
 <p>केंद्रीय कर आयुक्त (अपील)</p>		
<p>O/O THE COMMISSIONER (APPEALS) CENTRAL TAX</p>		
<p>वस्तु एवं सेवा कर अवन</p>	<p>CGST Building - 7th Floor Near Polytechnic Ambavadi, Ahmedabad - 380015</p>	
<p>सत्यमेव जयते</p>		
<p>सतवी मंजिल पॉलिटेक्निक पास आम्बावाडी, अहमदाबाद-380015</p>		
<p>079-26305065</p>		<p>टेलिफैक्स : 079-26305136</p>

क फाइल संख्या : File No : V2/139/GNR/2018-19

2014 to 2018

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-166-18-19

दिनांक Date : 31-12-2018 जारी करने की तारीख Date of Issue:

10/1/2019.

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

C. J. Jle

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : 29/Ref/CEX/NK/2018-19
दिनांक : 08-08-2018 से सृजित

Arising out of Order-in-Original: 29/Ref/CEX/NK/2018-19, Date: 08-08-2018 Issued by:
Assistant Commissioner, CGST, Div: Gandhinagar, Gandhinagar Commissionerate,
Ahmedabad.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Akash Ceramics Ltd

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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

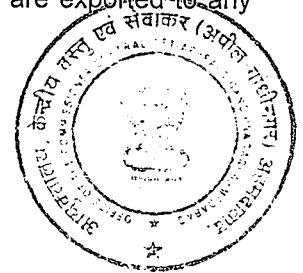
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by 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 प्रक्रिया 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.

(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.

ध 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- षोवी/35-इ के अंतर्गत:-

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

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

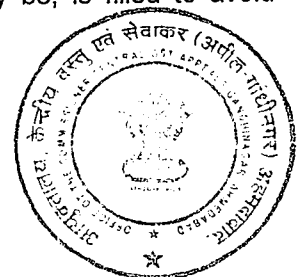
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-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 वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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 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 bear 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 उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 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 43 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।

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:

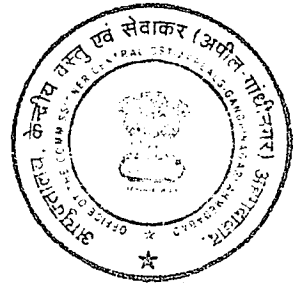
- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ 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.

(6)(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।

(6)(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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.



ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Akash Ceramics Pvt. Ltd., Village-Rajpura, Taluka-Mansa, Distt. Gandhinagar-382845 (in short 'appellant') against Order-in-Original No.29/Ref/CEX/NK/2018-19 dtd. 08.08.2018 (in short 'impugned order') passed by the Asstt. Commissioner, Central GST, Division Gandhinagar. (in short 'adjudicating authority').

2. Briefly stated that adjudicating authority vide impugned order sanctioned the refund claim of Rs.3,49,996/-, being Cenvat credit availed on 'Capital goods' and paid under protest following the CESTAT order, filed by the appellant but transferred to the Consumer Welfare Fund under Section 12B of the Central Excise Act, 1944.

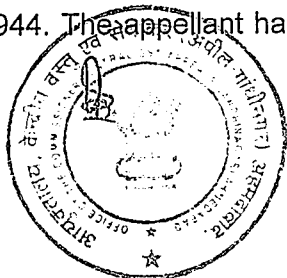
3. Aggrieved with the impugned order, the appellant filed the present appeal wherein, inter alia, stated that:

- They had submitted Chartered Accountant's certificate certifying that duty incidence has not been passed on to others and shown under 'Loan and Advances(Assets)' in the current books of accounts; that no depreciation has been claimed on Cenvat credit. This certificate has been rejected by the adjudicating authority on the ground that no evidences were produced in support of the certificate.
- The refund of credit of excisable goods used as input, which is covered under clause (c) of the proviso to Section 11B, is exception to the general rule of crediting the refund to Consumer Welfare Fund.
- Their finished product is subject to MRP and the MRP valuation has remained the same pre and post payment of interest.
- Interest is an abnormal item of expenditure and is neither recurring nor a significant and major components. Therefore, such interest was not and could not be recovered and same is borne by them. Incidentally, the presumption created u/s 12B does not apply to interest.

