रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद– 380015.

क फाइल संख्या : File No : V2(GTA)10/STC-III/2016/Appeal-I
V2(GTA)11/STC-III/2016/Appeal-I 4509 to 4514

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-201 to 202-16-17
दिनाँक Date 13.01.2017 जारी करने की तारीख Date of Issue 20/1/17.

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by Shri Uma Shankar Commissioner (Appeals-I) Central Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No AS PER ORDER dated AS PER ORDER Issued by: Additional Commissioner, Central Excise, Din: Mehsana, A'bad-III.

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

M/s. AS PER ORDER.

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, Meghani Nagar, New Mental Hospital Compound, 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 विरूद्ध 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 वहां 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 वहां 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 accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is 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–धारा (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/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For 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 or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 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 adjuration 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 वर्णित 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।

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,

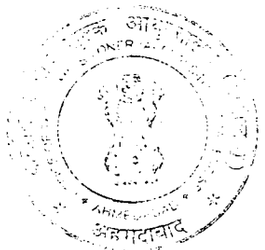
Under Central Excise and Service Tax, "Duty demanded" shall include:

(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)(i) ..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)(i) 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

Two appeals have been filed as detailed below:

Sr. No.	Name of the appellant	OIO No. and date	Appeal No.
1	Vimal Coating Limited	AHM-STX-003-ADC-MSC-35-15-16 dated 23.1.2016	10/STC-III/2016-17
2	Vim Coats Private Limited	AHM-STX-003-ADC-MSC-36-15-16 dated 23.1.2016	11/STC-III/2016-17

Both the impugned orders have been passed by the Additional Commissioner, Central Excise, Ahmedabad-III Commissionerate. As the issue involved in both the appeals are similar, they are taken up in this OIA.

2. Briefly stated, based on an intelligence that the aforementioned two appellants were not discharging service tax liability that arose on account of their having received crushing charges in respect of job work done and subsequently cleared by the principal manufacturer on nil rate of duty, two show cause notices were issued, demanding service tax under Business Auxiliary Service along with interest. Penalty was also proposed on the appellants under sections 77 and 78 of the Finance Act, 1994.

3. These notices were adjudicated vide the impugned OIOs, wherein the adjudicating authority confirmed the demand on service tax along with interest and also imposed penalties under sections 77 and 78 of the Finance Act, 1994.

4. The appellants, in their appeals have raised the following averments:

- that the activity in question, amounts to manufacture and no service tax was therefore payable;
- the adjudicating authority did not consider the judgements in the case of S N Sunderson [2012(143) ELT 483 (SC)] and Kher Stone Crusher [1992(61) ELT 596]; that in both the cases the courts have concluded that crushing amounts to manufacture;
- that since the activity carried out amounts to manufacture it is beyond the ambit of BAS;
- that even if the activity does not amount to manufacture, it cannot be held that there was any fraud, collusion, malafide intention to evade payment of taxes;
- that even if tax was paid by the job worker it would have been availed as credit by the principal manufacturer and utilized it towards payment of duty;
- that they would like to rely on the following cases:
  Chansama Taluka Sarvodaya Mazdoor Kamdar Sahakari Mandali[2012(25) STR 44]
  Lanxess ABS Limited [2011(22) STR 587]
  Continental Foundation Joint Venture [2007(216) ELT 177]
  Medicaps Limited [2011(24)STR 572]
  Prakash Plast [2012(25) STR 46]
  Pestrop Chemicals India Private Limited [2013(294) ELT 114]

Gujarat Glass Private Limited [2013(290) ELT 538]
IOCL [2010(262) ELT 751].

5. Personal hearing in respect of both the appeals was held on 4.1.2017. Shri D.K.Trivedi, Advocate, appeared on behalf of the appellants and reiterated the arguments advanced in the grounds of appeals.

6. I have gone through the facts of the case, the grounds mentioned in both the appeals and the oral averments, raised during the course of personal hearing.

7. I find that primarily there are two issues that need determination:

[a] whether the activity performed by the appellants, who are job workers for the principal manufacturers, amount to manufacture of otherwise; and
[b] whether the appellants are liable to service tax under Business Auxiliary Services [BAS].

Whether the activity of crushing of lumps, performed by the appellants, amounts to manufacture?

