



आयुक्त(अपील) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलिफैक्स 07926305136



DIN : 20211264SW0000453052

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1478/2021 / 14932 T & H 936
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-70/2021-22**
 दिनांक Date : **08-12-2021** जारी करने की तारीख Date of Issue 09.12.2021
 आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **35/AC/MEH/CGST/20-21** दिनांक: **04.02.2021** issued by Assistant Commissioner, CGST & Central Excise, Division Mehsana, Gandhinagar Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**
 M/s B.N. Chaudhari
 26, 1st Floor,
 Mahatma Gandhi Shopping Centre,
 Rajmahal Road, Mehsana-1

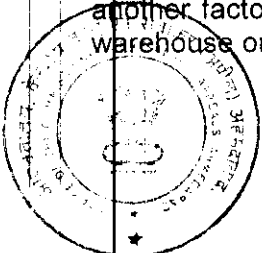
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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 परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।
- (i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :
- (ii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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।
- (iii) 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) 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।

(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 जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित दो समय पर या बाद में वित्त 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 ईए-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) 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.

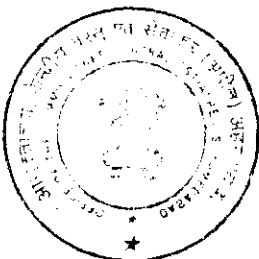
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2ndमाला, 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 पढ़ी 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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.

- (47) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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:

- (cxxxiv) amount determined under Section 11 D;
- (cxxxv) amount of erroneous Cenvat Credit taken;
- (cxxxvi) amount payable under Rule 6 of the Cenvat Credit Rules.

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।

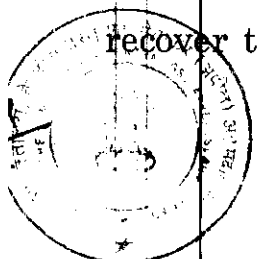
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. B.N.Chaudhari, 26, 1st Floor, Mahatma Gandhi Shopping Centre, Rajmahal Road, Mehsana (hereinafter referred to as the appellant) against Order in Original No. 35/AC/MEH/CGST/20-21 dated 04-02-2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division- Mehsana, Gandhinagar Commissionerate [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant was holding Service Tax Registration No. AARPC3885CST001 and engaged in providing Construction Service other than residential complex, including commercial/industrial building or civil structure, works contract and GTA services. In the course of the audit of the records of the appellant for the period F.Y. 2015-16, it was observed that the appellant had provided Works Contract service to M/s.ONGC Ltd, Mehsana . The appellant was paying 50% of the service tax payable and the remaining 50% was paid by ONGC under partial reverse charge as per Sr.No.9 of Notification No. 30/2012-ST dated 20.6.2012. As per the details furnished in the ST-3 returns, the appellant had provided works contract service having gross value of Rs.8,05,69,829/- for the F.Y. 2015-16 and had paid service tax amounting to Rs.30,37,144/-. The details provided by the appellant were verified during the course of audit of ONGC and it was found that the value of service provided by the appellant was Rs.10,48,94,849/- on which ONGC had paid service tax amounting to Rs.37,59,160/- under partial reverse charge. Therefore, it appeared that the appellant had short paid service tax amounting to Rs.7,22,016/-.

2.1 The appellant were, therefore, issued a SCN No. V.ST/11A-25/B.N.Chaudhary/17-18 dated 15.01.2018 seeking to demand and recover the service tax amounting to Rs.7,22,016/- along with interest



and also seeking to impose penalties. The said SCN was adjudicated vide OIO No. 07/AC/ST/MEH/18-19 dated 25.02.2019 wherein the demand was confirmed along with interest and penalties were also imposed under Section 77 and 78 of the Finance Act, 1994.

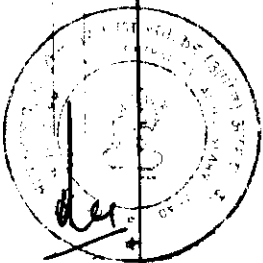
2.2 Being aggrieved, the appellant filed appeal before the Commissioner (Appeals), Ahmedabad who vide OIA No. AHM-EXCUS-003-APP-032-19-20 dated 09.10.2019 remanded back the case to the adjudicating authority observing that :

“10. In view of facts and discussion herein above, this aspect need a fresh look by the adjudicating authority, for which case is remanded back to the Adjudicating Authority, to comply with of the principles of natural justice and after proper appreciation of the evidences that may be put forth by the appellant before him. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority.”

