# 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 **टेलेफैक्स** : 079 - 26305136

क फाइल संख्या : File No : **V2(ST)12/North/Appeals/2019-20** / 12471 To 12475

ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-002-APP- 82 -19-20**

दिनाँक Date : **23/09/2019** जारी करने की तारीख Date of Issue 27/09/2019

**श्री गोपी नाथ**, आयुक्त (अपील) द्वारा पारित
Passed by **Shri Gopi Nath** Commissioner (Appeals)

ग Arising out of Order-in-Original No. **GST/D-VI/O&A/10/Optart/AC/NK/2018-19** Dated **28/02/2019** Issued by **Assistant Commissioner** , Central GST , Div-VI , Ahmedabad North.

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

## M/s Optart Electronic Pvt. Ltd

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 :-

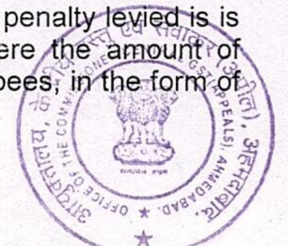
वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 विरूद्ध 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 वहां 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 वहां 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 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 **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 शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।**

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.

<u>रजिस्टर्ड डाक ए.डी. द्वारा</u> दूरभाष : 26305065

ORDER-IN-APPEAL

This appeal has been filed by M/s Optart Electronics Pvt Ltd, 380/2, S.G.Highway Near Sola Overbridge, B/h Valksvagon Show Room, Near New High Court, Ahmedabad [for short-'appellant'] against Order-in-Original No.GST/D-VI/O&A/10/Optart/AC/NK/18-19 dated 28.02.2019 [for short-'impugned order'] passed by the Assistant Commissioner, Division-VI, Ahmedabad North [for short-adjudicating authority].

2. Briefly stated, the facts of the case are that the appellant were engaged in manufacturing and installation of Electronic & Mechanical Weigh Bridges etc. During the course of audit, it was observed that the appellant had charged and collected gross amount including material and installation charges for sale of weigh bridge but not paid service tax on the amount of taxable service on Erection, Commissioning & Installation and Management, Maintenance & Repair service for the period of 01.10.2008 to 31.03.2013; that they neither obtained registration nor filed ST-3 returns. It was also observed that the appellant had engaged in trading activities which is an exempted service; that they failed to maintain separate accounts for input service used in respect of exempted as well as taxable service. As per Rule 6 (3) of Cenvat Credit Rules, the appellant is required to pay 5%/6% of value of exempted service or pay an amount as determined under Rule 6 (3) (A) of CCR, if they failed to maintain separate account. However, they failed to follow the procedure under Rule 6(3) of CCR. Accordingly, a show cause notice dated 21.04.2014 was issued to the appellant for recovery of service tax amounting to [i] amount of Rs.34,91,411/- for Errection, Commissioning or Installation service; [ii] Rs.1,44,325/- for Management, maintenance or Repair Service; and [ii] Rs.4,92,831/- for payment of service tax as per provisions of Rule 6(3) of CCR in respect of common input services used for manufacturing and trading activities. The adjudicating authority, vide impugned order, has confirmed all the demands with interest and imposed penalty equal to the service tax amount confirmed.

3. Aggrieved, the appellant has filed the instant appeal on the grounds that:

- The ownership of goods and the property in the goods remained with us, as seller, till the delivery of the goods in acceptable condition to our purchaser; the appellant as a seller, has born the risk of loss of or damage to the goods during transit to the destination and charges for installation were an integral part of their price of goods manufactured and sold with installation thereof. Hence there is no service tax on such activities.
- The appellant has not collected any extra amount for installation of weigh bridge manufactured/installed; that they carried exclusive manufacture/supply/installation of weighbridges to the site of customer and the transaction in question were contracts of manufacture and sale and not errection, commissioning and installation as contended by the department.

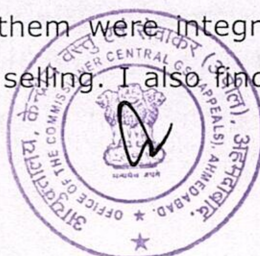
- Benefit of exemption notification 12/2003-ST was also denied by the adjudicating authority which is not correct as per judicial discipline in case of Allengers Medical System P Ltd (2012-277-ELT-183-Tr Del) and other various decisions including Commissioner (Appeals) decision vide OIA No.AHM-SVTAX-000-APP-011-14-15 dated 21.04.2014.
- The service tax demanded in respect of "Management, Repair and Maintenance "during the relevant period is less than the basic exemption limit and they are not liable to pay service tax.
- The appellant has not availed any credit related to exempted service; hence question reversal of Cenvat credit under Rule 6(3) of CCR does not arise.

4. Hearing in the matter was held on 20.08.2019. Ms Bhagyashree Bhatt, Chartered Accountant appeared for the same and reiterated the grounds of appeal and also submitted synopsis of the case dated 20.08.2019.

