



आयुक्त का कार्यालय, (अपीलस)

Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ : 079-26305065

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क फाइल संख्या : File No : **V2(ST)28 /North/Appeals/2018-19** *5432 to 5437*

ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-002-APP-32-18-19**

दिनांक Date : **25-Jun-18** जारी करने की तारीख Date of Issue *8/8/2018*

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **1927/AC/17-18/Ref** Dated **28-Feb-18** Issued by **Assistant Commissioner** , Central GST , Div-I , Ahmedabad North.

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

M/s Vitthal Enterprise

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:-

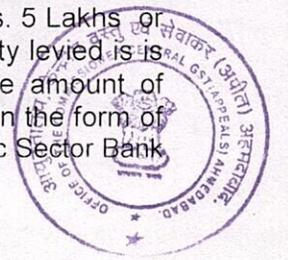
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मेंटल हास्पिटल कम्पाउण्ड, मेघाणी 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 प्रतियों (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर

आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** 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, 1994 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 13 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 होगा।

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.

रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065



ORDER IN APPEAL

M/s. Vitthal Enterprise, Vitthal Plaza, Survey No. 539, Near Vraj Bhumi, Opp. GEB, Naroda- Dahegam Road, New Naroda,, Ahmedabad- (STR No. AAJF V6497P SD 001) (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number 1927/AC/17-18/Refund dated 28.02.2018 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, CGST & Central Tax, Div-I (Naroda), Ahmedabad North, Jivabhai Mention, Ashramroad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that, appellant, engaged in providing construction service, had filed refund claim amounting to Rs. 1,43,044/- before Asst. Commissioner, Service Tax Div-VI , Ahmedabad on 06.09.2016 as prospective buyers have cancelled booking amount on which Service tax was paid. Now appellant was not required to pay the service tax as B.U. Permission was received on 19.05.2016, therefore refund was filed. Some details were called from appellant vide department letter 27.10.2016 and same were not supplied by appellant. It is said that SCN dated 18.11.2016 was issued to appellant but said SCN was not received by appellant. Refund was rejected by OIO- SD-06/Refund/19AC/Vitthal/16-17 dated 29.11.2016 on ground that information was not supplied :that refund being time barred in terms of Section 11B of CEA and appellant had not reversed cenvat credit u/r 6(3) of CER, 2004 on flats/shops becoming exempted or non-taxable in wake of receipt of BU permission

3. Being aggrieved with the order SD-06/Refund/19AC/Vitthal/16-17 dated 29.11.2016 the appellants preferred an appeal on 21.02.2017 before the Commissioner (Ahmedabad) wherein it is contended that refund has been rejected without issuing SCN and without affording opportunity of personal hearing. Commissioner Appeal Vide OIA No. AHM-EXCUS-002-APP-143-17-18 dated 26.10.2017(issued on 28.11.2017) remanded back the case to original adjudicating authority. Para 6 and 7 of OIA dated 26.10.2017 is reproduced as below.

" 6. *From impugned OIO, I observe that information was called from appellant after filing claims and same were not submitted. Therefore for want of information refund was rejected. Appellant had contended that refund has been rejected without issuing SCN and without affording opportunity of personal hearing. In the interest of natural justice, the needs to be remanded back to adjudicating authority and I do so.*

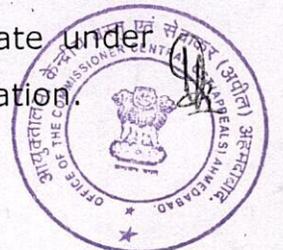


7. In view of facts and discussion herein above, the Adjudicating Authority is directed to decide the case afresh, for which case is remanded back to the Adjudicating Authority, after due compliance of the principles of natural justice and after proper appreciation of the evidences that may be put forth by the appellant before him. The appellant is also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority."

4. In remand proceedings new SCN dated 09.01.2018 was issued to appellant. Adjudicating authority vide impugned OIO 1927/AC/17-18/Refund dated 28.02.2018 rejected entire claim of Rs. 1,43,044/- on grounds that appellant had not furnished any particulars showing that they have paid the service tax on "out standing" amount, which was to be received from prospective buyers (either old prospective buyer or new buyers) and that claim being time barred in terms of Section 11B of CEA, 1944.

