



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,  
Office of the Commissioner (Appeal),  
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद  
Central GST, Appeal Commissionerate, Ahmedabad  
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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टेलिफैक्स 07926305136



DIN- 20231264SW0000444F4E

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या File No : GAPPL/ADC/GSTD/296 & 304/2023 -APPEAL 19333-39

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-CGST-001-APP-JC- 172 & 173 /2023-24

दिनांक Date : 30.11.2023 जारी करने की तारीख Date of Issue : 08.12.2023

श्री आदेश कुमार जैन संयुक्त आयुक्त (अपील) द्वारा पारित

Passed by Shri Adesh Kumar Jain, Joint Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST/WS07/O&A/OIO-03(GST)/AC-RAG/2022-23 dated 11.11.2022 and Order-in-Original No. CGST/WS07/O&A/OIO-05(GST)/AC-RAG/2022-23 dated 11.11.2022 both issued by The Assistant Commissioner, CGST & CX, Div-VII, Ahmedabad South.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

| Appellant   | Respondents  |
|---|--|
| The Assistant Commissioner, CGST, Division-VII, Ahmedabad South | 1. M/s NCPL Infracon LLP, 801/802, Regency Plaza Anand Nagar Road, Satellite, Ahmedabad-380015<br>2. M/s True Value Infra world LLP,, Opp. Sundarvan, Near ISRO, Satellite, Ahmedabad 380015 |

|       |   |
|-------|---|
| (A)   | इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।<br>Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.  |
| (i)   | National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.  |
| (ii)  | State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017  |
| (iii) | Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.   |
| (B)   | Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.   |
| (i)   | Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying -<br>(i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and<br>(ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed. |
| (ii)  | The Central Goods & Service Tax ( Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.  |
| (C)   | उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> को देख सकते हैं।<br>For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website <a href="http://www.cbic.gov.in">www.cbic.gov.in</a> .   |



**ORDER-IN-APPEAL****Brief Facts of the Case :**

The Assistant Commissioner, CGST, Division VII, Ahmedabad South (hereinafter referred to as the 'Appellant/Department') in terms of Review Order No. 18/2023-24 & 19/2023-24 dated 12.05.2023 issued under Section 107 of the CGST Act, 2017, have filed the present appeals against Order-in-Original No. CGST/WS07/O&A/OIO- 03(GST) & 05(GST)/AC-RAG/2022-23 dated 11.11.2022 (hereinafter referred to as the 'Impugned Orders') passed by the Assistant Commissioner, CGST, Division VII, Ahmedabad South (hereinafter referred to as the 'Adjudicating Authority') in the matter of M/s. NCPL Infracon LLP, 801/802, Regency Plaza, Anand Nagar Road, Satellite, Ahmedabad-380015 and M/s. True Value Infra World LLP, Opposite Sundarvan, Near ISRO, Satellite, Ahmedabad-380015 (hereinafter referred to as the 'Respondent's').

2. Briefly stated the facts of the case is that the 'Respondent's' were registered under erstwhile Service Tax regime for providing "works contract service" i.e. construction of Residential Complex, and holding Service Tax Registration No : AALFN8215HSD001 and AAKFT2017LSD001, they were registered under GST regime and holding Goods and Service Tax Identification Number 24AALFN8215H1Z7 and 24AAKFT2017L1Z5 for supply of taxable service namely "Works Contract Service" i.e. Construction of Residential Complex. During the course of verification of Transitional Credit of Tran-1 return it was observed that in the existing law i.e. in pre-GST era they were engaged in providing Works contact service and paying Service Tax after availing the benefit of abatement as provided under Notification No.26/2012-S.T dated 20.06.2012 as amended, however under the GST Regime the supplier had wrongly carry forwarded input tax credit amounting to Rs 29,64,164/- through TRAN- I in their electronic credit ledger in respect of inputs viz. cement, steel bar, etc held in stock on appointed day and which are contained in their semi finished & finished goods, under the provision of Section 140(3) of the CGST Acts, 2017.

