


केन्द्रीय कर आयुक्त (अपील)		
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,		
केन्द्रीय कर शुल्क अकादमी, 7 th Floor, Central Excise Building,		
Near Polytechnic,		
सातवीं मंजिल, पॉलिटेक्निक के पास, Ambavadi, Ahmedabad-380015		
आम्बावाडी, अहमदाबाद-380015		
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क फाइल संख्या : File No : **V2(ST)0269/A-II/2016-17** (5067 to 5071)
 ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-002-APP-122-17-18**
 दिनांक Date : 20-10-2017 जारी करने की तारीख Date of Issue 8-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **SD-01/07/AC/Fitweld/2016-17** Dated **23.11.2016** Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Fitweld Enterprise
Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
 Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

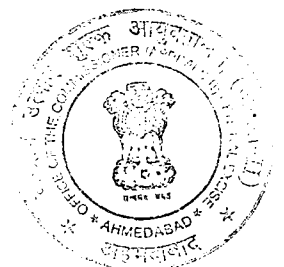
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी.- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 होंगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

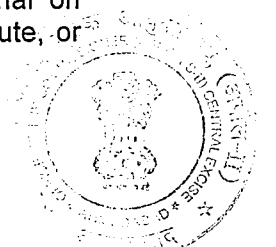
Under Central Excise and Service Tax, "Duty demanded" shall include:

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

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

4(1) 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

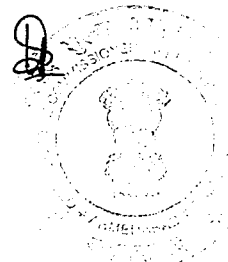
M/s Fitweld Enterprise, 2, Abhishek Apartment, Bileshwar Mahadev Society, Jantanagar Road, Ghatlodia, Ahmedabad 380 061 (henceforth, "*appellant*") has filed the present appeal against the Order-in-Original No.SD-01/07/AC/Fitweld/2016-17 dated 23.11.2016 (henceforth, "*impugned order*") passed by the Assistant Commissioner, Service Tax, Division-I, Ahmedabad (henceforth, "*adjudicating authority*").

2. The facts of the case, in brief, are as follows. In the departmental audit conducted for the year 2008-09, it was pointed out that the appellant was supplying labourers/ workers to a manufacturing company, 'Anup Engineering Co. Ltd'. This appeared to constitute the 'manpower recruitment or supply agency service' as specified under section 65(105)(k) of the Finance Act, 1994 and accordingly, the appellant appeared liable to pay appropriate service tax on the income generated from this activity. Show cause notices were issued at different times for recovery of service tax not paid and in this sequence, a show cause notice for the year 2014-15 was issued on 25.02.2015 raising a service tax demand of Rs.1,94,374/-. The adjudicating authority confirmed the demand and ordered recovery of Rs.1,94,374/- alongwith interest. A penalty of Rs.19,437/- was also imposed under section 76 of the Finance Act, 1994. The appellant is in appeal against this order.

3. The following are the main grounds of appeal, in brief-

3.1 Appellant submits that he undertakes fabrication work and carries out ancillary and incidental activities within the factory premises of Anup Engineering Ltd; that he carries out activities like cutting, slitting, bending, welding, etc. on the goods manufactured in the factory of Anup Engineering Ltd; that he raises invoices on Anup Engineering Ltd, periodically, for the quantum of job undertaken during a month. Appellant states that he carries out the job by employing his own workforce; that his workforce is exclusively under his administrative control; that he receives the payment from Anup Engineering Ltd for the quantum of job executed and no extra amount is received for use of additional labour.

3.1.1 Appellant further explains that contract between him and Anup Engineering Ltd is a lumpsum labour job contract; that all labourers/ workers are treated as the labourers of the appellant; that all labour requirements is his responsibility and not of Anup Engineering Ltd; that job contract awarded by Anup Engineering Ltd is not for labour hours or labour mandays.