5 Being aggrieved with the order 1927/AC/17-18/Refund dated 28.02.2018 the appellants preferred an appeal on 27.04.2018 before the Commissioner Appelas, Central Tax, Ambawadi, GST Bhavan, Ahmedabad, wherein it is contended that-

- I. The adjudicating authority while issuing SCN on 09.01.2018 has taken grounds other than those SCN issued previously in OIO dated 29.11.2016 viz. claim is time barred, non submission of GAR challan, non reversal of cenvat credit and unjust enrichment. New SCN dated 09.01.2018 is baseless and has travelled beyond original ground of SCN issued in OIO dated 30.11.2016. Impugned OIO 1927/AC/17-18/Refund dated 28.02.2018 is ultra virus therefore required to be quashed.
- II. Adjudicating authority considered time limit of one year from date of payment of service tax by prospective buyers and considered claim as time barred under 11B.
- III. BU permission was received on 19.05.2015. The Appellant paid service tax on entire out standing amount of said prospective buyers from their own pocket. Prospective buyers cancelled booking during October 2015 to March 2016. Amount received from prospective buyers were refunded to them on 15.10.2015. Relevant date under 11B from which refund is due should be from date of cancellation.



IV. In this case since there is no service receiver as amount is refunded back to prospective customers, the service rendered is in nature of self service. Appellant relied upon the decision in the case of UOI Vs Chit Fund Association [(2014) 42 taxman.com 52(SC)].

6. Personal hearing in the case was granted on 13.06.2018. Shree Priyanka Amin, CA, appeared before me and reiterated the grounds of appeal. She further stated that Hon`ble CESTAT had decided the issue in party`s favour in case of M/s JBR Nirman Pvt., Ahmedabad vide order No. A/13477-13478/2017 dated 16.11.2017. She submitted the copy of said CESTAT order dated 16.11.2017.

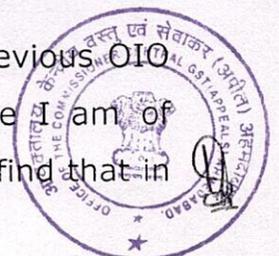
DISUSSION AND FINDINGS

7. *I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the all five appellants at the time of personal hearing. I find that adjudicating authority has not rejected the claim on merit. Three grounds taken to reject the claim are that-*

- a. the claim is time barred and
- b. appellant had not furnished any particulars showing that they have paid the service tax on "out standing" amount, which was to be received from prospective buyers (either old prospective buyer or new buyers)
- c. appellant had not reversed CENVAT credit u/r 6(3) on flats/shop becoming exempted or non-taxable.

8. Adjudicating authority has observed that service tax was paid during the period October-13 to September-14 for which refund is filed on 06.09.2016, i.e. after one year of payment of tax, therefore rejected the claim under 11B. Appellant contention is that Relevant date under 11B is date from which refund is due i.e. it should be from date of cancellation and that the claim is filed within one year of date of cancellation therefore it is not time barred. I find that Appellant had refunded Rs. 40,00,750/- (including service tax of Rs. 1,43,044/-) during October-2015 to March-2016 to their customers and claim was filed on 06.09.2016.

9. Now I shall dwell on time bar issue under Section 11B. In previous OIO dated 29.11.2016, time bar matter is not discussed therefore I am of considered view that time bar matter was not the issue earlier. I find that in



new SCN time barred issue was raised, therefore impugned OIO is travelling beyond SCN dated 18.11.2016.

10. I find that in case of construction of commercial complex service, service tax is required to be paid on amount received from prospective buyers towards the booking of complex before issue of completion certificate by the competent authority and this process goes on years, as has happened in the instance case, and booking/dealings can be cancelled at any point of time before taking possession of complex by him and therefore, I find that no service at all has been provided the relevant date of one year and date of payment as per Section 11B of Central Excise Act 1944 can not be made applicable in the instance case. I further find that since there is no contingency prescribed in this type of cases, the applicant can not be put to loss for want of such contingency.

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

12. I further find that Hon`ble Delhi High Court in the case of Suresh Kumar Bansal versus UOI [2016 (43) STR. 3 (Del)] has set aside the levy of service tax on construction of Complex Service.