3. In response to said TRAN-1, a SCN's were issued to the appellant stating as to why -

- *The Input Tax Credit of Rs. 31,23,285/- and Rs. 29,64,164/- respectively, wrongly carried forward in table No. 7 of TRAN-1 should not be demanded/recovered under Section 73(1) of the CGST Act, 2017 read with Rule 121 of CGST Rules, 2017;*



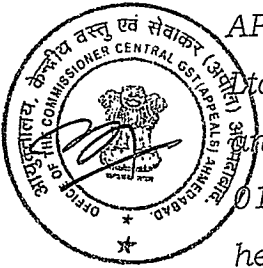
- Interest at applicable rates should not be charged and recovered from them under the provisions Section 50(3) and 50(1) respectively of the CGST Act 2017;
- Penalty should not be imposed upon them under Section 125 of the CGST Act 2017.

4. The adjudicating authority has found that the Respondents have correctly carried forward the ITC of Rs. 31,23,285/- and Rs.29,64,164/- respectively in their TRAN-1. The adjudicating authority has accordingly dropped the proceedings initiated against the Respondents.

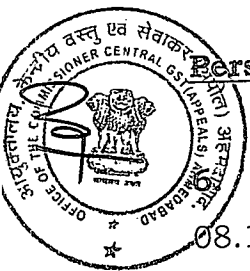
5. During Review of the 'Impugned Order's' dated 11.11.2022 the department has observed that the impugned order's are not legally tenable and proper on the following grounds:

- that the adjudicating authority has simply accepted the contention of the noticee that they have taken the eligible credit of Rs. 31,23,285/- and Rs. 29,64,164/- respectively, taken in table No 7 of TRAN-I and simply accepted the noticee's reliance of OIA No. AK/ADC/GST/522/RGD-APP/2021-22 dt 31.12.2021 in the case of M/s Godrej Greenview Housing Ltd. wherein it was held that credit on inputs TMT bars held in stock and/or used in the under construction building(WIP)as on appointed date of 01.07.2017 is eligible credit under Section 140(3) of CGST Act,2017 and held that the appellant has correctly transited the ITC to the GST regime;

- It appears that the adjudicating authority have not correctly appreciated the Section 140(3) of the CGST Act, 2017;
- The contention of the assessee does not appear to be correct as a building under construction being attached to earth cannot be called "goods" in terms of definition as per Section 2(52) mentioned above and in terms of various case laws under erstwhile Central Excise Act, 1944;
- the condition no. (v) as mentioned in Section 140(3) has also not been fulfilled. It may be noted that the registered person who is eligible for any abatement under this Act (CGST Act) cannot claim the above said Credit on input contained in their finished goods or semi-finished goods. As the said assessee was eligible for abatement under this Act, therefore the assessee was not eligible to take credit on input i.e. finished goods or semi-finished goods;



- that the credit of inputs Cement and TMT Bars are used for construction of buildings which is an immovable property. Therefore, in view of above criteria mentioned in Section 17 of the CGST Act, 2017, the decision of the adjudicating authority that the noticees have correctly availed the transitional credit of Cement and TMT Bars used in the construction of Building, does not appear to be legal and proper;
- the adjudicating authority should have considered the Section 17 of the CGST Act, 2017 which clearly restrict the eligibility of input tax credit in the case of inputs/input services used for construction of an immovable property (other than plant or machinery) and should have confirmed the demand of input tax credit of Rs. 31,23,285/- and Rs.29,64,164/- made in the show cause notice;
- they further pray to set aside the No.WS07/O&A/GST/010- 03 and 05/AC-RAG/2022-23 date 11.11.2022; passed by the Assistant Commissioner, Commissioner, CGST, Div-VII, Ahmedabad South.

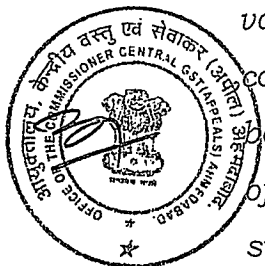


### Personal Hearing:

Personal Hearing in the matter was fixed/held on 25.10.2023, 08.11.2023 and 09.11.2023 wherein Mr. Nitesh Jain, C.A., appeared and stated that as per section 140(3), they are eligible for credit on goods and service held in stock, WIP (i.e. semi finished) and contained in finished. In this regard detailed submission submitted during PH. In view of above requested to dismiss/reject departmental appeal. Accordingly, the Respondent have submitted their reply/submissions dated 08.11.2023 as under –

