

	केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,		
केन्द्रीय उत्पाद शुल्क भवन,	4 th Floor, Central Excise Building,	
सातवां मंजिल, पॉलिटेक्निक के पास,	Near Polytechnic,	
आम्बावाडी, अहमदाबाद-380015	Ambavadi, Ahmedabad-380015	
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क फाइल संख्या (File No.): V2(83)48 /North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 359-17-18

दिनांक (Date): 28-Feb-2018 जारी करने की तारीख (Date of issue): 23-3-2018

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

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

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-IV), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No 13/AC/D/2017/AKJ Dated: 28/09/2017

issued by: Assistant Commissioner Central Excise (Div-IV), Ahmedabad North

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Caps & Seals Industries

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 an 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:

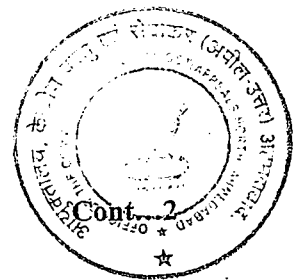
(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए ।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, 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 हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार 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

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है ।



P. A

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

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

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

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

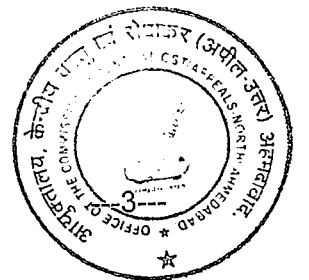
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-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 ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. 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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-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 है।

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

- (6) सीमा शुल्क, केन्द्रीय 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।

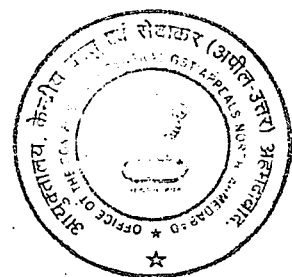
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग 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."



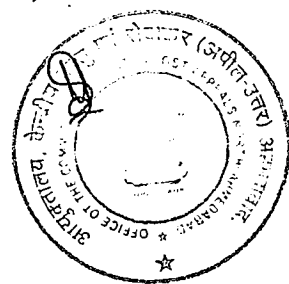
ORDERIN APPEAL

The subject appeal is filed by M/s. Caps & Seals Industries ,9/A-B, behind Sakar Healthcare, Changodar, dist- Ahmedabad (hereinafter referred to as '*the appellant*') against Order in Original No.13/AC/D/2017/AKJ (hereinafter referred to as '*the impugned order*') passed by the Asstt.Commissioner, CGSTCentral Excise ,Division-IV, Ahmedabad-north (hereinafter referred to as '*the adjudicating authority*').and engaged in the manufacture of Aluminium Caps/Seal and Plastic Plug falling under chapter 83,39of Central Excise Tariff Act,1985 [hereinafter referred as CETA-1985], The appellant avails cenvat credit on inputs and input services under the Cenvat Credit Rules,2004.(CCR 2004).

2. Briefly stated facts of the case are that during the course of audit, it is noticed that they are engaged in manufacture of dutiable excisable goods as well as trading activity exempted service .that during the period 2014-15 and 2015-16, they have availed and utilized Cenvat Credit of tax paid on common input services i.e. inward transportation, sea freight, courier charges,securitycharges, telephone, bank charges etc. which are used by them in trading activity as well as for manufacture of dutiable finished goods, without keeping separate accounts as under Rule 6(2) of Cenvat Credit Rules, 2004,defines the expression 'activity of trading' as exempted service under Section 66B of the Finance Act, 1994. In the event of their failure to maintain separate accounts, they should have paid an amount at six /seven percent of value of exempted service as per Rule 6(3) (i) of the Cenvat Credit Rules, 2004. In case of traded goods, 'value of exempt service' should be considered as per Explanation 1 (c) to Rule 6 of the Cenvat Credit Rules, 2004, They deliberately continued availing service tax credit on such input services and used in both dutiable product and trading activity with intent to evade the payment of tax. they are required to pay an amount of Rs.1,00,390/- under Rule 6(3)(i) of the Cenvat Credit Rules, 2004. That the appellant deliberately did not disclosed said facts to the department. That in ER-1, the appellant nowhere disclosed the facts, having taken credit on input services commonly used in dutiable goods as well as trading activity. it is a clear case of suppression of facts, and the Section 11A of the CEA 1944 for invoking the extended period. Show Cause Notice dated 18.05.2017 was issued. for recovery of credit Rs.1,00,390/- with Interest and penalty. Same was decided vide above order and confirmed the demand.