4. Personal hearing in the matter was held on 12.12.2018. Shri S.J. Vyas, Advocate, appeared on behalf of the appellant and reiterated the grounds of appeal and submitted that part of refund is of interest.

5. I have carefully gone through the appeal memorandum, submissions made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the appellant is entitled to refund in cash instead of crediting to Consumer Welfare Fund or otherwise. Accordingly, I proceed to decide the case on merits.

6. Prima facie, I find that the refund has arose due to CESTAT Order No.A/10372/2018 dtd.21.02.2018 passed in favour of the appellant. It is also fact the appellant had paid the said amount UNDER PROTEST in 2014. I also find that there is no dispute regarding eligibility of refund. I find that all the refund claims are subject to passing the test of unjust enrichment in terms of provisions contained in Section 11B of the Central Excise Act, 1944. The appellant has produced the Chartered Accountant's



certificate dtd.30.07.2018 stating that the appellant had made payment of duty under protest and shown under Loans and Advances(Asset) as per the current books of account and ledger account for current FY. In this regard, I find that in case of YU Televentures Pvt. Ltd. Vs. UOI [2017(358) ELT-81(Del.)] the Hon'ble High Court of Delhi has held as under:

"Refund - Unjust enrichment - Chartered Accountant's certificate that incidence of Countervailing Duty (CVD) on import was not passed on to customers - It is sufficient to rebut presumption of unjust enrichment - It was more so as same certificate had been accepted in earlier proceedings - Section 27 of Customs Act, 1962." [paras 26, 27]

Following the judicial discipline, I find that the CA certificate is sufficient to rebut presumption of unjust enrichment. The Chartered Accountant's certificate dtd.30th July, 2018 is reproduced below for the sake of ease:



Ramesh Desai & Associates
Chartered Accountants
Ramesh Desai
B.Com., LL.B., A.C.S., FCA, DISA (ICAI)

CERTIFICATE

This is to certify that AKash Ceramics Private Limited, having its corporate office at 7, Yogi Complex, Opp:- Drive-In Cinema, Drive-In Road, Ahmedabad 380054, Gujarat, has made an excise payment in protest of Rs.3,49,996/- vide excise audit report No.119/2012-13 and EX:105/2014-15 and has shown the same under Loans and Advances (Asset) as per the current books of account examined by us and as shown in the attached statement of account.

It is further certified that the Company has not claimed depreciation on cenvacredit portion in the above mentioned matters and that the incidence of the same has not been passed to any other person.

This is issued on request by the Company.

Place: Ahmedabad

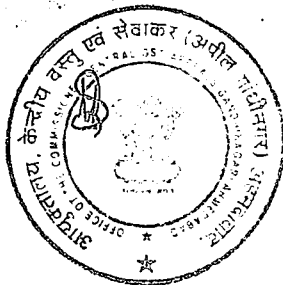
Date: 30th July 2018

For Ramesh Desai & Associates
Chartered Accountants FRN114507w



(CA Ramesh Desai)
Proprietor M#F034510

SC Jy -
12/12/18

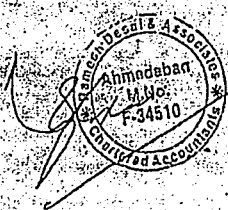


Akash Ceramics Pvt. Ltd. (16-17)
7, Yogi Complex, 3rd Floor,
Opp. Drive-In Cinema,
Drive-In Road, Ahmedabad -54
GUJARAT.