8. For any product to attract central excise duty, it must satisfy two basic conditions: [a] the article should be goods; and [b] it should have come into existence as a result of manufacture. Manufacture as defined under Section 2(f) of the Central Excise Act, 1944, states as follows:

[(f) "manufacture" includes any process, -
(i) incidental or ancillary to the completion of a manufactured product;
(ii) which is specified in relation to any goods in the Section or Chapter notes of [the First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]
[(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]
and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]

9. There is no dispute to the fact that the articles involved are goods.

10. The definition or test commonly used for ascertaining whether manufacture has taken place or not for the purpose of attracting Central Excise levy has been evolved by the Hon'ble Supreme Court in the DCM [1977(1) ELT (J199), Parle Products [1994(74) ELT 492] and Ujagar Prints [1988(38) ELT 535(SC)]. The Hon'ble Supreme Court in these cases held that for the process to amount to manufacture, a new commercial product, different from the one with which the process started should emerge. It should be an article with different name, character and use. Thus, a process which simply changes the form or size of the same article or substance would not ordinarily amount to manufacture and no excise duty would be payable

unless in a particular case by section note or chapter note of the Tariff or by wording of the relevant heading or sub-heading, the said process has been specified as amounting to manufacture.

11. The appellants as is already mentioned are engaged in the job work of crushing of all types of lumps such as limestone, dolomite and marble etc., on behalf of the principal manufacturer. This crushed material is thereafter sent back to the principal manufacturer, who [a] clears some of the crushed products after coating them; and [b] clears the rest of the crushed material after further grinding. These uncoated micronized minerals are cleared by the principal manufacturers after classifying the goods under chapter sub heading 25059000 of Central Excise Tariff Act, 1985 under nil rate of duty. The Managing Director of the principal manufacturer in his statement has stated that since the raw materials were never cleared as such, the classification of the said raw materials is not known. Nothing is produced on record to show that the chip or powder obtained from the crushing activity carried out by the job worker [ie the appellants] has not led to the emergence of a new a new commercial product, different from the one with which the process started. I find that no new article with different name, character and use has emerged out of the job work activity, so as to satisfy the test of manufacture. Except for the change in shape, there is absolutely no transformation in the composition, or chemical characteristics of the product. Therefore, I find that since the process of job work of crushing the lumps has not resulted into a new commercial product, different from the one with which the process started, and nor does it have a different name, character and use, the activity cannot be termed as amounting to manufacture.

12. Even otherwise in chapter note 2 of chapter 25 of CETA, 1985, it has not been expressly provided that the process of crushing of lumps shall amount to manufacture.

13. The appellant has relied on two case laws of S N Sunderson [2012(143) ELT 483 (SC)], and Kher Stone Crusher [1992(61) ELT 596] to contend that the process carried out by the appellant is not amounting to manufacture. I have gone through both the case laws. I find that in the first case of S N Sundersons, *ibid,* the Hon'ble Supreme Court of India, upheld the order of the High Court but did not go into the specifics as to how the process of crushing of limestone into limestone chips amounts to manufacture. The Hon'ble Supreme Court in the said order has stated as follows :

The appellants did not carry the matter before the excise authorities to the Tribunal, which would have been the appropriate place to decide whether the process employed by the appellants amounted to manufacture, but approached the High Court directly and the High Court came to the conclusion that the emergence of a new marketable product, namely, limestone chips of specific size amounted to manufacture.

2.It is contended before us that the High Court did not consider the judgments that related to the crushing of limestone lumps to obtain limestone chips. Judgments lay down law. The law is to be applied to facts. What the facts are has not been allowed to be placed in the proper perspective. It was for the appellants to have approached the High Court, set out their process of crushing before it and obtained its decision as to whether it amounted to manufacture or not. As it is, there is no reason to interfere with the order of the High Court on the aspect of manufacture.

[relevant extracts]

While in the case of M/s. Kher Stone Crusher, I find that the Hon'ble Madhya Pradesh High Court was adjudicating an issue of taxability under Madhya Pradesh General Sales Tax Act, 1958 and not under the Central Excise Act, 1944.

14. I find that the issue as to whether crushing amounts to manufacture, has already been decided by various authorities. The Hon'ble Supreme Court in the case of Coimbatore Pioneer Fertilizers Limited [1997(94)ELT6(SC)] has already held that pulverisation of rock phosphate, does not amount to manufacture. Further, the Hon'ble Tribunal in the case of M/s. SAIL [1991(54) ELT 414] went into the question of whether crushing of limestone amounts to manufacture. After examining the process viz-a-viz Section 2(f) of the Central Excises and Salt Act, 1944 and Chapter Note 2 of Chapter 25 of the Central Excise Tariff Act, 1985, the Hon'ble Tribunal concluded as follows:

31. In any eventuality since the appellants have succeeded on merits in showing that no process of manufacture was involved in crushing limestone into lime fine and lime fine was not an excisable product, therefore they were not required to pay any duty and had committed no offence. Hence, the question of time bar loses its significance.

On the department assailing this order before the Hon'ble Supreme Court , the Apex Court upheld the aforementioned findings of the Tribunal vide their order, reported at [1997 (96) ELT A160 (S.C)].

14.1 Hence, in view of the foregoing, I hold that the activity varied out by the appellant does not amount to manufacture.

Whether the appellants are liable to service tax under Business Auxiliary Services [BAS].