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

a. That They have rightfully availed Cenvat Credit. There were no common input services which were utilized by them in conducting trading business. That they have kept records like invoices and register in relation to the trading activity undertaken by them and there was nothing suppressed by them for which extended period could have been taken. There is no basis for demand of Rs.1,00,390/-. Since the liability to reverse a proportionate credit comes to nil account, rule 6(3) (i) of Cenvat Credit Rules, 2004 would not apply, SCN required to be withdrawn in the interest of justice.



b. Almost all the goods are being exported by them except for a small quantity' of goods for domestic clearance. There could not be any intention attributed to them for availing wrongful credit on miniscule amount of input services used in relation to trading of goods.

c. The entire basis of the show cause notice is illegal and unjustified. It is the burden on the department to prove that each and every service alleged was actually used for providing exempted output service.

d. They cited the decision of Mumbai Tribunal in the case of Rathi Daga reported in 2015(38) STR 213 (Tri-Mumbai) 2.case of Kishan Sahkari Chini Mills reported in 2012(286) ELT 51 (Tri-Del).

e. That the demand under Rule 6 of Cenvat Credit Rules, 2004 is otherwise not applicable because if the excisable goods as well as the traded goods are exported outside India, the provisions of Rule 6(6)(v) of Cenvat Credit Rules are applicable. they relied upon the decision of Hon'ble Bombay High Court in case of Repro India Ltd reported in 2009(235)ELT 614 (Bom). Therefore, they requested to drop the proceedings.

f. There is basic error on part of the revenue in demanding Rs.100390/- As per prescribed formula the amount of Cenvat credit to be reversed has to be worked out. They relied the following case laws:-

i.Hi-Line Pens Pvt.Ltd reported in 2003(158) ELT 168 (Tri-Del)

ii.Bharat Eath Movers Ltd reported in 2001(136) ELT 225 (Tri-Bang).

iii.Maize Products reported in 2008(89)RLT 211(Guj).

iv. Mercedes Benz India Ltd reported in 2015 (40) STR 381

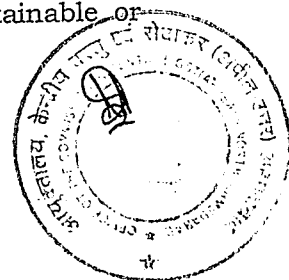
g. The value of trading business is thus, incorrect and erroneously arrived at by the Revenue and therefore, deserves to be withdrawn.

h. Regarding invoking of larger period in the present case, as to what was the suppression of facts or willful mis-statement or contravention of the provisions of the service tax law on their part, and therefore, invocation of extended period is illegal.

i. They referred to the decisions of 1. Continental Foundation Jt. Venture , reported in 2007(216)ELT 177 (SC) 2. Jaiprakash Industries Ltd reported in 2002 (146) ELT 481 (SC) 3. Bony Rubber Co Pvt.Ltd 1996 (84) ELT 58

j. that imposition of penalty is unjustified in the facts of this case.. They relied on the decision of Hindustan Steel Ltd reported in 1978 ELT 0159) demand of interest is without any authority in law, and liable to be set aside.

4. Personal hearing was accorded on dated 23.1.2018, Smt. Shilpa P. Dave, advocate, appeared on behalf of the appellant and reiterated the submissions made vide their appeal memorandum. She filed written Submission at the time of personal hearing, and cited case law of Repro India Ltd 2009(235)ELT 614 (Bom). I have carefully gone through the case records, facts of the case,GOA, submission made by the appellant at the time of personal hearing and the case laws cited by the appellant. The issue to be decided in this case is whether the whether the demand raised is sustainable or otherwise.



5. I find that, the appellant is engaged in manufacture of dutiable excisable goods as well as trading activity i.e. exempted service. This has been noticed from their various records/documents maintained by them. It is also not disputed that the appellant have availed and utilized the Cenvat Credit of duty paid on common input services i.e. inward transportation, sea freight, courier charges, travelling charges, factory expenses, security charges, consultation charges, telephone, bank charges etc. which are received and used by them in trading activity as well as for manufacture of dutiable finished goods, without keeping separate accounts as required under Rule 6(2) of Cenvat Credit Rules, 2004.

6. I find that, Rule 2(e) of the Cenvat credit Rules, 2004 defines the expression 'activity of trading' as exempted service under Section 66B of the Finance Act, 1994. In the event of their failure to maintain separate accounts, they should have paid an amount at six percent of value of exempted service (upto 30.05.2015) and at seven percent of value of exempted service (w.e.f. 01.06.2015) as per Rule 6(3) (i) of the Cenvat Credit Rules, 2004.

