



आयुक्त(अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाडी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलीफैक्स 07926305136



DIN : 20211064SW000000FCOC

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1330/2020 / 14020 TO 14021
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-49/2021-22**
दिनांक Date : **25-10-2021** जारी करने की तारीख Date of Issue 28.10.2021
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **04/C.Ex/OA/NRM/2020-21** दिनांक: **23.10.2020** issued by
Assistant Commissioner, CGST & Central Excise, Division Himmatnagar, Gandhinagar
Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**
M/s Anish Infracon India Pvt Ltd
Survey No. 160, Nr. Kadiwala Petrol Pump,
Opp. RTO Office, Himmatnagar, Sabarkantha,
Gujarat

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 :

- (i) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतः तनीचे 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।
- (ii) 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.



(क)	<p>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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।</p>	
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(A) 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.

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

(B) 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 जोड़यूटीक्रेडिटमार्ग की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में विदित अधिनियम (नं. 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) 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 मुख्य शीर्ष 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) रिविजनआवेदन के साथजहाँ संलग्नरकम एक लाख रुपये या उससे कम होतो रुपये 200/-फीसभुगतान की जाए औरजहाँ संलग्नरकम एक लाख सेज्यादाहोतो 1000/- की फीसभुगतान 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.

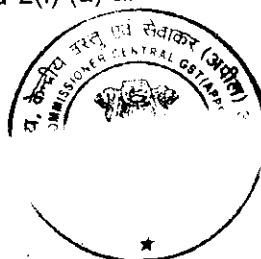
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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) उक्तलिखितपरिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामलेमेंसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबादमें2ndमाला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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 न्यायाधिकरणको एक अपील या केन्द्रीय सरकारको 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि-1 के अंतर्गतनिर्धारितकिए अनुसारउक्तआवेदन या मूलआदेश यथास्थितिनिर्णयनप्राधिकारी के आदेशमेंसेप्रत्येक की एक प्रतिपर रु.6.50 पैसेका न्यायालय शुल्कदेकटलगाहोना 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) इनओरसंबंधितमामलोंकोनियंत्रण करनेवालेनियमों की ओरभी ध्यानआकर्षितकियाजाताहैजोसीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 मेंनिहितहै।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (27) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवंसेवाकरअपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामलेमेंकर्तव्यमांग(Demand) एवंदंड(Penalty) का10%पूर्वजमाकरनाअनिवार्यहै। हालांकि, अधिकतमपूर्वजमा10 करोड़रुपएहै।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीयउत्पादशुल्कऔरसेवाकरकेअंतर्गत, शामिलहोगा "कर्तव्यकीमांग"(Duty Demanded)-

- (i) (Section) खंड 11D केतहतनिर्धारितराशि;
- (ii) लियागलतसेनवैटक्रेडिटकीराशि;
- (iii) सेनवैटक्रेडिटनियमोंकेनियम 6 केतहतदेयराशि.

⇒ यहपूर्वजमा 'लंबितअपील' मेंपहलेपूर्वजमाकीतुलनामें, अपील' दाखिलकरनेकेलिएपूर्वशर्तबनादियागयाहै.

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:

- (lxiv) amount determined under Section 11 D;
- (lxv) amount of erroneous Cenvat Credit taken;
- (lxvi) amount payable under Rule 6 of the Cenvat Credit Rules.

इसइस 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।

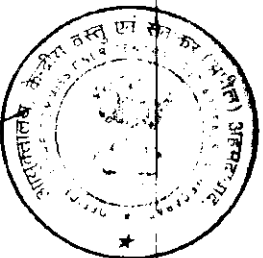
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

