



सत्यमेव जयते

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



DIN: 20221264SW000061616A

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/812/2022-APPEAL / 652K - 28
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-94/2022-23
दिनांक Date : 23-12-2022 जारी करने की तारीख Date of Issue 28.12.2022
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. MP/40/Ref/AC/21-22/HNM दिनांक: 01.03.2022,
issued by Deputy/Assistant Commissioner, Division-II, CGST, Ahmedabad-North
- ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

M/s Shashwatskyz Infracon LLP,
Mahavir Nagar, B/H. Archer Depo,
Sabarmati, Ahmedabad-380005

2. Respondent

The Assistant Commissioner, CGST, Division-II, Ahmedabad North , 3rd
Floor, Sahjanand Arcade, Opp. Helmet Circle, Memnagar, Ahmedabad – 52.

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 हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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 वो 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 इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

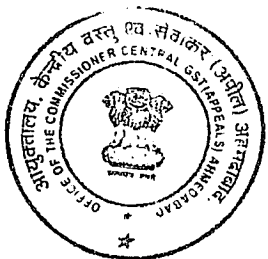
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, 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 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित हैं।

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

- (7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

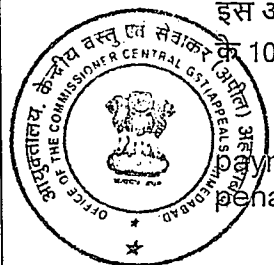
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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

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

इस 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

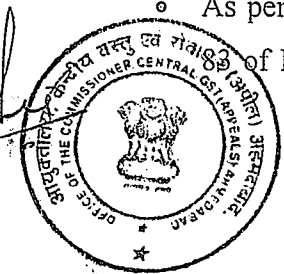
The present appeal has been filed by M/s. Shashwatskyz Infracon LLP, Mahavir Nagar, B/h. Acher Depo, Sabarmati, Ahmedabad – 380005 (hereinafter referred to as “the appellant”) against Order-in-Original No. MP/40/Ref/AC/21-22/HNM dated 01.03.2022 (hereinafter referred to as “the impugned order”) passed by the Assistant Commissioner, Central GST, Division II, Ahmedabad North (hereinafter referred to as “the adjudicating authority”).

2. Briefly stated, the facts of the case are that the appellant are engaged in providing taxable services under the category of Construction Service and holding Service Tax Registration No. ADDFS4874LSD001. The appellant has filed a Service Tax refund claim for an amount of Rs. 8,08,225/- under Section 11B of the erstwhile Central Excise Act, 1944, as made applicable in the case of Service Tax matter vide Section 83 of the Finance Act, 1994 on the ground that some of their customers, who had made their booking of flat / office / shop before 1st July, 2017 and had paid partial amount for their booking before implementation of GST law, have cancelled their booking post July 1, 2017. Since the Service Tax had been paid but the output service was cancelled, the service tax was no longer payable and accordingly, they had applied for refund of Service Tax paid by them. In the present case, the refund claim has been filed on 09.09.2021, and hence the refund claim for the cancellation made before 09.09.2020 is time barred as per Section 11B of the Central Excise Act, 1944 as made applicable for service tax matters vide Section 83 of the Finance Act, 1994. Therefore, the adjudicating authority vide the impugned order sanctioned the refund claim of Rs.5,94,258/- and reject the refund claim of Rs. 2,13,967/- under the provision of Section 11B(1) of the Central Excise, Act, 1944 as time barred.

3. Being aggrieved with the rejection of refund claim to the tune of Rs. 2,13,967/- vide the impugned order, the appellant preferred the present appeal on the following grounds:

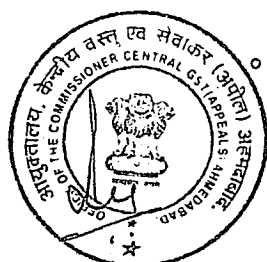
- The appellant had entered into agreements with potential buyers of the property which is under construction. As per the agreement, the potential buyers were required to pay advance against their bookings. As per the provisions of the Service Tax Law (Finance Act, 1994), the appellant has collected service tax as well as cesses at the applicable rates at the time of each payment received. The tax and cess so collected were deposited as per the law.
- Subsequently, few members, who had booked the property, cancelled their bookings at a later date. Owing to the cancellation of booking, the appellant was required to refund the amount of advance money received from the buyer along with the service tax paid thereon. Since the amounts of advances are also refunded to the member who had cancelled, the service tax so paid is no more payable.

- As per the provisions of Section 11B of the Central Excise Act, 1944 read with Section of Finance Act, 1994, the appellant is eligible to claim the refund of the excess paid



amount. Accordingly, the appellant had initially filed refund claim on 09 September 2021 to the Assistant Commissioner, CGST, Division II (Naroda Road), Ahmedabad North for refund of the excess amount paid.

