• आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क *
सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटेकनिक के पास, आमबाबाडि,
अहमदाबाद – 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

4110/4120

क फाइल संख्या : File No : V2(ST)/116 /Ahd-II/2016-17
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-049-2017-18
दिनाँक 27.07.2017 जारी करने की तारीख Date of Issue 01/09/2017

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeal)

ग Asstt. Commissioner, Div-III केन्द्रीय उत्पाद शुल्क, Service tax द्वारा जारी मूल आदेश सं
STC/Ref/22/JMC/HCV/DC/Div-III/16-17 दिनाँक: 24/05/2016, से सृजित

Arising out of Order-in-Original No. STC/Ref/22/JMC/HCV/DC/Div-III/16-17 दिनाँक: 24/05/2016 issued by Asstt. Commissioner,Div-III Central Excise, Service tax

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/S. JMC Projects Pvt. Ltd
Ahmedabad

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 a 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक 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।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 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 ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) 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.

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...

(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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(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 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 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) 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 कंम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) 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.

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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 निर्णयन 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, provided that the pre-deposit amount shall not exceed Rs.10 Crores. 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 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. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opp. Karnavati Club, S. G. Road, Ahmedabad *(hereinafter referred to as 'the appellants')* have filed the present appeal against Order-in-Original number STC/Ref/22/JMC/H.C.Verma/DC/Div-III/2016-17 dated 24.05.2016 *(hereinafter referred to as 'impugned order')* passed by the Deputy Commissioner, Service Tax, Division-III, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

2. The facts of the case, in brief, are that the Appellants had filed a refund claim for ₹2,18,34,989/- under the provisions of Section 11B of Central Excise Act, 1944 made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. The said refund claim was filed for the period 06.06.2007 to 31.03.2011 by the appellants. The appellants claimed that they had carried out the work of construction of diaphragm walls, anchor slab, retention wall etc. for M/s. SRFDC Ltd. (a wholly owned undertaking of the Ahmedabad Municipal Corporation) during the period 06.06.2007 to 31.03.2011. The said work was specifically excluded from the ambit of Service Tax as defined in Section 65(97a) of the Finance Act, 1994 and hence, no Service Tax was payable by them. The appellants paid Service Tax on the above work and after M/s. SRFDC Ltd. informed that Service Tax was not applicable to the work, the appellants filed the refund claim. During scrutiny of the claim, certain discrepancies were noticed and accordingly, a show cause notice, dated 22.01.2016, was issued to the appellants. The adjudicating authority, vide the impugned order, rejected the refund claim on the ground of unjust enrichment and limitation stating that the claim was not tenable under Section 11 B of the Central Excise Act, 1944.

3. Being aggrieved with the impugned order the appellants have preferred the present appeal. They stated that the impugned order is not a speaking one as the adjudicating authority has not properly discussed the case laws tabled by the appellants. They further quoted that M/s. SRFDC Ltd. did not pay any Service Tax to the appellants on the invoices raised. In support, the appellants submitted, before me, a letter of M/s. SRFDC Ltd. dated 29.09.2015. The appellants further claimed that the amount of Service Tax of ₹2,18,34,989/- paid by them was not duty but deposit and hence limitation under Section 11B will not be applicable to the case. The appellants further argued that the refund can also not be denied on the ground of unjust enrichment. They have shown the Service Tax amount as 'receivables' in the financial statements. Thus, as they have not received the amount of Service Tax from M/s. SRFDC Ltd., the question of unjust enrichment does not arise.

4. Personal hearing in the matter was granted and held on 22.03.2017. Shri Jigar Shah and Smt. Madhu Jain, both advocates, appeared before me on behalf of the appellants and reiterated the contents of appeal memo. Additional submissions and various judgments were also tabled before me, by them, during the course of hearing.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. There are the following two issues to be decided in the case viz.;

(i) Claim rejected on the ground of limitation under Section 11B of the Central Excise Act, 1944.

(ii) Claim rejected on the ground of unjust enrichment.