Excise Payment Under Protest-Audit Obj.
Ledger Account

1-Apr-2018 to 30-Mar-2018

Date	Particulars	Vch Type	Vch No.	Debit	Page 1 Credit
1-4-2018	Cr Opening Balance			3,49,996.00	
	Dr Closing Balance				3,49,996.00
				3,49,996.00	3,49,996.00

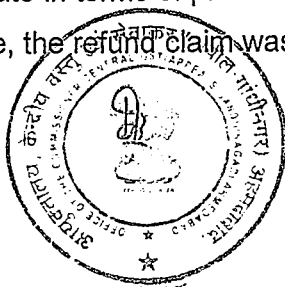


Chartered Accountant
Ahmedabad
M.No. F-34510

I find that the adjudicating authority had issued query memo dtd. 26.04.2018 and letter dtd. 27.06.2018 for furnishing documentary evidence to the effect that the appellant has not passed on the duty incidence to any other person. In reply, the appellant has produced the Chartered Accountant's certificated and ledger account as stated supra which has been noted in Para 9 of the order. However, I find that the adjudicating authority was not in a mood to accept these evidences whimsically. This cavalier attitude in rejecting submission is deplorable. Such rejection without substantive basis has unnecessarily created interest liability which could have been avoided. I find that by submitting CA certificate and ledger account, appellant have sufficiently discharged its requirement under unjust enrichment. Even otherwise, I find that the appellant has claimed refund of pre-deposit amount paid under protest for which the provision of unjust enrichment is not applicable as held by the Hon'ble Tribunal in case of Universal Speciality Chemicals Pvt. Ltd. Vs. CCE, Raigadh reported in 2015(315) ELT-106 (Tri. Mumbai) as under:

"Refund - Unjust enrichment - Refund of pre-deposit made under Section 35F of Central Excise Act, 1944 for availing right of appeal - Doctrine of unjust enrichment not attracted - Section 11B ibid. [1996 (82) E.L.T. 177 (Bom.) relied on]. [para 8]"

7. As regards the claim of interest by the appellant under Section 11BBibid, I find that the subject refund claim pertains to refund of pre-deposit paid under protest, which was paid due to audit objection, for which the provision of unjust enrichment is not applicable as stated supra. I find that any refund claim not settled within three months automatically attracts interest at appropriate rate in terms of provisions contained in said section 11BBibid. I find that in the instant case, the refund claim was filed on 09.04.2018




with the JAC which is not settled within three months from the date of application. Hence, I find that the appellant is eligible for interest at appropriate rate immediately after the expiry of three months from the date of application in terms of provisions contained in section 11BB. I also get support from the decision of the Hon'ble High Court of Gujarat in case of Kamakshi Tradeexim (India) Pvt. Ltd. vs. UOI reported in 2017(351) ELT-102 (Guj.) wherein it is held as under:

"Interest on delayed refund - Liability of Revenue to pay interest under Section 11BB of Central Excise Act, 1944 commences from date of expiry of three months from date of receipt of application for refund under Section 11B(1) ibid and not on expiry of said period from date of refund order - Merely because Court had stipulated period within which Department decide application would not operate in favour of Department and against assessee and curtail statutory period prescribed under Section 11BB ibid - Department not justified in refusing to grant interest on rebate claims made by assessee in accordance with law laid down by Supreme Court in Ranbaxy Laboratories Ltd.'s case - Order set aside. [2011 (273) E.L.T. 3 (S.C.) = 2012 (27) S.T.R. 193 (S.C.) relied on]. [paras 7, 8, 9]"

Accordingly, in view of the above discussion and findings, appeal filed by the appellant is allowed with consequential relief as per law and the impugned order is set-aside.

8. 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.

Attested:


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

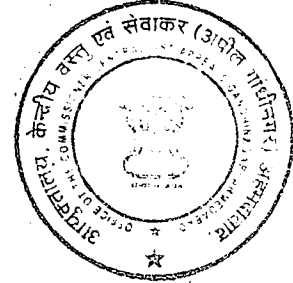
BY SPEED POST TO:

M/s. Akash Ceramics Pvt. Ltd.,
Village-Rajpara, Taluka-Mansa,
Distt. Gandhinagar-382845

Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone.
- (2) The Commissioner, CGST, Gandhinagar (RRA Section).
- (3) The Asstt. Commissioner, CGST, Division Gandhinagar.
- (4) The Asstt. Commr(System), CGST, Gandhinagar.
(for uploading OIA on website)
- (5) Guard file
- (6) P.A. file.

उमा शंकर
(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)



10-15-58