15. Relevant extracts of Section 65(19) of the Finance Act, 1994 which defines Business Auxiliary Service, is reproduced below for ease of reference:

[(19) "business auxiliary service" means any service in relation to, —
(i) to (iv).....;
[(v) production or processing of goods for, or on behalf of, the client;]
(vi) to (vi) .....;

and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods].

[*Explanation.* — For the removal of doubts, it is hereby declared that for the purposes of this clause, —
(a).....;
[(b).....;
(c)"manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)]

16. Notification No. 8/2005-ST dated 1.3.2005, which grants exemption to a job workers from Service tax in respect of goods produced on behalf of client, is as follows:

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 Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of production of goods on behalf of the client referred in sub-clause (v) of clause (19) of section 65 of the said Finance Act, from the whole of service tax leviable thereon under section 66 of the said Finance Act :

Provided that the said exemption shall apply only in cases where such goods are produced using raw materials or semi-finished goods supplied by the client and goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of excise is payable.

Explanation. - For the purposes of this notification, -
(i)the expression "production of goods" means working upon raw materials or semi-finished goods so as to complete part or whole of production, subject to the condition that such production does not amount to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(ii) "appropriate duty of excise" shall not include 'Nil' rate of duty or duty of excise wholly exempt.

17. For the period from 1.7.2012, when negative list was introduced vide Section 66D of the Finance Act, 1994, the relevant extracts are as follows:

SECTION [66D. Negative list of services. —

The negative list shall comprise of the following services, namely :—

[(f) services by way of carrying out any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption;]

18. The process amounting to manufacture or production of goods is defined under Section 65B(40) of the Finance Act, 1994 as under :

"Process amount to manufacture or production of goods means a process on which duties of excise are leviable under section 3 of Central Excise Act ,1944 or the medicinal and toilet preparations (Excise duties) Act, 1955 or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act for the time being in force."

19. I have already held that the activity carried out by the appellant as a job worker for the principal manufacturer does not amount to manufacture. The exemption notification, *ibid*, grants exemption to a job worker from payment of service tax only in cases where such goods are produced using raw materials or semi-finished goods supplied by the client and goods so produced are returned back to the principal manufacturer for use in or in relation to the manufacture of any goods falling under the first schedule of CETA '85 on which appropriate duty of excise is payable, wherein appropriate rate of duty does not include Nil rate of duty. Since in this case, the principal manufacturer, removes uncoated crushed lumps received back from the job worker without payment of duty, the appellant being a job worker is liable to pay Service Tax under Business Auxiliary Service. This holds good upto 1.7.2012. For the period consequent to 1.7.2012, when the negative list regime was ushered in, since the activity does not fall within the exclusion as provided under Section 66D(f) read with Section 65B(40) of the Finance Act, 1994, the appellants are liable to pay service tax under Business Auxiliary Service. Hence, I uphold the confirmation of demand of service tax under Business Auxiliary service from the appellants, for the entire period.

Invocation of extended period

20. The issue as to whether crushing of lumps would amount to manufacture was settled by the Hon'ble Tribunal long ago. It is on record that the Apex Court had also upheld this order. The argument of the appellant that since there were diverse judgements, no extended period could be invoked is not tenable. Relying on a judgement given by the Apex Court in respect of some other Act, to come to a conclusion that the crushing amounts to manufacture under the Central Excise Act, 1944, is not a valid argument. The case laws relied upon by the appellant to contend that since there were diverse legal interpretations, extended period cannot be invoked stands distinguished. Even otherwise, the appellant at no point of time disclosed to the department that they were providing such taxable services. The facts were disclosed only after investigation. Hence, I find that the case has elements such as suppression, contravention of the provisions of the Act and the rules made there under with the intent to evade payment of duty and therefore, the invocation of the extended period by the adjudicating authority needs no interference at this level.

21. In view of the foregoing, both the OIOs dated 23.1.2016 are upheld and the appeals filed by the appellants stand rejected.

22. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

22. The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स - I)

Date: 13/01/2017.

Attested

(Vinod Lukose)
Superintendent (Appeal-I)
Central Excise, Ahmedabad.

By RPAD.

To,

Vimal Coating Limited, Plot No. 20, Phase-II, GIDC, Dediyasan, Mehsana.	Vim Coats Private Limited, Plot No. 25, Phase-II, GIDC, Dediyasan, Mehsana.

Copy to:-

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III
3. The Additional Commissioner (System), Central Excise, Ahmedabad-III
4. The Deputy/Assistant Commissioner, Service Tax, Gandhinagar Division, Ahmedabad-III.
5. Guard file.
6. P.A

केन्द्रीय उत्पाद शुल्क आयुक्तालय, (अपील-I) OFFICE OF THE COMMISSIONER (APPEALS-I) CENTRAL EXCISE AHMEDABAD अहमदाबाद