3. In the denovo proceedings, the matter has been decided by the adjudicating authority vide the impugned order wherein he has confirmed the demand of service tax along with interest and penalties under Section 77 and Section 78 of the Finance Act, 1994.

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

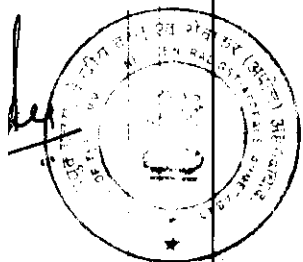
- i) They had booked income in their books of accounts at the time of making bill, while ONGC had discharged service tax on making payment to them. So it was not justifiable that the department demands service tax on the basis of the ledgers of ONGC for a particular period. It may happen that they had discharged service tax liability in 2014-15 while ONGC who



had discharged their service tax liability in 2015-16 when they had made payment.

- ii) The demand has been raised on the basis of ledger of ONGC for the year 2015-16, wherein there were bills of which they had already discharged service tax liability in the year 2014-15 while providing service and raising bills. They submit the reconciliation statement of income which indicates that there is no short payment of service tax.
- iii) The department has only considered 2015-16 even though their method for discharging service tax differed from ONGC.
- iv) The demand has been raised on the basis of third party ledger instead of taking into account factual data as per point of taxation method followed by them. As per Rule 3 the point of taxation is the time when invoice is issued.
- v) The entire demand is barred by limitation as the SCN for the period from 01.04.2015 to 31.03.2016 was issued on 15.01.2018. The SCN has baldly alleged suppression of information from the department.
- vi) The extended period of limitation cannot be invoked as there was no suppression, willful mis-statement on their part.
- vii) Penalty cannot be imposed on them under Section 78 of the Finance Act, 1994 as there was no suppression, willful mis-statement on their part with intent to evade payment of service tax.
- viii) Penalty cannot be imposed on them under Section 77 of the Finance Act, 1994 as there is no short payment of service tax and they are not liable for payment of service tax.

5. Personal Hearing in the case was held on 28.10.2021 through virtual mode. Shri Vipul Khandhar, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.

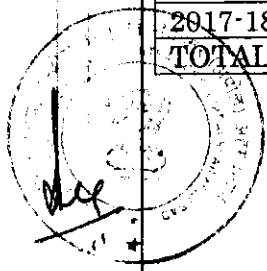


6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. I find that the issue to be decided is whether the appellant had short paid service tax in respect of services provided by them as alleged by the department and confirmed in the impugned order or otherwise.

6.1 I find that the proceedings have been initiated against the appellant and demand raised for service tax solely on the basis of the cross verification of the details furnished in the appellant's ST-3 returns with the records of ONGC. However, I find that no details of the discrepancies found in the course of such cross verification has been furnished either in the SCN or the impugned order. In order to determine that there has been short payment of service tax, it is crucial that the details of the invoices in respect of which the appellant have paid service tax and the invoices against which ONGC has paid service tax are compared to ascertain the exact invoices which have caused the difference based on which the demand has been raised. However, this exercise has not been done either at the time of audit or at the time of issue of SCN and neither was it done when the case was adjudicated for the first time nor has it been done in the denovo adjudication.

6.2 The appellant have submitted a reconciliation statement of the value of taxable services provided by them to ONGC as per their ST-3 returns and as per records of ONGC, the same is reproduced as below :

| F.Y | As per ST-3 returns | | As per ONGC records | | Difference, if any | |
|--------------|---------------------|------------------|---------------------|------------------|--------------------|------------------|
| | Taxable value | Service Tax paid | Taxable value | Service Tax paid | Taxable value | Service Tax paid |
| 2012-13 | 22188000 | 1912912 | 12136345 | 1500053 | 10051655 | 412859 |
| 2013-14 | 24621168 | 3043173 | 22823039 | 2820926 | 1798129 | 222247 |
| 2014-15 | 11049483 | 1365696 | 7803579 | 964521 | 3245904 | 401175 |
| 2015-16 | 21146851 | 2960560 | 27512333 | 3759160 | - 6365482 | - 798600 |
| 2016-17 | 19739959 | 2956854 | 15947895 | 2385362 | 3792064 | 571492 |
| 2017-18 | 5678118 | 851720 | 10411785 | 1561768 | - 4733667 | - 710048 |
| TOTAL | 104423579 | 13090915 | 96634976 | 12991790 | 7788603 | 99125 |



It is seen from the above details that in the F.Y. 2012-13, F.Y. 2013-14, F.Y. 2014-15 and F.Y. 2016-17, the value of taxable service furnished by the appellant was more than that recorded in the records of ONGC. However, for the years F.Y. 2015-16 and F.Y. 2017-18, the taxable value of services as per the records of ONGC is more than what was declared by the appellant in their ST-3 returns. While not much inference can be drawn from the above data, what is clearly forthcoming is that mere comparison of the details in the records of the appellant with that of ONGC cannot be a basis for alleging that the appellant had short paid service tax.

