

	केंद्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय उत्पाद शुल्क भवन, सातवीं मंजिल, पोलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
 079-26305065		टैलेफेक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : V2(STC)102 /North/Appeals/ 2017-18
 ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 392-17-18
 दिनांक (Date): 26-Mar-2018 जारी करने की तारीख (Date of issue): 21/4/2018
 श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित
 Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-VII), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी
 मूल आदेश सं _____ दिनांक _____ से सृजित
 Arising out of Order-In-Original No 19/ADC/2017/RMG Dated: 29/12/2017
 issued by: Additional Commissioner Central Excise (Div-VII), Ahmedabad North
 घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Om Associates

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:

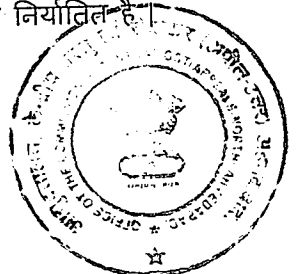
(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

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।



- (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 :-

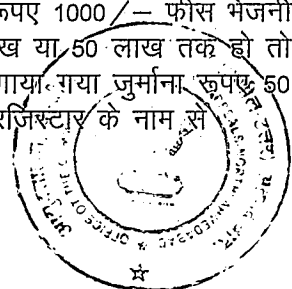
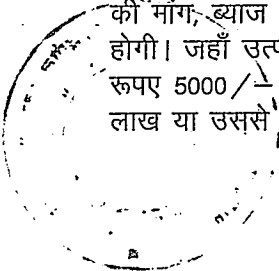
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों 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.

- (b) 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.

- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 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 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 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।

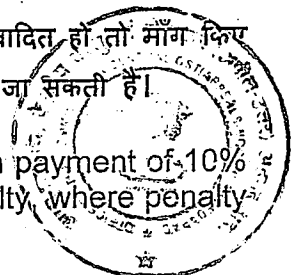
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग किया 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 alone is in dispute.



ORDER IN APPEAL

This appeal has been filed by M/s. Om Associates, 135/1, Pagi Room, Om Residency, Nr. Sopan Saran Flat, Silver Star Char Rasta, Chandlodiya, Ahmedabad-382 480 [for short -“*appellant*”] against OIO No. 19/ADC/2017/RMG dated 27.12.2017 passed by the Additional Commissioner, CGST and Central Excise, Ahmedabad North Commissionerate [for short -“*adjudicating authority*”].

2. An investigation by DGCEI revealed that the appellant, who was engaged in providing labour contract service in respect of construction of buildings had received income and that though they had collected service tax, they had failed to deposit the same to the Government exchequer. Consequent to completion of investigation, a show cause notice dated 31.5.2016, was issued to the appellant demanding service tax of Rs. 1,77,93,330/- for the period from 1.1.2013 to 31.3.2015, along with interest. Penalties were also proposed under sections 77 and 78 of the Finance Act, 1994.

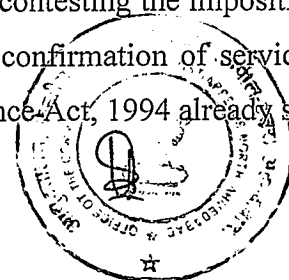
3. The aforementioned show cause notice was adjudicated vide the impugned OIO dated 27.12.2017, wherein he confirmed the demand of Rs. 1,77,93,330/-, appropriated the amount of Rs. 1,77,93,330/- already paid; ordered payment of interest; appropriated the amount of Rs. 8,65,096/- paid towards interest; imposed penalty of Rs. 10,000/- under section 77 and a penalty of Rs. 1,77,93,330/- under section 78 of the Finance Act, 1994.

4. Aggrieved, the appellant has filed this appeal, raising the following contentions:

- that the show cause notice issued by DGCEI, clearly mentions that the appellant had paid the service tax and interest thereon ;
- that penalty under section 78 is not applicable in their case; that penalty under section 78 is only applicable in case of any malafide intention;
- that they would like to rely on the case of M/s. Bajaj Travels Limited, decided by the Hon’ble Delhi High Court;
- that they have already paid penalty of Rs. 10,000/- imposed under section 77 of the Finance Act, 1994.

