



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
Near Polytechnic,

Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)205/Ahd-I/2017-18) 3588-3592
Stay Appl.No. /2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-001-2018-19
दिनांक Date : 27-04-2018 जारी करने की तारीख Date of Issue 12-06-18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 31/CX-I/Ahmd/JC/MK/2017 दिनांक: 17.10.2017 issued by
Joint Commissionr, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Thummar Engineers
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 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 अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुके 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 :

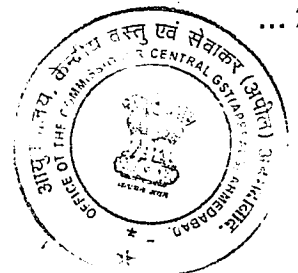
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(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 मामलों 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 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.

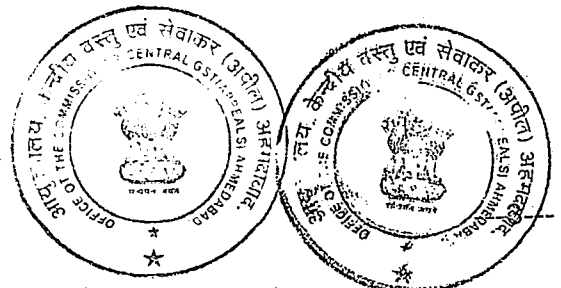
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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) 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 (सिरस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हॉस्पिटल कम्पाउण्ड, मेघानी 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.



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।

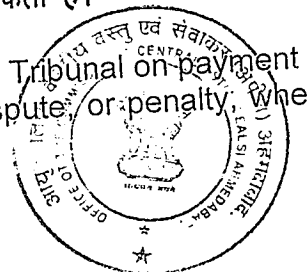
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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

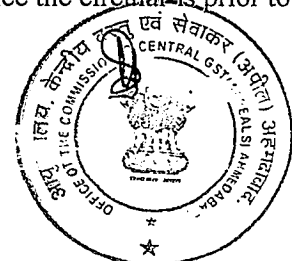
This appeal has been filed by M/s. Thummar Engineers, 3, Padmavati Flats, Bhulabhai Park Society, Gitamandir Road, Ahmedabad 380 022 [for short – ‘appellant’] against OIO No. 31/Cx-I/Ahmd/JC/MK/2017 dated 17.10.2017, passed by the Joint Commissioner, CGST, Ahmedabad South Commissionerate [for short – ‘adjudicating authority’].

2. Audit of the records revealed that the appellant, engaged in providing labour services under the category of *Erection, Commissioning and Installation service* to various contractors viz L&T, L&T Geo Structure, Ashoka Buildcon, etc. as a sub contractor, had not paid the service tax on the Erection Commissioning and Installation service provided to the main contractor. Therefore, a show cause notice dated 1.12.2016 was issued to the appellant *inter-alia* demanding service tax of Rs. 1,21,02,492/- along with interest and further proposing penalty on the appellant under sections 76, 77(2) and 78 of the Finance Act, 1994.

3. This notice was adjudicated vide the impugned OIO dated 17.10.2017, wherein the adjudicating authority confirmed the demand along with interest and further proposed penalty on the appellant under sections 76, 77 and 78 of the Finance Act, 1994.

4. Feeling aggrieved, the appellant has filed this appeal on the following grounds that:

- the adjudicating authority has not appreciated the facts & circumstances of the case;
- that the work awarded to the appellant by the contractors involved fabrication/civil construction of structures such as walkways, lifts, canopy, railings, roofing, etc. in the course of construction of airports, metros, bridges and roads,
- that prior to 1.7.2012, commercial or industrial construction service in terms of section 65(25b), specifically excluded the service of construction provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams; that notification No. 17/2005-ST granted exemption to site formation & clearance, excavation and earthmoving & demolition, provided to a person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports from service tax; that notification No. 42/2010-ST granted exemption to commercial or industrial construction service when provided wholly within an airport; that construction of civil structure or part thereof provided by the appellant to the aforesaid contractors in respect of roads, airports, bridges and metros prior to 1.7.2012 was not liable to service tax
- that wef 1.7.2012, notification No. 25/2012-ST granted exemption to services by way of construction pertaining to airport, railways or metro under serial no. 14a and to other services as listed under Sr. No. 13a of the said notification;
- that the appellant was also informed by their main contractor that since the work awarded to them was of fabrication/construction for airport, metro bridge and road it was not liable to service tax;
- that they had not paid service tax and had not recovered service tax from the main contractors;
- that the applicable category of service rendered by the appellant would fall under construction of civil structure or part thereof and since such service was in respect of roads, airports, bridges and metros, the same was specifically excluded from section 65(25b) & therefore not liable to service tax;
- the notice does not specify as to under which clause the service rendered by the appellant to the contractor, would fall;
- the appellant relies upon the case of Mackintosh Burn Ltd [2016(42) STR 161]; that the work undertaken by the appellant was not of erection commissioning or installation of plant machinery or equipment but was in respect of construction of roads, bridges and airports and metros; that they would like to rely on the case of Pioneer Fabrications P Ltd [2016(42) STR 563];
- that there is nothing in Sr. No. 14(a) and 13(a) which restricts the scope of the exemption to only works contract;
- that the reliance placed on Boards circular dated 6.5.2011 is irrelevant since the circular is prior to the notification No. 25/2012 dated 20.6.2012;