7. Further, I find that, as per Rule 6(3) of the Cenvat Credit Rules, 2004 provides that the manufacturer of goods or provider of output service, opting not to maintain separate accounts, shall follow any of the following options, as applicable to him, namely:-

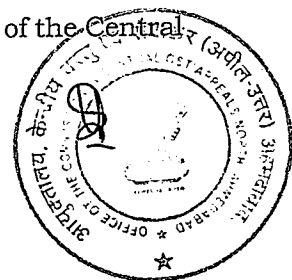
(i) Pay an amount equal to 6% of the value of the exempted goods and exempted service; or

(ii) Pay an amount determined under sub-rule (3A); or

(iii) Maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub rule (2), take Cenvat Credit only on inputs under sub clause (ii) & (iv) of the clause (a) and pay an amount as determined under sub rule (3A) in respect of input services. The provisions of sub-clauses (i) & (ii) of clause (c) of sub rule (3A) shall not apply for such payments.

8. I find that, As per Rule 6 (3) (i) of Cenvat Credit Rules, 2004, the amount in the present case, as per Rule 6(3)(i) *ibid*, is 6%/7% of the value of exempted services i.e. trading service, confirmed is Rs.1,00,390/- required to be recovered from the appellant with interest at the applicable rate. I find that the amount has been worked out on the basis of balance sheet produced by the appellant, and the amount has been arrived at on the basis of formula prescribed in the Rule 6 of the Cenvat Credit Rules, 2004. Thus, I find that the impugned order is correct and legal.

9. Regarding penalty imposed, I find that as per Rule 15 (2) ,in a case where the CENVAT credit in respect of input or capital goods or input services has been taken or utilized wrongly on account of fraud, wilful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made there under with intention to evade payment of duty, then, the manufacturer shall be liable to pay penalty in terms of the provisions of section 11AC of the Excise Act. Hence the appellant is liable to penalty under Rule 15(2) *ibid* read with Section 11AC of the Central Excise Act, 1944.



10. I find that, monthly returns were filed by them, but the data of availing input service tax credit on trading activity was not specifically included in such returns. Hence, department was not in a position to know the availing of such wrong credit on exempted services. As per Rule 6 of Cenvat Credit Rules, 2004 the appellant has to follow the procedures, they never followed the said procedures and never informed the department about the availing of credit on input services used in both dutiable goods and exempted service. Failure of providing such information amount to suppression of facts and hence, invoking the extended period is found legally correct. The case laws cited by the appellant are not applicable to the present case. Period involved is period 2014-15 and 2015-16 when trading is specifically included in exempted service.

11. Since the appellant is found to have suppressed the material facts from department to get undue benefits of service tax credit which in fact not eligible to them as per CCR and thereby evaded the payment of duty, therefore, provisions of Section 11AC(1)(c) of the Central Excise Act, 1944 are to be applied in the case.

12. I find that, Rule 15(2) of CCR, 2004 provides that, where CENVAT Credit in respect of inputs or input services has been taken or utilized wrongly by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of Excise Act, or of the rules made there under with intent to evade payment of duty then, the manufacturer shall be liable to pay penalty in terms of provisions of Section 11AC of Excise Act. That Section 11AC of CEA 1944 applies when the extended period is applicable. Since, the extended period itself is invocable in the present case; penalty imposed on the appellant is correct and legal.

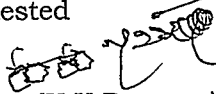
13. I find that, they have submitted that no penalty is imposable and also interest provisions are not attracted in this case. I find that the issue is related to the period 2014-15 and 2015-16. The issue came into light only after the audit. Therefore, I do not agree with the contention of the appellant, and find no reason to interfere in the impugned order.

14. In view of above, I uphold the impugned order and disallow the appeal.

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

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

Attested



[K.K.Parmar]

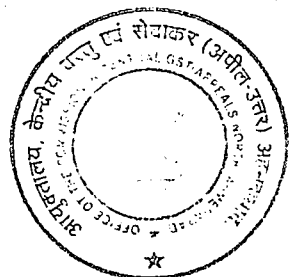
Superintendent (Appeals)
Central tax, Ahmedabad.

By Regd. Post A. D

M/s. Caps & Seals Industries ,
9/A-B, behind Sakar Healthcare,
Changodar,
Dist- Ahmedabad.

उमाशंकर
[उमा शंकर]
आयुक्त (अपील्स)

date- /2/18



Copy to-

1. The Chief Commissioner, CGST Central Excise, Ahmedabad zone.
2. The Commissioner, CGST Central Excise, Ahmedabad- North
3. The Asstt. Commissioner, CGST Central Ex. Div-IV, Ahmedabad- North
4. The Asstt. Commissioner (Systems), CGST Central Ex., Ahmedabad-North.
5. Guard file.
6. PA File.