At the onset I would like to quote below the relevant portions of the Notification number 25/2012-Service Tax dated 20.06.2012;

> "G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012- Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services leviable thereon under section 66B of the said Act, namely:-
>
> .....
>
> **12. 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, or alteration of -**
>
> **(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;**
>
> **(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);**
>
> **(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;**

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal;....."

In view of the above, we can very well see that the work performed by the appellants is exempted from payment of Service Tax. Up to this point there is no confusion about the taxability but the issue gets complicated after this. The appellants have paid Service Tax since 06.06.2007 to 31.03.2011 and when they came to know that the work performed by them is exempted, they have asked for a refund of the Service Tax that they have paid. The appellants have claimed, in their appeal memorandum, that they did not collect the said Service Tax, paid by them, from their client and have shown the amount as 'receivables' in their financial statements. They stated before me that there were several correspondences between both the parties regarding the payment of Service Tax and lately M/s. SRFDC Ltd., vide letter dated 29.09.2015, informed the appellants that as Service Tax was not payable on the work performed by the appellants, 'the question of reimbursement does not arise'. In support of their claim, the appellants have submitted photocopies of the said correspondences before me. In view of the above, I agree with the appellants that they were not supposed to pay any Service Tax and they have not received any amount of Service Tax, paid by them, from M/s. SRFDC Ltd. In paragraph 17 of the impugned order, the adjudicating authority draws a conclusion stating that as the invoices raised by the appellants include Service Tax; the appellants have received the same. This conclusion is supported by a vague argument and devoid of any evidence. In the copy of the minutes of pre-bid meeting, submitted by the appellants before me, it is very clearly mentioned that Service Tax will not be included in the rates quoted by the bidder. Thus, it is very clear that whatever amount, in the form of payment, received by the appellants, was exclusive of the Service Tax. That is the reason why the appellants were incessantly requesting M/s. SRFDC Ltd. to reimburse the Service tax amount paid by the appellants.

6. Now, I start with the main issue that whether Section 11B of the Central Excise Act, 1944 is applicable to a Service that is exempted by notification. The answer is no because, the Service Tax was paid by the appellants mistakenly/erroneously and hence, the same should be treated as a deposit and not duty. Hon'ble High Court of Kerala, while disposing the writ petition of M/s. Geojit BNP Paribas Financial Services Ltd. on 23.06.2015, has held that if Service Tax is not leviable, the refund claimed is not relatable to Section 11B of the Central Excise Act, 1944.

"10. The question of alternative remedy would arise if Service Tax is otherwise leviable under the Central Excise Act. Herein, in this case,

there is no dispute with regard to the fact that no Service Tax is leviable for the service extended by the petitioner to the Muscat Bank SAOG. Thus, the writ petition is maintainable when the amount is arbitrarily withheld without any justification under law as the refund claimed by the petitioner is not relatable to Section 11B of the Central Excise Act. Similar view was also taken by the Karnataka High Court in K.V.R. Constructions v. Commissioner of Central Excise (Appeals) and another [(2010) 28 VST 190 (Karn)] and by the Madras High Court in Natraj and Venkat Associates v. Asst.Commr. of S.T., Chennai-II [2010 (249) E.L.T.337 (Mad.)].

11. In that view of the matter, the writ petition is allowed. There shall be a direction to the second respondent to sanction, refund claimed by the petitioner based on the request made by him within two months from the date of receipt of a copy of this judgment".

In the case of Joshi Technologies International vs. the Union of India, the Hon'ble High Court of Gujarat proclaimed that in case of amount paid by mistake or through ignorance, the revenue is duty bound to refund it as its retention is hit by Article 265 of Constitution of India which mandates that no tax shall be levied or collected except by the authority of law, Section 11B of Central Excise Act, 1944. I would quote the required contents of the paragraph 15.3 and 15.4 of the said judgment as below;