- At the outset, True Value Infra World LLP submits that while availing transitional credit they have complied with provisions as provided under Section 140(3) of the CGST Act and hence, denies all the allegations as in the appeal made by the department as they are incorrect and unsustainable;
- ITC of Rs. 31,23,285/- and Rs 29,64,164/- respectively, in column 7(a) of TRAN-1 has been claimed under provisions of Section 140 (3) as credit of eligible duties in respect of inputs held in stock as the term defined in Companies Act read with Accounting Standards issued by Institute of Chartered Accountants of India as made applicable to all commercial entities in India including companies;

- It has been contended that a building under construction being attached to earth cannot be called "Goods". May we request to kindly take a note of the ratio decided in case of Larsen & Toubro Limited. Further and alternately, if the view so espoused in the appeal filed that the building has been converted into an immovable property is agreed to then in view of the same judgement of L&T as quoted above, it can be deduced that no Indirect tax including GST can be levied because an immovable property is not taxable under GST.
- It has been contended that we are eligible for abatement under the CGST Act. As already mentioned in Point No. 8 of the above table, there is no abatement eligible under the GST Act on the rate of GST applicable to the output services rendered in case of supply of service, involving transfer of land or undivided share of land, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, and the value of such transfer of land or undivided share of land, in such supply shall be deemed to be one third of the total amount charged for such supply. It is evident that there is no abatement in terms of the rate of GST applicable to the output service rendered and the said notification provides for the method of valuation to be adopted for determination of taxable value. Therefore, the contention taken in by the department holds no ground that abatement has been available due to which the transition credit gets disallowed because of the non-fulfillment of condition (v) of section 140 (3) and is therefore not sustainable.
- Further, we were providing works contract service and was availing the benefit of Notification No. 26/2012-ST. We are fulfilling the condition in our case
- We are providing services for construction of building which is immovable property in nature, in our case property of goods (ready construction) are passed on to the buyer. We construction the building on Land and passed on the ownership of Land as well as constructed unit to the buyer, hence our service is nothing but the works contract service as per definition of Sec 2(119) of CGST Act, 2017. Under GST law there is no distinction with regards to Works contract service or Construction of complex service, both these services are merged into one as the essence of both the services is same.
- One more fact that needs evaluation is that section 140(3) qualifies only those works contract service providers who have availed benefit of abatement notification 26/2012-ST. On reading said notification it can be



witnessed that Work contract service do not feature anywhere therein hence on plain reading the said sentence in section 140 (3) becomes redundant so to say, hence we believe that a constructive and pragmatic interpretation needs to be taken in this regards .

- we had been paying service tax under Sr. No.12 of Notification No. 26/2012-ST. To substantiate the same, kindly refer our ST3 return of Apr Jun-17 which we have already submitted in earlier submission wherein we have paid service tax selecting the said entry under the "Construction of Residential Complex" Hence, based on above discussion and with documentary evidences, we are providing works contract services as per Sec. 2(119) of CGST Act and we have also availed the benefit of Notification No. 26/2012-ST.

- The respondent further relies on the OIA No AK/ADC/GST/522/RGD-APP/2021-22 dated 31.12.2021 passed by the Additional Commissioner, CGST and Central Excise, Raigad (Appeals) in the case of M/s Godrej Greenview Housing Limited, Mumbai.

that the law intend to block the credit of the goods or services or both received for the construction of immovable property on his own account including when used in the course or furtherance of business.

- the ITC pertaining to the goods or services used in the construction of the immovable property should not be restricted by the provisions of Section 17(5), and we are entitled to claim the ITC.

- the law clearly intends to allow the ITC on the goods or services used for the construction of the immovable when the said taxpayer is in the same business line. It is evident from the provision of section 17(2) of the CGST Act, 2017 read with Rule 42 of the CGST Rule, 2017, the said provision provide for the ITC reversal in case the ITC is used for partly taxable supply and partly for exempt supply.

- that the law has included the ITC attributable to input and input services used for construction of the immovable property in the pool of common credit of ITC reversal when supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act. Hence it can be safely concluded that the law has intended to allow the credit of the goods or services used for construction of the immovable property and has not restricted the ITC on the same.