13. I further find that Hon`ble Tribunal, Ahmedabad, in case of C.C.E. & S.T., Bhavnagar Versu Madhvi Procorn Pvt. Ltd., as reported in 2015 (38) S.T.R. 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]

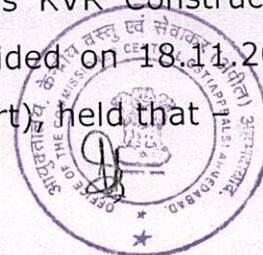
14. I further find that Hon`ble High Court of Madras, in case of Natraj and Venkat Associates Versus Asst. Commissioner, CF, S. T. , Chennai-II in Writ Petition No. 15357 of 2009, decided on 20.10.2009 as reported in 2010 (17) S.T.R. 3 (Mad.)/2010- TIOL-67-HC-MAD-ST held that-

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]

15. I further find that the above said has been relied upon in various subsequent case laws viz. 2012 (26) STR 195 (Karnataka High Court), 2012 (27) STR 281 (Tribunal Bangalore), 2012 (28) STR 562 (Bombay High Court), 2015 (39) STR 706 (Kerala High Court), 2017(48)STR 286 (Tribunal Delhi) etc.

16. I further find that Hon`ble High Court of Karnataka has, in the case of Commissioner of C. Ex. (Appeals), Bangalore Versus KVR Construction, in Writ Appeal Nos. 2992-2993 of 2009 (T-TAR), decided on 18.11.2010, as reported in 2012 (260 STR 195 (Karnataka High Court), held that



Refund - Limitation - Service tax paid mistakenly on Construction services - Department not disputing that it was not payable due to exemption notification, and that it was not passed on - Refund filed under Form 'R' prescribed for refund claims - *HELD* : Department did not have legal authority to collect Service tax, and if they did, it could be challenged as unconstitutional - Mere payment of amount could not authorize Department to regularize/validate and retain it - Department's plea that filing of claim under Form-R indicated that assessee intended to claim refund of duty and they could not later claim that it was not duty, rejected - In that view, refund could not be rejected on ground of limitation under Section 11B of Central Excise Act, 1944. [paras 18, 19, 23]

Writ jurisdiction - Alternative remedy - Refund of Service tax paid mistakenly - First Appellate Authority rejecting refund as time-barred - High Court finding that Section 11B of Central Excise Act, 1944 was not applicable - In that view, even Section 35B(1)(b) *ibid* was inapplicable - Writ petition against order of First Appellate Authority could not be rejected on ground of alternative remedy - Article 226 of Constitution of India. [para 25]

17. I further find that Hon`ble High Court of Gujarat has, in the case of Addition Advertisement Versus UOI, as reported in 1998 (98) ELT. 14 (Guj.) has held that if there is no service, there is no tax.

18. Therefore, I find that once the booking is cancelled and the 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 refund, following the various laws cited above.

19. Proportional Reversal of cenvat credit U/R 6(3) of CER, 2004, on flats/shops becoming exempted or non-taxable in wake of receipt of BU permission was not the issue in first SCN as contended by appellant. Adjudicating authority was required to issue fresh order on the basis of original SCN only. Therefore non reversal of cenvat credit U/R 6(3) can not be taken as guard for rejecting the claim.

20. Having allowed refund on time limitation issue and cenvat credit reversal U/R 6(3) issue , now I shall dwell on remaining issue of non submission of duty payment documents of said "out standing" amount. I am of considered view that parson claiming refund needs to substantiate by documentary evidence in terms of section 11B (1), that the duty claim as refund has been paid earlier. Para 11B(1) is reproduced as below



"(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) **as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :**"

21. In view of above discussion and findings, I remand the case back to original adjudicating authority for limited purpose of verifying of duty paying document. Needless to say appellant may be afforded personal hearing to produce the duty paying document and to contest their stand.

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

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

उमा शंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

R.R. Patel
(R.R. PATEL)

SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD



To,

M/s. Vitthal Enterprise,
Vitthal Plaza, Survey No. 539,
Near Vraj Bhumi, Opp. GEB,
Naroda- Dahegam Road,
New Naroda, Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner Central Tax, GST North,,Ahmedabad-.
- 3) The Additional Commissioner, Central Tax , GST North, Ahmedabad
- 4) The Asst. Commissioner, CGST Div-I (Naroda),Jivabhai Mention. Ashram Road, Ahmedabad-North
- 5) The Asst. Commissioner(System), GST North, Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