5. I have gone through the facts of the case, the grounds of appeal and the submissions made in the appeal memorandum as well as during the course of personal hearing. I find that the issue to be decided is whether the adjudicating authority was correct in confirming the demand along with interest, and penalty in respect of [a] "Errection, Commissioning and Installation" service; [b] "Management, maintenance or Repair service; and [c] reversal of Cenvat credit under Rule 6(3) of CCR.

6. As regards service tax amounting to Rs.34,91,411/- confirmed in respect of "Errection, Commissioning and Installation" service, I find that the adjudicating authority has taken a view that the appellant has issued bills/invoices and recovered gross amount which were inclusive of said service and no service tax was discharged on such income received from sales and installation of electronic/mechanical weigh bridges; that since they did not specifically bifurcated the value of goods sold and taxable value of said service, they are liable to pay service tax on gross value. On other hand, the appellant has contended that they manufactured and sold the goods in question and received consideration which includes installation charges and transportation charges; that since all such considerations were part of transaction value and subjected to central excise duty, service tax cannot be charged.

6.1. I observe that the appellant engaged in the manufacture of electronic/mechanical weigh bridge and weigh bridge scale and they also carried out installation work of said goods manufactured and sold by them. From the documents submitted by the appellant, I find that they were not recovering any installation charges of said goods separately which is not disputed by the adjudicating authority. In other words, as contended by the appellant, the installation of goods manufactured and sold by them were integrally related and connected with the activity of manufacturing and selling. I also find that they were



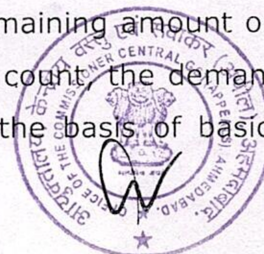
also filing SSI declaration under notification No.08/2003-CE dated 01.03.2003 before Central Excise Department, as a manufacture of excisable goods i.e weigh bridge and weigh bridge scale etc, by declaring total turnover of excisable goods manufactured by them. I find that the entire value received by way of manufacture and sale of goods (which includes installation charges) was taken by them for declaring total transaction value to determine the benefit under the said notification. In the circumstances, I do not find any merit in the contention of the adjudicating authority relating to demand of service tax separately on "Errection, Commissioning and installation charges".

6.2 The appellant has relied on Hon'ble Tribunal, Delhi's decision in case of M/s Allengers [2012(277) ELT 183] and Commissioner (Appeals) decision, in similar issue, in case of M/s Eagle Scale manufacturing works [OIA No.AHM-SVTAX-000-APP-011-14-15 dated 21.04.2014]. The Hon'ble Tribunal has been held that;

> *"the appellants manufactured and hold the medical equipment. It is revealed from the record that the activity of installation, erection and commissioning are incidental to delivery of goods to the customers. Therefore, there is no reason for levy of service tax on the installation and commissioning of medical equipment".*

6.3 In view of above discussion, a nd by following above decision of Hon'ble Tribunal, I also hold that the appellant is not liable to pay service tax on "Errection, Commissioning and Installation" charges received from their buyers.

7. As regards demand of short payment of service tax amounting to Rs.1,44,325/- for Management, maintenance or Repair Service, I find that the adjudicating authority has confirmed the demand on the grounds that the activities of repairing, servicing, maintenance etc of old weigh bridges and weigh bridge scales are covered in the definition of the said service category under Section 64(64) of Finance Act, 1994. The appellant has not disputed the liability of service tax of service rendered under the said category. They contended that they were eligible for basic exemption limit under relevant notification No.06/2005-ST dated 01.03.2005 as amended, which provided tax exemption upto Rs.10 lakhs during the relevant period and the service tax demanded is less than the basic exemption limit. Since the appellant was not liable to pay service tax under the category of "Errection, Commissioning and Installation" category, I find merit consideration in the contention of the appellant. Looking into the facts narrated in para 20 of the show cause notice, I find that from the financial year 2008-09 to 2011-12, the taxable value received by the appellant in respect of "Management, Maintenance and Repair Service" is much less than exemption limit prescribed under the notification ibid. Further, during 2012-13 also, they were eligible for SSI exemption value upto Rs.10 lacs and liable for service tax on remaining amount only. Looking into the facts and contention of the appellant on this count, the demand under the said service category needs to be re-quantified on the basis of basic exemption



under notification supra admissible to them. Therefore, I remand this issue to the adjudicating authority to look into the matter afresh for ascertaining the correctness of taxable value during the relevant period as per records and duty to be demanded accordingly.

8. Finally, the demand of Rs.4,92,831/- as per provisions of Rule 6(3) of CCR in respect of common input services used for manufacturing and trading activities. The adjudicating authority has confirmed the demand by holding that the appellant have availed Cenvat credit on taxable as well as exempted service but failed to maintain separate account according to Rule 6(2) of CCR; that since they have not reversed/paid the Cenvat credit an amount in terms of Rule 6(3) of CCR, the adjudicating authority has confirmed the demand with interest and imposed penalty. On the contrary, the appellant has contended that since they have not availed any Cenvat credit in respect of exempted service, the question of reversal does not arise.