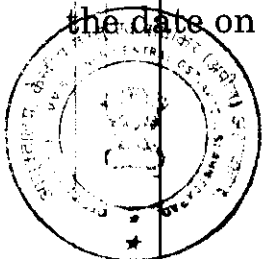
7. The appellant have also referred to the Point of Taxation Rules, 2011 (POTR, 2011) in the support of their stand that they have rightly discharged their service tax liability. In this regard I find it pertinent to refer to Rule 3 of the POTR, 2011, the relevant part of which is reproduced as below :

"3. For the purposes of these rules, unless otherwise provided, "point of taxation" shall be; -
(a) the time when the invoice for the service provided or agreed to be provided is issued:".

According to the above rule, for the appellant, the point of taxation is the date of issue of invoice. Insofar as ONGC is concerned, they are governed by Rule 7 of the POTR, 2011 as they are liable to pay service tax under reverse charge in terms of Section 68(2) of the Finance Act, 1994. The said Rule 7 of the POTR is reproduced as below :

7. Notwithstanding anything in rule 3, 4 or 8, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made:"

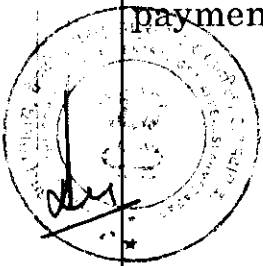
Therefore, in terms of the above rule, for ONGC, the point of taxation is the date on which payment is made by them to the appellant.



7.1 It is nobody's case that the date of invoice of the appellant and the date of payment made by ONGC to the appellant are the same. Consequently, it is very much obvious that when the points of taxation for the appellant and ONGC are different, the dates of service tax liability too would be different for them. This provides an explanation to the difference in the value of taxable services between the ST-3 returns of the appellant and the records of ONGC.

7.2 I find that in the SCN issued to the appellant the allegation of short payment of service tax is based solely on the ground that the cross verification of the details obtained from ONGC with that of the appellant indicated a difference between the taxable value declared by the appellant as compared to that declared by ONGC. There has been no exercise to ascertain the actual reasons for the difference between the taxable value of the appellant as compared to that of ONGC either while issuing the SCN or while adjudicating the case. I also find that the adjudicating authority has without verifying the details submitted by the appellant rejected it on vague and hypothetical argumentative grounds not supported by facts. The adjudicating authority has also not considered the submissions of the appellant regarding the Point of Taxation Rules, 2011 and rejected it on the grounds that no evidence was submitted by the appellant. I find that this is a very frivolous ground for not considering the appellant's contention inasmuch as the fact that there are different dates of service tax liability is clearly evident even from a plain reading of the POTR, 2011.


7.3 Considering the absence of any other evidence or material on record to indicate that the appellant had mis-declared the value of taxable service provided by them to ONGC, in their ST-3 returns, I am inclined towards the view that there was no short payment /non-payment of service tax on the part of the appellant.



8. In view of the above, the demand confirmed vide the impugned order is not legally sustainable. Accordingly, the impugned order is set aside and the appeal of the appellant is allowed.


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

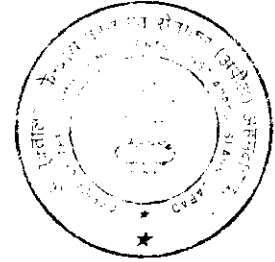
The appeal filed by the appellant stands disposed off in above terms.


(Akhilesh Kumar)
Commissioner (Appeals)

Date: .12.2021.

Attested:


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



BY ROAD / SPEED POST

To

M/s. B.N.Chaudhari,
26, 1st Floor,
Mahatma Gandhi Shopping Centre,
Rajmahal Road, Mehsana

Appellant

The Assistant Commissioner,
CGST & Central Excise,
Division- Mehsana
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.