".....Therefore, the contention that the self assessment made by the petitioner has attained finality and hence, the petitioner cannot claim refund unless the assessment is challenged is misconceived and contrary to the law laid down in the above decision. The upshot of the above discussion is that even in case where any amount is paid by way of self assessment, in the event any amount has been paid by mistake or through ignorance, it is always open to the assessee to bring it to the notice of the authority concerned and claim refund of the amount wrongly paid. The authority concerned is also duty bound to refund such amount as retention of such amount would be hit by Article 265 of the Constitution of India which bears the heading "Taxes not to be imposed save by authority of law" and lays down that no tax shall be levied or collected except by authority of law. Since the Education Cess and Secondary and Higher Secondary Education Cess collected from the petitioner is not backed by any authority of law, in view of the provisions of Article 265 of the Constitution, the respondents have no authority to retain the same. The decision of the Supreme Court in the case of Paros Electronics (P) Ltd. v. Union of India (supra) would have no applicability to the facts of the present case, inasmuch as, in that case the refund was not granted as the levy had become final being contested at all departmental levels. In the present case, the education cesses have been paid by the petitioner by way of self assessment and no assessment order has been passed thereon.

15.4*Reference may also be made at this stage to the decision of this court in the case of Alstom India Ltd. v. Union of India, 2014 (301) E.L.T. 446 (Guj.), on which reliance has been placed by the learned counsel for the petitioner, wherein it has been held as follows :*

It is now "11. well-settled law that a citizen, even after making payment of tax on demand by either misinterpretation of the statutory provision or under unconstitutional provision or under mistake of law, can subsequently challenge the inherent lack of jurisdiction on the part of the said State authority to demand tax, and if such a citizen succeeds, the Court can, in an appropriate case, direct refund of the amount which had been collected by the State authority having no jurisdiction. There are instances where after payment of tax by an assessee, on his prayer, the provisions of imposition of tax has been held ultra vires the Constitution of India and in such a case, the subsequent proceedings for annulment of the proceedings under which the tax was collected cannot be dismissed on the sole ground of payment of tax by the petitioner inasmuch as there cannot be a waiver of constitutional rights of mandatory character or fundamental rights. The only exception to this principle is where the assessee has passed on the burden of tax to the third parties i.e. the consumers. [See Mafatlal Industries Ltd. and Others v. Union of India and Others reported in (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.)]. Thus, if the Constitution does not permit an authority to collect tax by enactment of appropriate law vesting such power, merely because such authority has recovered the amount by virtue of ultra vires adjudication, cannot be a factor standing in the way of the assessee to challenge the provisions as ultra vires just as in a Civil Litigation after suffering a decree, the judgment debtor in the executing proceedings can pray for declaration that the decree sought to be executed is a nullity for want of inherent jurisdiction without preferring any appeal against the original decree [See Chiranjilal Shrilal Goenka v. Jasjit Singh reported in (1993) 2 SCC 507]."

Also in the case of Alstom India Ltd. vs. the Union of India, the Hon'ble High Court of Gujarat proclaimed that;

"Refund-Tax paid-On misinterpretation of statutory provision or under unconstitutional provision or under mistake of law-In such case, inherent lack of jurisdiction of State authority to demand tax can be challenged subsequent to payment of tax-If citizen succeeds, Court can, in appropriate case, direct refund of amount collected by State authority having no jurisdiction-Subsequent proceedings cannot be dismissed on sole ground of payment of tax by citizen as there cannot be waiver of constitutional rights of mandatory character or fundamental rights-Only exception to this principle is where assessee has passed on burden of tax to third parties".

Thus, in view of the above, I hold that when a particular service is not taxable under the Service Tax law, then in such a situation what has been collected as Service Tax against such a non taxable service is not 'tax' in the

