said amount of service tax while making bill payment to them. The appellant has debited the said amount deducted by principal contractor and shown as expenses in Profit & Loss Account for FY 2015-16 and rely upon case laws viz. CCE, Bhavnagar vs. Modest Infrastructure Ltd.[2011(33)STT-278(Ahd-CESTAT)]
- (b) in terms of para 8(g) of the sub-contract agreement dtd14.11.2014, the appellant shall borne the service tax applicable during the assessment by central excise & customs department. The service tax was levied w.e.f. 01.04.2015 whereas the sub-contract agreement was entered into on 14.11.2014 when the service tax was not applicable in respect of services provided to the Govt. Hence, the rate quoted by them was without consideration and inclusion of element of service tax. Cost Accountant's certificate to that effect has been enclosed.
- (c) when service tax is not leviabale under respective provisions, interest and SBC correspondingly automatically gets deleted as both are directly linked to basic amount of service tax refund claim.

4. Personal hearing in the matter was held on 20.12.2017. Shri Kiran Parikh, Chartered Accountant, appeared on behalf of the appellant and reiterated the ground of appeals and agreed to submit affidavit of service receiver, CA and Cost Accountan's certificate within 10 days. He submitted additional written submission and citation[Modest Infrastructure:2017(27)Taxman.com6(Guj)] that CA certificate and party's letter are sufficient.

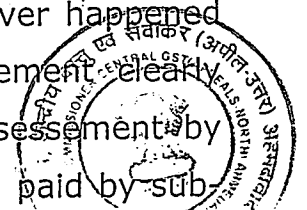
5. I have carefully gone through the case records, appeal memorandum and submission made at the time of personal hearing and evidences available on records. I find that the main issue to be



decided is whether the impugned order is just, legal and proper or otherwise. Accordingly, I proceed to decide the case on merits.

6. Prima facie, I find that the appellant is a service provider and has been awarded contract for construction of academic blocks for Sir BPIT Polytechnic, Bhavnagar. The said activity was exempted from levy of service tax in terms of Notification No.25/2012-ST dated 20.06.2012 vide Sr. No.12(A). This exemption was withdrawn vide Notifn. No.6/2015-ST dated 01.03.2015. Now this exemption was re-introduced with retrospective effect vide Section 102 of the Finance Act, 1994. Accordingly, the appellant filed the refund claim for service tax paid during the period 01.04.2015 to 29.02.2016 and has also filed certificate dated 24.10.2016 issued by M/s. Rajj & Co., Chartered Accountant, certifying that the appellant has borne the amount of refund towards service tax out of its own fund and the burden of the said amount has not been passed over to the service recipient i.e. principal contractor. I find that the adjudicating authority has sanctioned the refund of Rs.7,67,227/- but credited to the Consumer Welfare Fund under Section 12Cibid without discussing and giving reasoned findings on unjust enrichment.

6.1. In this regard, I find that the appellant has not charged any service tax separately in the bills raised to the principal contractor in terms of Para 8(g) of the Sub-Contract Agreement dated 14.11.2014. I find that when this agreement was entered into, the said activity was exempted from levy of service tax vide Mega Exemption Notification No. 25/2012-ST dated 20.06.2012. So, the contention of the appellant that rate quoted by them was without considering service tax element appears genuine. It is well understood that at the material time, the sub-contract offered to the appellant by the principal contractor was devoid of Service Tax. However, the exemption was withdrawn vide Notification number 06/2015-ST dated 01.03.2015. Now, to collect Service Tax (which was not included in the work order) the appellant was needed to receive a revised work order from the principal contractor. But unfortunately that never happened since the condition no.8(g) of the sub-contract agreement clearly provided that "If service tax applicable during the assessment by central Excise & Customs Department shall be borne and paid by sub-



contractor(AI)". Hence, it is proved beyond doubt that the bill raised by the appellant during material time is cum-tax and no service tax is charged seperately in the said bill raised. Further, the summery about service tax deposited by the appellant clearly shows that the principal contractor has also recovered service tax of Rs.9,49,300/- under RCM from the R.A. bills raised by the appellant. This implies that the appellant has borne the incidence of tax and has also made providsions in the books of account. In support, the appellant has also produced certificate dtd.24.10.2016 to that effect issued by M/s. Rajj & Co., Chartered Accountant; Declaration dtd.02.12.2016 by the principal contractor M/s. Backbone Enterprises Ltd., and certificate of Cost Accountant M/s. KVM & CO. dated 28.01.2017.

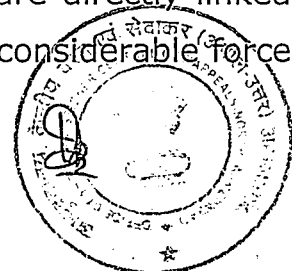
The appellant has also relied upon the case law viz. CCE&ST, Bhavnagar Vs. Modest Infrastructure Ltd. 2012 (27) taxmann.com6(Guj.) [=2013(31)STR-650(Guj.HC)]. I have carefully gone through this case law. I find that the Hon'ble High Court has held as under:

"Refund - Unjust enrichment - Burden of proof - Once the raw material supplier/customer themselves issued certificate that the amount of Service Tax was not received by the assessee from their customers then there was no question of undue enrichment by the assessee - No illegality in impugned order - Question formulated are concluded by finding of fact and appeal is liable to be dismissed - Section 11B of the Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of the Finance Act, 1994[para 11]"

Appeal dismissed.

Applying the ratio of above case laws, I find that the appellant is entitle to refund. Thus, I find force in the argument of the appellant that he never recovered Service Tax from the principal contractor and paid the tax from his own account. Therefore, I affirm that the burden of tax was borne by the appellant and he did not pass the same to the principal contractor. In view of the above, I conclude that the doctrine of unjust enrichment is not applicable to the instant case and the amount of ₹ 7,67,227/-, credited to the Consumer Welfare Fund, needs to be retrieved and credited to the account of the appellant.

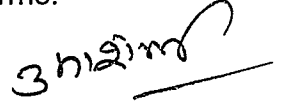
7. As regards the contention of the appellant that when service tax is not leviabale under respective provisions, interest and SBC correspondingly automatically gets deleted as both are directly linked to basic amount of service tax refund claim, I find a considerable force



in view of para 6.1 supra and hold that the appellant is also entitle to interest and SBC.

8. In view of my above discussions and findings, I set aside the impugned order and allow the appeal with consequential relief.

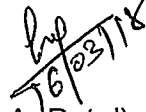
9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:


(B.A. Patel)
Supdt.(Appeals)
Central GST, Ahmedabad.

BY SPEED POST TO:

M/s. Arpan Infratech,
SF/4, Aamrapali Axiom,
Near Bopal-Amlī Cross Road,
S.P. Ring Road, Bopal,
Ahmedabad-380058

Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone.
- (2) The Commissioner, CGST, Ahmedabad-North (RRA Section).
- (3) The Asstt. Commr, CGST, Division VI(S.G. Highway West),
Ahmedabad Norh.
- (4) The Asstt. Commissioner(System), Central Tax , Ahmedabad-South
(for uploading OIA on website)
- (5) Guard file
- (6) P.A. file.