- There is no dispute to the fact that they are eligible to claim the refund of the amount paid by them as service tax and applicable cesses.
- The adjudicating authority has accepted the facts submitted by them based on the supporting documents provided. The adjudicating authority has also accepted that the appellant are eligible under the law to claim the refund of amount so paid by them. However, the refund claim was rejected solely on the ground that the application is beyond the time limit as prescribed in Section 11B of the Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994.
- Levy of service tax on a service which is not rendered to the recipient is illegal and unauthorised, once a customer takes back the entire consideration due to some reasons and the providers refund the entire amount, the question that service was provided cannot arise. Based on the above submission and facts of the case, levy of service tax on a service which is not rendered to the recipient is illegal and unauthorized and has to be refunded. They further submitted that the fact that they had paid service tax at the time of collection of advance from the buyer. The intended service was never completed as the buyer cancelled the booking before the construction was completed and the possession and title was handed over. Accordingly, the amount that was paid by them was never meant to be paid as tax. This contention is already accepted in the case of Natraj and Venkat Associates Vs. ACST reported in (2010) 249 ELT 337.
- Section 11 B takes away their right to apply and not the right to claim – hence 11B is procedural in nature and can be waived. Section 11B states the time limit and procedure to apply for the refund, it does not restrict the right to claim the refund beyond the time limit specified in Section 11B i.e. One Year. The issue was clarified in the case of Uttam Steel Ltd. Vs. Union of India reported in 2003 (158) E.L.T. 274 (Bom.), wherein it was said that prescription of time limit in section 11B is only procedural and not substantive law and thus non-compliance thereof can be waived.
- They also relied on the decision in case of M/s. Panchratna Corporation, Ahmedabad Vs. Assistant Commissioner STC, wherein the Commissioner (Appeals), Ahmedabad have passed the order on dated 29.06.2019 allowing the refund even though the application was made after 1 year under Section 11B of the Central Excise Act, 1944.
- This issue has already been adjudicated in their favour in other cases. In this regard they relied on the decision in case of Cloud 9 Infra Space LLP, Addis Infracon LLP and Addor



Reality Pvt. Ltd., where the parties have applied for refund on similar grounds earlier on 8 March 2018. This application was also rejected against which further appeal was preferred with Commissioner (Appeals). The Commissioner (Appeals) have adjudicated the appeal in thier favour as per order dated 23 October 2018. In the Order in Appeal, the Commissioner (Appeals) have clearly mentioned in Para 8(b) that the appellants have filed the refund claims within stipulated time limit prescribed under Section 11B of Central Excise Act, 1944.

- The impugned order is thereby unjust and improper, to state it as time barred and shall be quashed and set aside, as a matter which is already discussed and decided upon in their own case earlier.
- On the basis of above grounds, the appellants requested that the impugned order is unjust and improper and therefore required to be quashed and set aside.

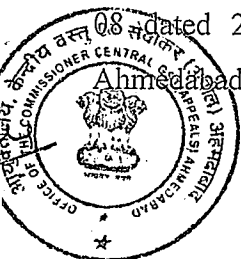
4. Personal hearing in the case was held on 14.12.2022. Shri Abhishek Shah, Chartered Accountant, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present case is whether the impugned order passed by the adjudicating authority, rejecting refund claim of Rs. 2,13,967/- under the provision of Section 11B(1) of Central Excise, Act, 1944 as time barred, is legal, proper and correct or otherwise.

6. I find that it is the contention of the appellant that as no service has been provided and received, therefore, the amount of Service Tax paid by the appellant is in nature of merely deposits and not Service Tax. In this regard, I find that in case of construction of commercial complex services, service tax is required to be paid on the amount received from prospective buyers towards the booking of complex before the issue of completion certificate by the competent authority and this process goes on for years, as has happened in the instant case, and the booking / dealings can be cancelled at any point of time by the buyers before taking of possession of complex by him.

7. I find that the service tax is payable on the services provided or to be provided and in this case, once the booking is cancelled and the entire amount is returned to the proposed buyer, thus no service has been provided and received, therefore, the amount of service tax paid by the appellant is in the nature of merely deposits and not service tax.

8. I find that the Commissioner (Appeals) vide OIA No. AHM-SVTAX-000-APP-023-17-08 dated 29.05.2017 issued on 29.06.2017 in the case of M/s. Panchratna Corporation, Ahmedabad has also taken similar view while allowing the appeal of the assessee.