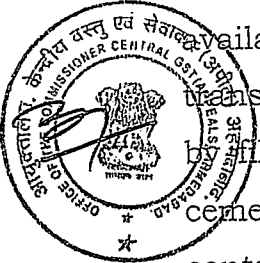
- that interest is not payable since the tax itself is not payable based on the submission given in the preceding paras, hence the demand for the payment of interest should also be set aside.
- that penalty under Section 125 of the Act is not imposable since the tax itself is not payable and the Respondent has not contravened any of the provisions of the Act.
- that the respondent has availed the credit under TRAN-I in accordance with the provision of the GST law and has not contravened any of the provision of law. Therefore, the allegation made by the department in the appeal filed are baseless and not backed by any legal provision hence the said appeal is liable to be set aside.

**Discussion and Findings :**

7. I have carefully gone through the facts of the case, grounds of appeal, submissions made by the 'Respondents' in the Appeals Memorandum's as well as through additional submission's and documents available on record. It is observed that the Respondent's had availed the transitional credit of Total Rs. 31,23,285/- and Rs. 29,64,164/- respectively by filing TRAN-1 in their electronic credit ledger in respect of inputs viz. cement, steel bar, etc held in stock on appointed day and which are contained in their semi-finished and finished goods, under the provision of Section 140(3) of CGST Act, 2017.

8. A Show Cause Notice were issued to the Respondents in this regard. Thereafter, the Adjudicating Authority has passed the impugned order's on 11.11.2022 and drop the proceedings initiated against respondent vide OIO No. CGST/WS07/O&A/OIO-05(GST)/AC-RAG/2022-23 dated 11.11.2022. Accordingly, the appellant/department has preferred the present appeal.

9(i). In this case, the transitional credit of Rs. 31,23,285/- and Rs. 29,64,164/- respectively availed by the 'Respondents' on the inputs contained in semi-finished or finished goods held in stock on the appointed day was held inadmissible and ordered for recovery. It is observed that transitional credit availed by the appellant was held inadmissible under Section 140 (3) of CGST Act, 2017. For better appreciation of facts, I refer to Section 140 (3) of CGST Act, 2017 as under:



**Section 140 (3) of CGST Act, 2017:-**

A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of Notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:-

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act :



9(ii). As the supply of service in relation to construction of residential complex also involves transfer of "land/undivided share of land" which do not attract GST, the value of such land/ undivided share of land shall be deemed to be 1/3rd of the total amount charged for such supply. As such GST on Residential Complex [for which a part or total consideration is received prior to issue of a completion/occupancy certificate or its first occupancy, whichever is earlier], shall be 2/3rd of the total consideration charged for such supply (thus GST payable on a Flat/House/Complex would works out to be 12% of the total consideration inclusive of the value of land/ undivided share of land). As such ITC claimed Rs. 31,23,285/- and Rs. 29,64,164/- respectively on the inputs contained in their finished goods or semi-finished goods (i.e. building under development) held in stock on the appointed day is not found to be admissible as per condition mentioned at above condition (v) of Section 140(3) of the CGST Act,2017.



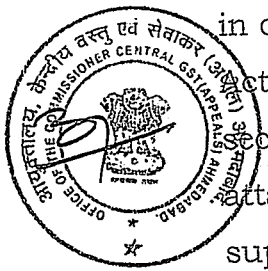
**10(i).** It is seen that in the case of M/s R.B. Construction Company 2019 (23) G.S.T.L. 429 (App. A.A.R.-GST), Appellate Authority For Advance Ruling Under GST, Gujarat, has held as under:-

10.6 Section 2(52) of the CGST Act, 2017 and the GGST Act, 2017 defines the term 'goods' as every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. The work of the appellant falls within the definition of 'works contract' as given under Section 2(119) of the CGST Act, 2017 and the GGST Act, 2017. Therefore, even if the contract of the appellant was on work-in-process stage on the appointed day, the same would not be covered within the terms 'semi-finished or finished goods' as the term 'goods' covers movable property and not immovable property.

**10(ii).** In view thereof, the respondents is not entitled to avail input tax credit in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in the stock under sections 140(3) of the CGST Act, 2017. As per Section 2(59) of the CGST Act, 2017, inputs means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. Whereas as per Section 2(52) of the said Act "Goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.