The present appeal has been filed by M/s. Anish Infracon India Pvt Ltd, Survey No. 160, Near Kadiwala Petrol Pump, Opposite RTO Office, Himmatnagar, District : Sabarkantha, Gujarat (hereinafter referred to as the appellant) against Order in Original No. 04/C.Ex./OA/NRM/2020-21 dated 23-10-2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, Central GST, Division : Himmatnagar, Commissionerate- Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. The facts of the case, in brief, is that the appellant was engaged in the Goods Transport Agency services and providing Works Contract Service to the Government and having Service Tax Registration No. AAJCA0635RSD001. During the course of audit of the records of the appellant, it was observed that they had booked an income of Rs.77,28,076/- in the Profit & Loss Account of F.Y. 2016-17 under the head of Cessation of Liability. Scrutiny of the said Cessation of Liability ledger indicated that the income booked and transferred to Profit & Loss Account was due to non maintenance of the work done by M/s.Vishal Construction as per contract (income of Rs.59,33,551/- booked) and due to financial problem M/s.United Infrastructure had not done work as per contract (income of Rs.17,94,525/- booked). The appellant verbally informed the Audit officers that the sub-contract of road work given to M/s.Vishal Construction and M/s.United Infrastructure was not completed in certain time and they had forfeited the remaining amount payable i.e. Rs.77,28,076/-. The appellant further informed that they had booked the income in relation to road work which is exempted from service tax as per Sr. No.13(a) of Notification No. 25/2012 dated 20.6.2012, hence the said income is not liable to Service Tax.

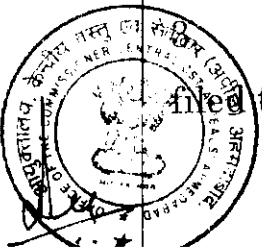


2.1 The Audit officers were of the view that the contract between the appellant and M/s.Vishal Construction and M/s.United Infrastructure was breached due to non-completion of work in certain time and the appellant became entitled to receive compensation from customers as per Section 53 of the Indian Contract Act, 1972. However, the appellant had chosen not to seek such compensation by way of filing civil suit and instead forfeited the amount payable by M/s.Vishal Construction and M/s.United Infrastructure for breach of contract. It, therefore, appeared that the act of refraining from seeking compensation from the customer by the appellant is covered under the ambit of Section 66E (e) of the Finance Act, 1994 which declares the event of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as a service. Therefore, the appellant was required to pay service tax amounting to Rs.11,59,211/- on the amount of Rs.77,28,076/- forfeited, which was to be treated as consideration towards a declared service.

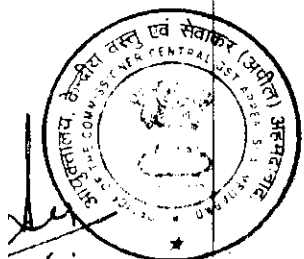
2.2 The appellant was issued a SCN No. VI/1(b)-156/IA/VIII/AP-53/19-20 dated 08.06.2020 wherein it was proposed to recover the Service Tax amounting to Rs.11,59,211/- under the proviso to Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Penalty was also sought to be imposed under Section 78 of the Finance Act, 1994.

2.3 The said SCN was adjudicated vide the impugned order wherein the demand for Service Tax amounting to Rs.11,59,211/- was confirmed under the sub-section (1) of Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Penalty of Rs.11,59,211/- was also imposed under Section 78 of the Finance Act, 1994.

Being aggrieved with the impugned order, the appellant firm has filed the instant appeal on the following grounds:



- A. The impugned order has held that cessation of liability as consideration for agreeing to the obligation to refrain from an act. This is incorrect. The amount written off by them is not in the nature of consideration for the obligation to refrain from any act.
- B. The department has failed to provide a valid basis as to how cessation of liability amounts to agreeing to 'obligation to refrain from an act'.
- C. They are not covered under the purview of Section 66E(e) of the Finance Act, 1994. The said amount is not consideration for the provision of any service and thus the balances written off by them is not leviable to service tax.
- D. Non-payment of invoice for services not provided cannot be equated or considered to be making a supply of taxable service falling within the ambit of clause (e) of Section 66E.
- E. As per Rule 6(3) of the Service Tax Rules where an assessee has issued an invoice against a service to be provided which is not provided by him wholly or partially or where the amount of invoice is renegotiated due to deficient provision of service, then such sub-contractor needs to raise a credit note for the value of the services not so provided.
- F. The notice has been issued on 08.06.2020 for the period 2016-17. There is no willful suppression of facts with the intention to evade payment of duty on their part. They have maintained transparent books of accounts and have filed ST-3 returns regularly. Therefore, extended period of limitation cannot be invoked.
- G. As the demand is not liable to be paid the question of interest does not arise at all.
- H. Penalty under Section 78 can only be imposed if there is fraud, collusion, willful mis-statement, suppression of facts or contravention of any provisions with intent to evade payment of service tax. No penalty is imposable for any