5. Personal hearing in the case was held on 22.3.2018, wherein Shri Amit Patel, CA, appeared on behalf of the appellant and reiterated the grounds of appeal. The learned CA was requested to submit ST-3 return wise payment in a tabular form to show the liability and date of payment, within two days. In the additional written submission dated 22.3.2018 the appellant has while repeating the grounds of appeal has also relied upon the case law of Adecco Flexione Workforce Solutions Ltd [2012(26) STR (Kar)] and Pushpan Travels [2010-TIOL-123-CESTAT-AHM]. Thereafter vide letter dated 26.3.2018, the appellant once again provided the ST-3 wise payment, in tabular form which depicted the liability and date of payment.

6. I have gone through the facts of the case, the grounds of appeal and the grounds raised during the course of personal hearing and the written submissions submitted on the date of personal hearing and on 26.3.2018. I find that the appellant is only contesting the imposition of penalty under Section 78 of the Finance Act, 1994. The rest i.e. confirmation of service tax along with interest and penalty imposed under section 77 of the Finance Act, 1994 already stands paid/deposited to the Government.

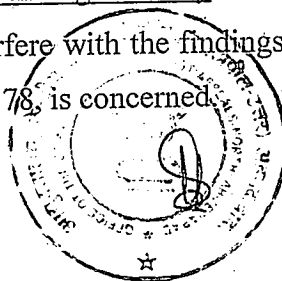


7. So the question to be decided in this appeal is whether the appellant is liable for penalty under section 78 or otherwise.

8. Since facts are not being disputed, I would not like to repeat what is already mentioned *supra*. However, the appellant has questioned the imposition of penalty under section 78 of the Finance Act, 1994, on the grounds that there was no malafide intention. The appellant has also provided a ST-3 return wise payment in a tabular form to show the liability and date of payment, viz.

Period	Taxable value	Service tax along with interest	Paid on	Tax due date	Return due date
January 2013 to March 2013	1,56,85,457	21,25,159	15/10/2013	31/3/2013	25/4/2013
April 2013 to June 2013	1,51,63,106	19,68,433	16/10/2013	5/7/2013	25/1/2013
July 2013 to September 2013	1,46,48,437	18,19,475	16/10/2013	5/10/2013	
October 2013 to December 2013	1,70,74,550	20,71,232 72,779	17/01/2014 7/1/2016	5/1/2014	25/4/2014
January 2013 to March 2013	4,54,07,539	56,12,372	7/11/2014	31/3/2014	
April 2013 to June 2013	1,04,46,518	14,96,648	11/5/2015	5/7/2014	14/11/2014
July 2013 to September 2013	1,07,98,443	15,00,554	28/5/2015	5/10/2014	
October 2013 to December 2013	1,06,57,369	14,09,495	28/5/2015	5/1/2015	25/4/2015
January 2015 to March 2015	40,77,565	5,82,279	7/1/2016	31/3/2015	
Total	14,39,58,984	1,86,58,426			

The investigation *via* summon proceeding, was initiated on 11.10.2013. After initiation of the investigation, the appellant opted for VCES, for the period from July 2011 to December 2012. The service tax due of Rs. 1.06 crores for the said period, was made under VCES vide two installments on 31.12.2013 and 28.6.2014. The notice dated 31.5.2016, therefore, covers only the period subsequent to 31.12.2012. It is in this background, that his plea that there was no malafide is to be seen. The above table also shows that the payments were made after a considerable period of time. The adjudicating authority, I find has in para 21 of the impugned OIO, clearly held that the appellant, did not file the returns with the sole intention to evade the tax liability which they had already collected; that the appellant resorted to suppression with the sole intent, to evade service tax. The appellant, except for stating that he has discharged the service tax short paid before the show cause notice along with interest has not countered the findings of the adjudicating authority. The appellant's past and the short payment as depicted in the table above, shows that there was suppression, and contravention of the provisions of the sections, rules, with an intent, to evade payment of duty. Had the DGCEI not taken up the investigation, the nonpayment would never have seen the light of day. The appellant has not produced/submitted anything, which forces me to interfere with the findings of the adjudicating authority, as far as imposition of penalty under Section 78, is concerned.