- that so long as the service provided by the appellant is one of either construction or erection or commissioning etc. pertaining to an airport or metro or road or bridge, it is entitled to the exemption;
- that the notice is barred by limitation;
- that since the demand of service tax is liable to fail both on merits and on limitation, the question of imposition of penalties proposed in the notice does not arise.

5. Personal hearing in the matter was held on 26.4.2018, wherein Shri N.K.Oza, Advocate, reiterated the grounds of appeal. He submitted that they had supplied material with labour. No agreement was however submitted.

6. The adjudicating authority in his impugned OIO dated 17.10.2017, has held as follows:

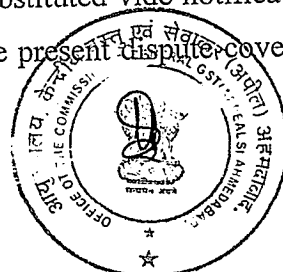
- that the appellant had provided copy of only one contract letter issued by L&T Construction, Bangalore; that on going through the content of the letter it is observed that they were assigned the work of "*fabrication & erection of FLB, lift, walkway and mezzanine structure at Bangalore International Airport*";
- that the available records depict that the appellant had provided labour service relating to fabrication and erection in his capacity as a sub-contractor;
- that the appellant had provided input service to the main contractor, for completion of an output service which was exempted;
- that the appellant failed to prove with documentary evidence that the work awarded to them was original work, which are exempted;
- that the appellant is liable to pay service tax on the work/assignment carried out by them on sub contract basis with regard to input service;
- that the appellant had not disclosed the fact to the department in the returns regarding value of service, etc..

7. In this background, I find that the question to be decided is whether the appellant is liable for service tax as demanded/confirmed by the adjudicating authority or otherwise.

8. Since the impugned OIO has spelt out the definition of *Commercial or Industrial Construction, Erection, Commissioning or installation service* and *Works Contract*, I do not wish to repeat the same. However I would like to reproduce Sr. Nos. 13(a), 14(a), 29(h) of exemption notification No. 25/2012-ST dated 20.6.2016, which exempts the said services from the whole of the service tax leviable thereon under section 66B of the said Act. The said serial numbers read as follows:

13. *Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-*
 (a) *a road, bridge, tunnel, or terminal for road transportation for use by general public;*
14. *Services by way of construction, erection, commissioning, or installation of original works pertaining to,-*
 (a) *an airport, port or railways, including monorail or metro;*
29. *Services by the following persons in respective capacities -*
 (h) *sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;*

The adjudicating authority has reproduced Sr. 14(a) as substituted vide notification No. 9/2012-ST dated 1.3.2016, which I think is not relevant since the present dispute covers a period from 2011-12 to 2014-15.

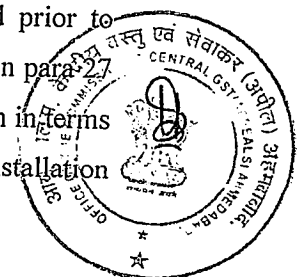


9. Now as far as the service tax in respect of the period prior to 1.7.2012 is concerned, I find that CBEC [as it was then known] vide its circular no. 96/7/2007-ST dated 23.8.2007, has clarified that sub-contractors being a service provider, service tax is leviable on their services. Board further vide its circular no. 138/07/2011-ST dated 6.5.2011, stated that "*In this case the service provider is providing WCS and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service. The services received by the WCS provider from its sub-contractors are distinctly classifiable under the respective sub-clauses of section 65(105) of the Finance Act by their description. When a descriptive sub-clause is available for classification, the service cannot be classified under another sub-clause which is generic in nature. As such, the services that are being provided by the sub-contractors of WCS providers are classifiable under the respective heads and not under WCS.*" Thereafter, vide circular no. 147/16/2011-ST dated 21.10.2011, Board further clarified as follows:

2. *The matter has been examined. Vide the circular referred above, it was clarified that when the service provider is providing WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc. and he in turn is receiving various services like Architect service, Consulting Engineer service, Construction of complex, Design service, Erection Commissioning or installation, Management, maintenance or repair etc., which are used by him in providing output service, then while exemption is available to the main contractor [as per Section 65 (zzzza) of the Finance Act], as regards the services provided by its subcontractors, the same are distinctly classifiable under the respective sub-clauses of section 65(105) of the Finance Act, as per their description and that their taxability shall be decided accordingly. It is thus apparent that just because the main contractor is providing the WCS service in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as WCS. Rather, the classification would have to be independently done as per the rules and the taxability would get decided accordingly.*

[emphasis supplied]

9.1 Certain facts which stand un-disputed are that the appellant was providing services to the main contractors, who were engaged in the construction of airports, metros, bridges and roads. Now the definition of Commercial or Industrial Construction services, [Section 65(25b)] clearly excludes services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Hence, the main contractors to whom the appellant was providing the services were exempted by virtue of their providing services in construction of airports, metros, bridges and roads. On clarification being sought from the Board as to whether the exemption available to works contract service providers in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, etc. is also available to sub contractors who provide work contract service to these main contractor, in relation to this project, the Board stated that just because the main contractor is providing the WCS service in respect of the projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, etc. it would not automatically lead to the classification of the service as Works contract service. The Board further held that classification would have to be independently done as per the rules and the taxability would be decided accordingly. It is the appellants claim that the work they have done would fall under the category of construction of civil structure or parts thereof and as such service was in respect of roads, airports, bridges, and metros, the same is excluded in terms of the definition under Section 65(25b). The entire taxability as far as the demand prior to 1.7.2012, is concerned, rests on this aspect. However, I find that the adjudicating authority has in para 37 held the services provided by the appellant was labour service relating to fabrication and erection in terms of the work assigned & that these were labour service relating to erection, commissioning or installation



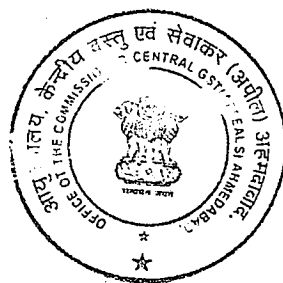
service. I feel that it would not be appropriate to impose the tax on the appellant without first classifying as to under which service the appellant would fall. A proper discussion in this regard is imperative, which needs to even take into consideration the claim made by the appellant. Hence, I find that it would be appropriate to remand back the matter to first decide the classification of the service provided by the appellant and thereafter decided the taxability issue.

10. Now, as far as the period from 1.7.2012 is concerned, I have already reproduced the relevant extracts of the exemption notification No. 25/2012-ST. I find that the adjudicating authority in para 32 of his impugned OIO has held that the appellant failed to prove that the service provided by them to the main contractors were under category of works contract service for original work. Now in terms of serial no. 13 of the said notification, services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road, bridge, tunnel, or terminal for road transportation for use by general public - are exempt from service tax. Further as per serial no. 14, services by way of construction, erection, commissioning, or installation of original works pertaining to an airport, port or railways, including monorail or metro - are exempt. In terms of serial no. 29 of the notification, services by sub-contractor, providing services by way of works contract to another contractor providing works contract services are exempt. The appellant during personal hearing has claimed before me that they had supplied material with labour. The appellant, I find has not submitted the contracts except one, to the adjudicating authority. The appellant's claim needs to be examined in depth. However, this cannot be possible, if the appellant fails to supply the requisite documents to the adjudicating authority.

11. It would be in the interest of justice if the matter is remanded back to the adjudicating authority to examine the claims of the appellant in detail. The appellant is directed to provide all the documents within two months from the receipt of this order, without fail. The adjudicating authority is further directed to first classify the service for the period prior to 1.7.2012, before deciding the taxability and in respect of the period from 1.7.2012, examine the claim of the appellant that he is eligible for the benefit of the notification no. 25/2012-ST. While deciding the matter, the adjudicating authority is also directed to give a detailed finding in respect of the claims made by the appellant. Needless to state that the adjudicating authority will follow the principles of natural justice while deciding the matter.

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

Date : .4.2018



उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Attested



(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

M/s. Thummar Engineers,
3, Padmavati Flats, Bhulabhai Park Society,
Gitamandir Road,
Ahmedabad 380 022

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Tax Division-V, Ahmedabad South.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South.
5. Guard File.
6. P.A.