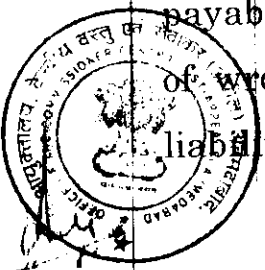
failure referred to in the said provisions if the noticee proves that there was reasonable cause for the said failure. They rely upon various decisions in this regard.

- I. They submit a signed certificate from the sub-contractor is submitted for supporting the claim that the said income is not against provision of service but is an amount which was not paid to the sub-contractor due to non-performance of the contract.

4. Personal Hearing in the case was held on 12.10.2021 through virtual mode. Ms. Bhagyashree Dave, CA, appeared on behalf of the appellant for the hearing. She reiterated the submissions made in the appeal memorandum.

5. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and evidences available on records. I find that the issue before me for decision is whether the income booked under the head of Cessation of Liability is a consideration for service as defined under Section 66E (e) of the Finance Act, 1994 or otherwise.

5.1 I find that the appellant have explained the transaction between them and their sub-contractors as : 1) They take advances from the sub-contractor which the sub-contractor is required to claim after completion of work. 2) Sub-contractor raised invoice for work done which is accounted by them as expenses in their books of accounts. 3) Due to financial difficulty the sub-contractor fails to complete the work and hence no services are provided by him. 4) As there is no completion of service but invoice was wrongly issued and booked by them, the amount payable on account of wrongly raised invoice is actually not payable to the sub-contractor. 5) Hence the balance payable on account of wrongly raised invoices is written off and shown as cessation of liability.



5.2 I find that the appellant have essentially contended that on receipt of the invoices from the sub-contractor, they had booked it as expense. However, when the sub-contractor did not complete the work as per the contract, the amount as per the invoice was not payable and therefore, they had, to square the account booked the amount payable as Cessation of Liability. Considering the contention of the appellant, I find that as no payment was received by them from their sub-contractors, the question of the appellant receiving 'consideration' for 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' does not arise and consequently, there is no question of any service or service tax liability.

5.3 However, from the submissions of the appellant, I find that they have also stated that they receive advances from their sub-contractors and that on the sub-contractors failing to complete the work as per the contract, the balance payable on account of wrongly raised invoices by the sub-contractors is written off and shown as cessation of liability. What this implies is that the appellant retain the advances paid by the sub-contractors and the balance amount is written off for failure to complete the work as per the contract. Even considering this to be the factual position, I find that a similar issue has been decided by me in the past vide OIA No. AHM-EXCUS-002-APP-17/2021-22 dated 17/09/2021 in the case of M/s.Hi Tech Industry. The relevant part of this OIA is reproduced as under :-

"9. After going through the facts of the case, views of the adjudicating authority and the contentions raised in the appeal memorandum, I find that the first point to be decided in the instant case is as to whether the amount of booked under Order Cancellation Income by the appellant would amount to a consideration as envisaged in the service tax law or not and then only the question of taxability arises in the matter. The department is contending that the said amount is nothing but a consideration for tolerating the act of not performing the contractual obligation by the buyers of the appellant. At this juncture it is relevant to refer to Section 53 of the Indian Contract Act which reads as under:



"When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract."