3.2 Appellant has relied on the Tribunal's decision in the case of Divya Enterprises [2010(19) STR 438 (Trib.-Bang.)]; another Tribunal's decision in the case of Rameshchandra C Patel [2012(25) STR 471 (Trib.-Ahmd.)] and also other decisions.

3.3 Appellant further states that even if the job activity carried out by him does not amount to 'manufacture', such activity would be covered under business auxiliary service and not manpower recruitment or supply service, however, in that case also there is exemption under Notification No.25/2012-ST against entry no.30.

3.4 Appellant has also claimed benefit of cum tax value as no amount towards service tax has been charged and collected from Anup Engineering Ltd.

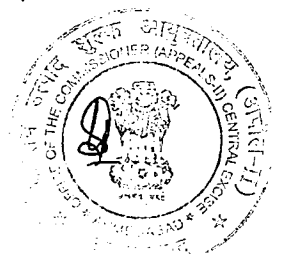
3.5 With regard to penalty, appellant has submitted that penalty waiver should have been granted by invoking section 80 of the Finance Act, 1994.

4. In the personal hearing held on 4.10.2017, Shri Gunjan Shah, Chartered Accountant reiterated the grounds of appeal and also requested for condonation of delay in filing the appeal.

5. I have carefully gone through the appeal. The activity performed by the appellant in the factory premises of Anup Engineering Ltd, by engaging his own labour force, is under dispute. The department has considered the activity as a manpower supply service which was taxable in terms of section 65(105)(k) of the Finance Act, 1994, whereas, appellant claims it to be a job-work activity not leviable to service tax.

5.1 The dispute therefore is about interpretation of the activity undertaken by the appellant, *vis-à-vis* the evidences and the submissions put up by the appellant and consequently its classification into taxable services as defined under Section 65 of the Finance Act, 1994 during the period under dispute. For sake of reference, 'Manpower Recruitment or Supply Agency' service as defined under Section 65(68) read with Section 65 (105)(k) of the of the Finance Act, 1994, is reproduced as under:

"65(68) "manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person;

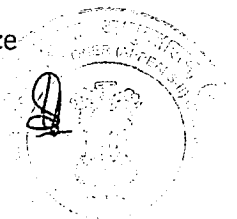


65(105)(k) to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate;”

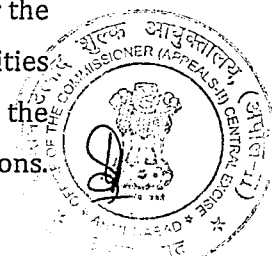
5.2 Hence, before deciding the nature of the services rendered by the appellant, it would be necessary to look into terms/conditions stated under the contract agreement. The appellant has submitted a copy of Rough English Translation marked as 'Lumpsum Job Work Agreement under Contractual Labour Act' dated 15.07.2013, alongwith its Gujarat version. The terms of agreement are as below-

- i. That the appellant should not engage more than nine persons and if at all is required to engage more than nine persons than they should be engaged at the cost and risk of the service recipient as per the license under the Contract Labour Regulation and Abolition Act 1970. To complete the task if any labour persons are required then they must be brought by the appellant. The said labourers should be treated as labourers of the appellant and they will not be treated as labourers of the service recipient. The appellant will not work in the company.
- ii. That the appellant should maintain registers like attendance register, salary register, leave register, etc and identity card as per the requirement of the Contract Labour Act. The service recipient can supervise such documentary compliances.
- iii. The appellant shall pay minimum wages as per the provisions of the Minimum Wages Act and the Service recipient shall not be responsible for this, hence the contractor shall not pay wages less than as prescribed under the Minimum Wages Act, 1948 and as resolved by Industrial Engineering units.
- iv. The appellant shall be responsible for all the present applicable acts such as Factories Act, Provident Fund Act, Employee State Insurance Act, Payment of Bonus Act, Workmen Compensation Act, Gratuity Act, Contract Labour Regulation and Abolition Act, 1970, Industrial Dispute Act. All the Registers and records should be maintained by the appellant and the service recipient will be allowed to inspect the records.
- v. The appellant shall pay the salary within 7 days of the next month following the month to which the salary pertains in presence of the service recipient.