9. The appellant has relied upon three case laws to substantiate his plea that no penalty is imposable on them under Section 78 of the Finance Act, 1994. I would now like to discuss these case laws:

[a] M/s. Bajaj Travels Limited [2012 (25) S.T.R. 417 (Del.)]. The Hon'ble High Court in para 20 of the said judgement held as follows:

20. The facts narrated above, clearly disclose, and there is no dispute about the same, that there was failure on the part of the appellant to pay full service tax. It was argued by the learned counsel for the appellant that this provision has no application as tax was paid though short-paid. Section 76 applies only when no tax is paid at all as it deals with "failure to pay service tax" and not when tax is paid but short-paid. However, the defence of the appellant is that this failure was due to reasonable cause and, therefore, Section 80 becomes applicable. A bare reading of this provision would show that the onus is upon the appellant to prove "reasonable cause" for this failure. The moot question is as to whether the appellant has been able to discharge this onus? Before we advert to this issue, it is necessary to understand the meaning which is to be assigned to expression "reasonable cause". It would mean, in common parlance a cause or ground which was not unreasonable. To put it otherwise, in the context of this case the appellant has to show that there was sufficient and proper reasons which occasioned the appellant to make short deposits of service tax than required under the provisions of the Act. If the appellant can show that the manner in which he was making the deposits of the service tax was bona fide i.e., in good faith, it would amount to 'reasonable cause'. Bona fide implies in the absence of fraud or unfair dealing. The equivalent of this phrase is "honestly". The correct province of this phrase is, therefore, to qualify things or actions that have relation to the mind or motive of the individual. Chambers 20th Century Dictionary defines bona fide to mean 'in good faith : genuine'. The word 'genuine' means 'natural : not spurious; real; pure; sincere'. In Law Dictionary Mozley and Whitley define bona fide to mean 'good faith, without fraud or deceit'. Thus the term bona fide or genuinely refers to a state of mind.

The appellant has quoted para 10, which is the petitioner's contention in the above case. The contention of the petitioner cannot be extracted to substantiate a plea. However, on going through para 20, reproduced supra, it is clear that Section 80, if at all it is applicable, is only if the appellant shows a reasonable cause. The appellant has not succeeded in demonstrating his bonafide. He has not argued/given any plausible reason as to why the service tax collected and which was due to be deposited to the Government was not done. Only after being pointed out through an investigation, did the appellant come forward and deposit the same. Hence, I find that this case law is not applicable to the facts of the present case.

[b] Adecco Flexione Workforce Solutions Ltd [2012(26) STR (Kar)]. The rationale of this case would not be applicable since [a] the notice was issued invoking extended period and therefore the benefit of Section 73(3) of the Finance Act, 1994 could not be claimed and [b] this is a case wherein the appellant deposited the tax collected only after the same was pointed out by DGCEI.

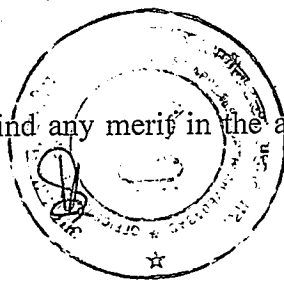
[c] Pushpan Travels [2010-TIOL-123-CESTAT-AHM]/ [2010 (19) S.T.R. 98 (Tri. - Ahmd.)]. The operative part of the judgement is reproduced below for ease of reference.

3. I have considered the submissions made by both the sides. In this case appellant is the owner of a single cab and is not a very literate person. Further, as soon as it was pointed out he has paid the tax. This shows that there was no intention to evade tax. Taking into account the fact that appellant is an owner of a single vehicle and is an individual, I consider this to be a fit case for application of provisions of Section 80 of Finance Act, 1994 and set aside the penalties imposed. Accordingly, penalties imposed under various Sections of Finance Act, 1994 are set aside.

The facts being different, the citation is not applicable to the appellant's case.

10. In view of the foregoing, I do not find any merit in the appeal and the same is rejected.

In view of the foregoing, I do not find any merit in the appeal and the same is rejected.



11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
11. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date: 3.3.2018

Attested

Vinod

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,
M/s. Om Associates,
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Silver Star Char Rasta,
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Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad North.
3. The Deputy/Assistant Commissioner, Central Tax, Division-VII, Ahmedabad North.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad North.
5. ~~Guard File.~~
6. P.A.