9. I further find that Hon'ble Tribunal, Ahmedabad, in the case of CCE & ST, Bhavnagar Vs. Madhvi Procon Pvt. Ltd. as reported in 2015 (38) STR 74 (Tri.-Ahmd.) has rejected the appeal of Department and held that:

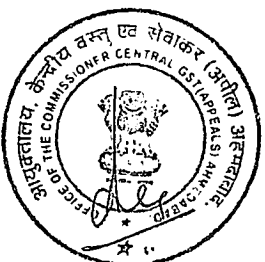
"Taxability - Service Tax not payable when no service provided - Advance amount received under the contract for providing service - Service Tax paid on such advance contract - Contract terminated and no service provided - Customer recovered back the amount from service provided by encashing bank guarantee - Assessee entitled to refund of advance Service Tax paid as no services provided and payment is to be treated as a deposit and not payment of tax - Provisions of Section 11B of Central Excise Act, 1944 as extended to Service Tax inapplicable. [para 4]

Refund - Limitation - Service Tax paid in advance as per terms of contract, but subsequently contract terminated and no service provided - Advance amount recovered by customer by encashment of bank guarantee - Amount paid by assessee (service provider) to be considered as 'deposit' and not as payment of duty, hence refundable as no Service Tax payable when no service provided - Provisions of Section 11B of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994 not applicable. [para 4]"

10. I further find that Hon'ble High Court of Madras, has in the case of Natraj and Venkat Associates Vs. Assistant Commissioner of S.T., Chennai-II in writ petition No. 15357 of 2009, decided on 20.10.2009 as reported in 2010 (17) STR 3 (Mad.) held that:

"Refund - Limitation - Service tax paid on construction activity undertaken in Sri Lanka and refund thereof claimed as erroneously paid - Service tax paid on 4-7-2005 - Refund claim filed on 20-9-2006 and claim beyond period of limitation - Rejection of refund claim on time-bar appears to be as per provisions - Supreme Court in 1993 (67) E.L.T. 3 (S.C.) upheld Delhi High Court ruling that money realized in excess of what is permissible in law is outside the provisions and such money not covered under "duty of excise" - Limitation under Section 11B of Central Excise Act, 1944 not applicable to amount paid which cannot be taken as duty of excise - High Court empowered to entertain refund claim as what was paid was not Service tax - Refund directed - Section 11B ibid as applicable to Service tax vide Section 83 of Finance Act, 1994. [paras 3, 6, 7, 13, 14, 15, 16]

Refund - Unjust enrichment - Proof on non-collection of Service tax from customers produced - Affidavit filed stating that amount received less than invoice value and Service tax not collected - E-mail correspondences and foreign inward remittance produced to show actual payment received - Documents showing unjust enrichment not attracted - Refund admissible - Sections 11B and 12B of Central Excise Act, 1944 as applicable to Service tax vide Section 83 of Finance Act, 1994. [para 15]"



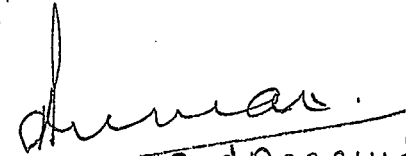
11. In view of the above judicial pronouncements, I find that it is settled position of law that if there is no service, there is no tax and amount paid by the appellant is in nature of merely deposits and Section 11B of the Central Excise Act, 1944 cannot be made applicable in such cases. The adjudicating authority has sanctioned refund in respect of the units by relying upon these judgments, however, he has partly applied the judicial precedence in these judicial pronouncements. I find that the orders of jurisdictional Commissioner (Appeals) and Hon'ble CESTAT has binding precedence for lower adjudicating authority and should be followed unreservedly.

12. Therefore, I find that once the booking is cancelled and entire amount is returned, the appellant has not provided any service and whatever the amount paid by them is in the nature of deposits only and they are eligible for the refund, and Section 11B of the Central Excise Act, 1944 cannot be made applicable in such cases.


13. In view of the above discussion, I set aside the order passed by the adjudicating authority and allowed the appeal filed by the appellant.

14. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

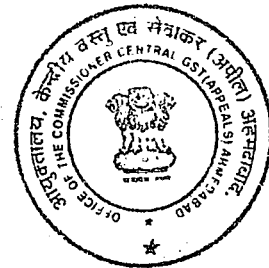
The appeal filed by the appellant stands disposed of in above terms.


(Akhilesh Kumar)
Commissioner (Appeals) 23rd December, 2022.

Attested


(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad

Date :



By RPAD / SPEED POST

To,
M/s. Shashwatskyz Infracon LLP,
Mahavir Nagar, B/h. Acher Depo,
Sabarmati, Ahmedabad – 380005

Appellant

The Assistant Commissioner,
CGST, Division-II,
Ahmedabad North

Respondent

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Ahmedabad North
- 3) The Assistant Commissioner, CGST, Division II, Ahmedabad North
- 4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North
(for uploading the OIA)

✓ 5) Guard File

6) PA file