9. In the instant case, it is not disputed that the activities of trading carried out by the appellant is falling within the meaning of 'exempted service' as defined under Rule 2(e) of CCR. The only dispute is whether the appellant had availed Cenvat credit on input/input services which were used in relation to both dutiable and exempted activity. It was imperative on the appellant, to either, not take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2), *ibid*. However, in the instant case the appellant argued that they had not taken any credit on exempted service, whereas the department is on other side alleged that the appellant had taken Cenvat credit. I find that Shri Rajesh D Patel, Director of the appellant has admitted in his statement dated 04.04.2014 that the appellant had availed Cenvat credit in respect of trading activity but failed to reverse the amount of the said provisions of Rule 6(3) of CCR. The said statement was never retracted by him. In the circumstances, I do not find any merit in the contention of the appellant. Therefore, the provisions of Rule 6 (3) of CCR clearly attract in appellant's case.

10. I find that in view of amended provisions of Rule 6 (3) of CCR, the Joint Secretary (TRU) has issued a letter no. 334/8/2016-TRU dated 29.2.2016 which states that:

> *(h) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.*
>
> *(i) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.*
>
> *(ii) sub-rule (2) of rule 6 is being amended to provide that a manufacturer, who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider*

*who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.*

*(iii) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products excluding exempted goods or when a provider of output services provides two classes of services, namely exempted services and output services excluding exempted services, Page 33 of 38 then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services, subject to a maximum of the total credit taken or (b) pay an amount as determined under sub-rule (3A).*

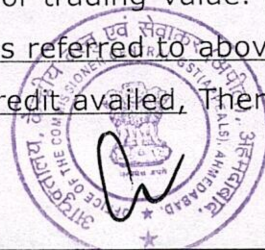
*(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.*

However, this amendment reflects the interpretation and intent of the Government. In-fact Joint Secretary himself states that the rules are *being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.* Even otherwise to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal. Though the above referred amendment has made in a clarification nature and not specified any retrospective effect, the intent of the Government is very clear.

11. Further, I find that there are catenas of decision in the matter that the assessee, even if it had failed to maintain a separate account in view of the retrospective amendment, it was entitled to reverse proportionate Cenvat credit. The Hon'ble High Court of Bombay in the case of CCE V/s IVP Ltd [2017 (349) ELT - 18] in its decision held that:

> *5. The findings essentially are of fact. However, only one question which was projected as a substantial question of law, now appears to be concluded against the Revenue on account of the retrospective amendment and which is incorporated in the Finance Act, 2010. The Finance Act, 2010 makes an amendment of Rule 6 of Cenvat Credit Rules, 2002. The Central Government, in exercise of powers conferred by Section 37 of the Central Excise Act, published a Notification in the Official Gazette dated 1st March, 2002. Rule 6 was amended and is deemed to have been amended retrospectively, in the manner provided in column (3) of the Seventh Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule, against the rule specified in column (2) of that Schedule. The amendment, therefore, enables the dealer to make these adjustments. The respondent-assessee, even if it had failed to maintain a separate account in view of the retrospective amendment, it was entitled to reverse proportionate Cenvat credit. The option of paying an amount equal to 10% sale value of exempted goods, therefore, could not have been enforced on the assessee. That is how consistently even the Tribunals and the High Courts namely, the High Court of Karnataka at Bangalore, the High Court of Judicature at Madras and the High Court of Gujarat at Ahmedabad, have all understood and interpreted this provision. In such circumstances and even while these matters were brought to our notice, a Division Bench in the case of Central Excise Appeal No. 138 of 2005, decided on 17th October, 2016 [2017 (349) E.L.T. 33 (Bom.)] took up the same issue and held that these substantial questions of law would not survive. They would have to be answered against the Revenue and in favour of the assessee. That is how they stand answered even in this matter. The Revenue's appeal is accordingly dismissed.*

12. In the instant case, I observe that the demand for the entire period in dispute was raised on the basis of percentage of trading value. However, looking into the spirit of Board's circular and decision as referred to above, I hold that the Cenvat credit demanded is not more than the credit availed, Therefore, the Cenvat



credit availed on such exempted service is required to be determined. In the circumstances, I feel that this issue is required to be considered by the adjudicating authority for determining the Cenvat credit availed by the appellant on such exempted service, as such, I remand the issue to the adjudicating authority for considering the matter in view of above discussion.

13. In view of above discussion, I hold that the appellant is not liable to pay service tax on "Errection, Commissioning and Installation service. In respect of payment of service on "Management, maintenance or Repair Service" and reversal of Cenvat credit under Rule 6(3) of CCR, I remand the case to the adjudicating authority.

14. The appeal stands disposed of above terms.

(Gopi Nath)
Commissioner (Appeals)
Date : .09.2019

Attested

(Mohanan V.V)
Superintendent (Appeal),
Central Tax,Ahmedabad.

**BY R.P.A.D**

To

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380/2, S.G.Highway Near Sola Overbridge,
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**Copy to:-**

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Principal Commissioner, Central Tax, North.
3. The Asstt. Commissioner, (Systems), CGST, Hq., North
4. The Assistant Commissioner, Division VI, North.
5. Guard file.
6. P.A file.