**11.** I further refer the letter F.No.381/274/2017, dated 27-2-2018 issued by the Directorate General of Audit, New Delhi. The said letter was issued in a case of M/s. ABC wherein it was noticed during the audit that the said assessee has taken transitional credit of inputs (bricks, TMT bars and rods, cement etc) held in stock as on 30-6-2017 as well as on inputs contained in their building under development. The DG (Audit), referring to the provisions of Section 140 (3) of CGST Act, 2017 clarified as under;

*As per Section 2 (59) of the said Act, 'inputs' means any goods other than capital goods used or intended to be used by a supplier in course of furtherance of business. As per Section 2 (52) of the said Act, 'Goods' means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. M/s. ABC referred to Section 140*



(3) of the CGST Act, 2017 and submitted that they availed the credit of Rs.59.24 lakh in Tran 1 against the inputs contained in their finished goods or semi finished goods (i.e. their buildings under development) held in stock on the appointed day. The contention of the assessee does not appear to be correct as a building under construction being attached to earth cannot be called 'goods' in terms of definition as per Section 2(52) mentioned above and in terms of various case laws under erstwhile Central Excise Act, 1944. Therefore it is appears that in the case of building construction, the transitional credit of inputs already used in construction and contained in WIP as on 30-6-2017 is not admissible.

**12(i).** In view of above, the provisions of Section 140(3) of CGST Act, 2017 allows transitional credit of inputs contained in semi-finished and finished goods in stock as on appointed day only to the specified class of persons. However, clarification issued by DG (Audit) categorically rules out transitional credit of inputs already used in construction of building in stock and contained in work in progress as on 30-6-2017 on the ground that such buildings does not fall under the definition of 'goods' given under Section 2(52) of CGST Act, 2017 under which 'goods' is defined to mean only movable property.



Concurrent reading of Section 140(3) of CGST Act, 2017, Section 2(52) of CGST Act, 2017 and clarification issued by DG (Audit) leads that, the term 'goods' given under Section 140 (3) of CGST Act, 2017 means every kind of movable property. Therefore, to qualify for availing transitional credit of eligible duties of input contained in semi-finished or finished 'goods' in terms of Section 140(3), such goods ought to be movable goods. In this case, transitional credit of Rs. 31,23,285/- and Rs. 29,64,164/- respectively were availed on inputs already used in such buildings/ structures and contained in under construction buildings/structures (work-in-progress). Such buildings/structures are undoubtedly immovable goods. Since Section 140(3) read with Section 2(52) allows transitional credit only on inputs used finished/semi-finished goods of movable nature, transitional credit of Rs. 11,96,181/- availed on inputs used in such buildings/structures is not admissible.


**13.** The interest is levied on "ineligible ITC availed and utilized" under Section 50 of CGST Act, 2017. Therefore, interest is leviable in the present case. The respondents are also liable for penalty under Section 125 of CGST

Act, 2017 for contravention of the provisions of Section 140 of CGST Act, 2017. Hence, penalty is also imposable upon the respondents.

14. In view of above discussions, the appeal filed by the 'Department/Appellant' is allowed and the 'impugned order' passed by Adjudicating Authority is set aside.

अपीलकर्ताद्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

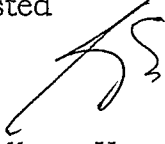
The Appeal filed by 'Department' stand disposed off in above terms.

  
30/11/2023  
(Adesh Kumar Jain)

Joint Commissioner (Appeals)

Date: 30.11.2023

Attested



(Sandheer Kumar)  
Superintendent (Appeals)



By R.P.A.D.

To,

To,

The Assistant / Deputy Commissioner, Appellant  
CGST, Division - VII, Ahmedabad South.

(i) M/s. True Value Infra World LLP,  
Opposite Sundarvan, Near ISRO,  
Satellite, Ahmedabad-380015.

(ii) M/s. NCPL Infracon LLP,  
801/802, Regency Plaza,  
Anand Nagar Road, Satellite,  
Ahmedabad-380015.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Ex., Appeals, Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-South.
4. The Dy./Asstt. Commissioner, CGST, Division-VII, Ahmedabad South.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad.
6. Guard File.
7. P.A. File.