- vi. The appellant shall observe all the provisions of various labour laws and in case if Government or labour inspectors give inspection note than the appellant shall be responsible for answering the same and for the payment of penalties, if any.
- vii. If the workers of the appellant shall show any negligence than the appellants shall be held responsible. If any equipment which belong to the service recipient and not properly maintained than the appellant will be responsible for the same. If during the work any damage occur than the service recipient will deduct the said amount from payable amount of the appellants. If such amount exceeds the amount payable to the appellant than the service recipient will be able to recover the same. In future if any liability arises on account of ESI Act, 1948, the responsibility will be on the part of the appellant.
- viii. If the activities such as theft, fire or any other illegal activities are undertaken by the workers of the appellant then entire responsibility will be on the appellant. If any worker is dismissed by the appellant than such worker shall not take any legal steps against the service recipient or shall not implicate company directly or indirectly. However, if any worker raised any objection and if any amount is paid to the worker than the appellant shall pay to the service recipient with interest at the rate of 18%. Reemployment, retrenchment of workers will not be treated as done in Factory or Company of the service recipient. If any compensation is payable on the above than it shall be responsibility of the appellant.
- ix. The appellant shall do a satisfactory work in accordance with the purchase order of the service recipient. No payment will be made to the appellant without purchase order and no payment of compensation shall be made for slack period.
- x. If any confusion or dispute arises in respect of this agreement, both the parties have to compromise on mutual agreeable terms. If compromise is not possible then the arbitrator will be appointed. The decision taken by the arbitrator shall be binding on both the parties.
- xi. The damages of the appellant will not be borne by the Service recipients.

5.3 The above contract appears to be in the direction of sending labour to the service recipient for the nature of job, though not defined under the contract; accordingly there is a supply of labour. The contract is illustrative of the nature of the work to be carried out by the manpower supplied at the end of the service recipient. At the same time, the contract speaks about the time stipulations under which the assigned work has to be completed and the nature of the work to be assigned under the Purchase Order. The contract also owes on the part of the appellant, all responsibilities for risks attached with the job may it be loss/damage during the course of work and the same would be subjected to the (monetary) deductions from the considerations.



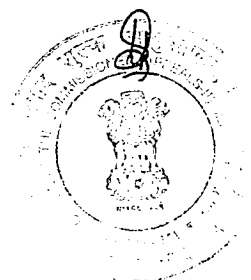
Although the entire contract is aimed at completion of job attaching the quality and conditions of the work to be carried out, the same appears to be subsequent to the supply of manpower of the appellants and conditions for the working on the same. Also the conditions in a way clearly demarcate the relationship between the labour employed at the end of service recipient as an employer-employee relationship all throughout the course of the work undertaken with the appellant only although they have been destined to work at the premises of the service recipient for a contracted period of time. The mode of consideration for the services provided by the appellant is different than what the appellant perceive as it would have been, based on man days/man hours, so as to exit from taxability under the statute, would be incorrect. The fact remains that the appellant had contributed by way of provision of skilled labor in interim process of the entire manufacturing process, which is fabrication as per the designs and on the material supplied by the service recipient, albeit the same is subsequent to the supply of manpower and based on the contractual agreement. Also the consideration has been fixed on the basis of the work accomplished which appears to none different than the consideration which is analogical to the supply of manpower, because, the work is extracted through the manpower employed by the appellant at the service recipient's premises, however the same is specific in this case. Mere the nature of consideration does not steal the essence of the taxable services, under the category of 'Manpower recruitment and Supply Services'. Hence, I find that the entire activity on the part of the appellant bears the essential characteristics of Manpower Supply and not of Business Auxiliary Services.