From the above legal provision, it is amply clear that what is provided therein is the entitlement of a compensation to the party who was prevented from performing the contract for any loss which he may sustain as a consequence of the non-performance of the contract. The nature of relief envisaged in the said provision is clearly defined as a compensation for the affected party for any loss which he may sustain on account of the act of the other party. Merely because there is a mutual agreement on the amount of compensation in the event of a breach of promise/agreement, the compensation does not take the colour of consideration, as contended by the department. What is to be understood is the distinction between the terms "consideration" and "compensation". Consideration is not defined under service tax law but as per provisions of Indian Contract Act, it means a promise made by the promisee in reciprocation. Whereas the compensation is something which is awarded to the sufferer on account of breach of the contract by the other party. The definition of the term 'service' as given in Section 65B(44) of the Act envisages "consideration" and not "compensation". I find that the amount forfeited/penalty by the buyers of the appellant is in the nature of a compensation and not consideration as contended by the department.

10. *It is a fact accepted by the department too that the amount forfeited/penalty is for tolerating the act of not performing the contractual obligation. Therefore, such a transaction is clearly in the nature as envisaged in Section 53 of the Indian Contract Act and hence the amount so received would definitely amount to a compensation. Mere receipt of money which is in the nature of a compensation cannot be treated as consideration for any activity. Further, when it is established that the transaction in the case is in the nature of compensation against a breach of contract as envisaged in Section 53 of the Indian Contract Act, the contention that there was an act of tolerating the act of not performing the contractual obligation by the service provider is not sustainable.*

11. *I am, therefore, of the considered view that the amount booked as Order Cancellation income which is in fact forfeiture of amounts/penalty paid by the buyers of the appellant in the present case is in the nature of a compensation as envisaged in Section 53 of the Indian Contract Act, 1872 for non performance of the contractual obligations. Such a transaction, being compensation against*



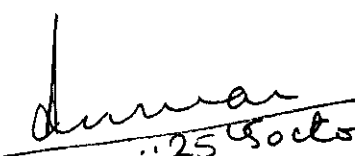
breach of contractual obligations, does not per se amount to a consideration and does not per se constitute any service or declared service as envisaged under Section 65B (44) and Section 66E(e) of the Act. When there is no consideration, there is no element of service as defined under the Act and consequently there cannot be any question of service tax in the matter".

6. I find that there is no change in the legal provisions nor has there been any judicial ruling contrary to the aforesaid orders. That being so, I do not find any reason to take a different view in the matter. Hence, following my above decision on similar facts, it is held in the present case also that the income booked by the appellant under the head 'Cessation of Liability' is not a consideration and neither has any service in terms of Section 66E (e) of the Finance Act, 1994 been provided by the appellant. Consequently no service tax is payable by the appellant on the income booked under Cessation of Liability. In view thereof, the impugned order is deserved to be set aside for being not sustainable in law both on merits and facts.

7. In view of the foregoing the facts, I set aside the impugned order for being not legal and proper and allow the appeal of the appellant.


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

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


(Akhilesh Kumar)
Commissioner (Appeals)

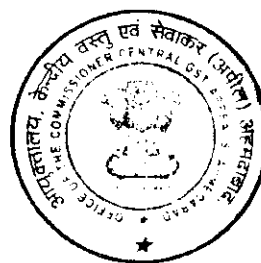
Date: .10.2021.

Attested:


(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To
M/s. Anish Infracon India Pvt Ltd,



Appellant

Survey No. 160, Nr. Kadiwala Petrol Pump,
Opp. RTO Office, Himmatnagar,
District : Sabarkantha, Gujarat
Near Gurudwara, Jail Road,
Mehsana, Gujarat

The Assistant Commissioner
CGST & Central Excise,
Division Himmatnagar
Commissionerate, Gandhinagar

Respondent

Copy to:

- 1) The Chief Commissioner, Central GST, Ahmedabad Zone.
- 2) The Commissioner, CGST, Gandhinagar.
- 3) The Assistant Commissioner (HQ System), CGST, Gandhinagar.
(for uploading the OIA)
- ✓ 4) Guard File.
- 5) P.A. File.