first place. It is only the 'amount' collected without authorization of law which is illegal and hence cannot be retained by the department and has to be refunded to the person who has paid such amount. This is a settled principle of law; time and again it has been reiterated by various judicial authorities. In Cawasi & Co case [1978 E L T (J 154)] the Hon'ble Supreme Court observed that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known, be it 100 years after the date of payment. This judgment has been quoted and depended upon by the Hon'ble Andhra Pradesh High Court in the case of M/s. U Foam Pvt. Ltd vs. Collector of Central Excise -1988 (36) E L T 551(A P). In the case of Hexacom (I) Ltd vs CCE, Jaipur - 2003 (156) E L T 357 (Tri -Del), the tribunal held that if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The time limit under Section 11B of Central Excise Act, 1944 does not apply. The tribunal observed the following, "*We have perused the records and heard both sides. It is not in dispute that no Service Tax was leviable during the period in question. Therefore, whatever payment was made did not relate to Service Tax at all. It was merely an erroneous collection by DOT and payment by the appellants. Therefore, provisions relating to refund of Service Tax, including those relating to unjust enrichment, cannot have any application to the return of the amount in question. It is further noted that provisions contained in Section 11D of the Central Excise Act have not been made applicable to Service Tax. Therefore, if any amounts are collected erroneously as representing Service Tax, which is not in force, there is no bar to the return of such amounts. The rejection of refund application was, therefore, not correct*". In the case of CCE, Raipur vs. Indian Ispat Works Ltd -2006 (3) S T R 161 (Tri -Del), the Tribunal held that, "*The department has allowed the claim of the respondents for the period 16-11-97 to 1-6-98, but rejected the refund claim for the previous period and subsequent period as time barred. The rejection of the claim of refund is wrong as it can be seen from the records, that the amount paid by the respondents is not a tax, but an amount collected by the department without any authority of law*". In the case of CCE, Bangalore vs Motorola India – 2006 (206) E L T 90 (Kar), the High Court has held that in the case of claim of refund, limitation under Section 11B of Central Excise Act is not applicable since the amount paid by mistake in excess of duty and such amount cannot be termed as duty. Citing the above case of Motorola India, the adjudicating authority, in paragraph 6 of the impugned order claimed that the said case has been dissented in 2009 (238) ELT 515 (Tri Ahm). However, on the contrary, I find that the said order has been distinguished on altogether on a different ground and those grounds are not relevant to the present case. Hence, it cannot be said that the decision of Hon'ble High Court has been overruled by the Tribunal. In the same paragraph 6 of the impugned order,

the adjudicating authority also countered the claim of the appellants in the case of ITD Cementation India Ltd. vs. the Commissioner of Service Tax, stating that the department has contested the levy of Service Tax up to Supreme Court. However, he failed to quote the outcome of the said issue where the Hon'ble Supreme Court **dismissed** the Civil Appeal D. No. 7856 of 2015 filed by the Commissioner of Service Tax, Mumbai against the CESTAT Final Order Nos. A/1237-1241/2014-WZB/C-I(CSTB). Thus, the conclusion is clear that if a tax has been collected which is not leviable at all, the time limit given in the tax laws does not apply. The general time limit under the Limitation Act 1963, applies under which the limit is three years from the time of coming to know of it.

7. Regarding the second issue i.e., whether the provision of unjust enrichment is applicable to the case, I proclaim that since Section 11B of the Central Excise Act is not applicable to it, provisions relating to unjust enrichment will have no application to it. Moreover, it has been thoroughly discussed in paragraph 5 of this order that M/s. SRFDC Ltd. have not reimbursed the Service Tax paid by the appellants and hence, it is confirmed that the appellants could not transfer the burden of tax to M/s. SRFDC Ltd. When the burden of tax was not transferred to the second party, provision of unjust enrichment will not be applicable to the issue.

8. Thus, in view of the discussion held above, I proclaim that the appellants are eligible for the refund claim and the provisions of limitation under Section 11B of the Central Excise Act, 1944 and unjust enrichment will not be applicable to them. Accordingly, in view of my foregoing conclusions, I reject the impugned order and allow the appeal in above terms.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeal filed by the appellants stands disposed off in above terms.

(उमा शंकर)

आयुक्त (अपील्स - **II**)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED

(S. DUTTA)

SUPERINTENDENT (APPEAL-II),

CENTRAL EXCISE, AHMEDABAD.

To,

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Ahmedabad- 380 015.

Copy to:

1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Commissioner, Service Tax, Ahmedabad.
3) The Dy./Asst. Commissioner, Service Tax, Division-III, Ahmedabad.
4) The Asst. Commissioner (System), Service Tax, Hq., Ahmedabad.
5) Guard File.
6) P. A. File.