5.4 Further, the same issue has been addressed categorically by way of clarification with regard to the 'Manpower Recruitment and Supply Agency' services under Circular No. CBEC Circular No. 96/7/2007-ST dated 23.8.2007, relevant part reproduced as below;

"In the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another person for a consideration. Employer-employee relationship in such case exists between the agency and the individual and not between the individual and the person who uses the services of the individual.

Such cases are covered within the scope of the definition of the taxable service [section 65(105)(k)] and, since they act as supply agency, they fall within the definition of "manpower recruitment or supply agency" [section 65(68)] and are liable to service tax."

The workforce employed for carrying out the given task of the service recipient has a employee employer relationship with the appellant and it is under complete control of



the appellant. Thus, essence of the disputed activity is supply of manpower and accordingly liable to service tax.

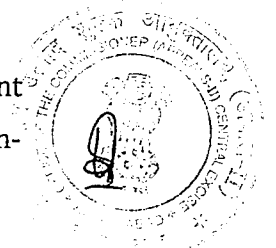
5.5 The appellant's reliance on the case law of M/s Divya Enterprise and also other case laws lacks the strength as in the instant case, the purchase order, if read as whole, primarily speaks of the supply of labour with all the responsibilities (related to the labour laws) lying with the appellant. Subsequently the purchase order dictates the nature of work to be extracted from the labour employed by the appellant. As regards lump sum payments, the nature of considerations although look different in this case but are task specific.

5.6 The appellant in his grounds of appeal has sought the benefit of cum tax value and the requested for the demand to be reworked out accordingly. Here, the present matter is pertaining to the case of the deliberate Service Tax evasion and hence, benefit of cum-duty price cannot be extended to the appellant. In this regard, I rely upon judgment of Hon'ble Tribunal, Delhi reported at 2011 (268) E.L.T. 369 (Tri. - Del.) in the case of M/s Pinkline Exim P. Ltd., V/s Commissioner of C. Ex. Jaipur-I, which is pari materia to the instant case. The Hon'ble Tribunal has held that benefit of cum duty price cannot be extended in the cases of deliberate duty evasion by clandestine clearances. The relevant extract of the same is as under:-

"4.3 It has been pleaded that in accordance with the ratio of Hon'ble Supreme Court's judgment in case of CCE, Delhi v. Maruti Udyog Ltd. reported in 2002 (141) E.L.T. 3 (S.C.) the price of the fabrics on which duty has been demanded, must be treated as cum duty price and assessable value must be calculated by permitting abatement of duty from the price. Tribunal in cases of Asian Alloys Ltd. v. CCE-III reported in 2006 (203) E.L.T. 252 (Tri. - Del.) and Sarla Polyester Ltd. v. CCE, reported in 2008 (222) E.L.T. 376 (Tri. - Ahmd.) has held that the ratio of Hon'ble Supreme Court's judgment in case of CCE, Delhi v. Maruti Udyog Ltd. is not applicable to the cases of deliberate duty evasion by clandestine clearances. Therefore this plea of the Appellant is also not acceptable."

6. In view of the discussion hereinabove, I uphold the confirmation of demand of Service Tax under the impugned order in the instant case, under the taxable category of 'Manpower Recruitment or Supply Agency' services. Consequently, impugned order for interest is also upheld.

7. With regard to penalty under section 76 of the Finance Act, 1994, appellant has requested for waiver in terms of section 80 of the Finance Act, 1994 as the non-




payment of service tax was no deliberate to evade payment of service tax. Section 80 provided for waiver of penalties where reasonable cause for failure was proved. Here, I appellant has not been able to put forth any convincing reason for failure to pay the service tax and therefore, benefit of section 80 is inapplicable.

8. In view of aforesaid discussion, the impugned order is upheld and appeal is rejected.

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

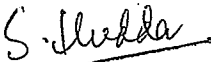
The appeal filed by the appellant stands disposed of in above terms.


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested


(Sarfarmal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
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2, Abhishek Apartment, Bileshwar Mahadev Society,
Jantanagar Road, Ghatlodia, Ahmedabad 380 061

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-VII, Ahmedabad- North.
5. Guard File.
6. P.A.



