
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015 टेलीफोन : 079-26305065	 7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015 टेलीफैक्स : 079 - 26305136
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क फाइल संख्या : File No : **V2(ST)0100/A-II/2017-18 / 254-58**
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-230-17-18**
 दिनांक Date : 29.12.2017 जारी करने की तारीख Date of Issue 17/01/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **SD-05/03/DKJ/DC/2017-18** Dated **28.04.2017**
Issued by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Pratik Ads

Ahmedabad

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 :-

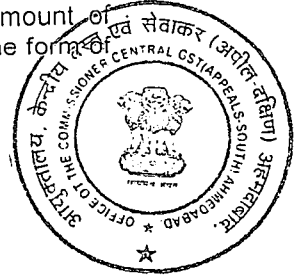
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
 Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी 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 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 फॉर्म 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 A219K 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 न्यायाधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 34 के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 अर्जी 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,

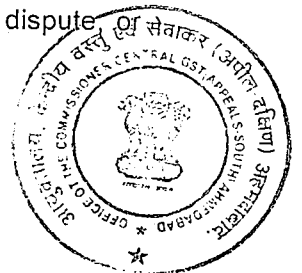
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.



ORDER IN APPEAL

This appeal is filed by M/s. Pratik Ads., 404, Aankanksha, Opp. Vadilal House, Navrangpura, Ahmedabad [for short –‘appellant’] against OIO No. SD-05/03/DKJ/DC/2017-18 dated 28.4.2017, passed by the Deputy Commissioner, Division V, Service Tax Commissionerate Ahmedabad [for short – ‘adjudicating authority’].

2. Briefly, the facts are that a show cause notice no. STC/4-07/HM 4&5/Pratik/03 dated 11.4.2003, was issued to the appellant based on CERA’s audit objection vide HM No. CERA/ST Review/HM No. 5 dated 7.4.2003, wherein it was *inter alia* alleged that the appellant had not paid service tax of Rs. 4,00,748/- in respect of *advertising services* provided to Government agencies; that the appellant had collected an amount of Rs. 3.64 crores for the purpose of getting the advertisements released through electronic media but had not included the said amount while computing the taxable value and had short paid service tax of Rs. 15,50,193/-. The notice therefore, demanded the service tax not paid along with interest and further proposed penalty on the appellant under sections 76, 77 and 78 of the Finance Act, 1994.

3. This notice was adjudicated vide the aforementioned impugned OIO dated 28.4.2017, wherein the adjudicating authority confirmed the demand of Rs. 4,00,748/- along with interest, dropped the demand of Rs. 15,50,193/-, imposed penalty on the appellant under sections 76,77 and 78 of the Finance Act, 1994.

4. The appellant feeling aggrieved has filed this appeal raising the following grounds:

- appellant has specifically submitted that the impugned notice could not be adjudicated after such long delay; that such abnormal delay has the effect of denying proper opportunity of defending their case since records are not available with the appellant;
- that the Hon’ble Tribunal in the case of Prithvi Associates [2006(1) STR 32] had held that the services provided to State/Central Government, amounted to advertisement on which the service tax is required to be paid;
- that Board’s circular in para 11 had held that the expenses incurred for making the space available on rental charges paid for getting such space for advertisement are not includible in the value of taxable service; that since their business activity closed in 2003-04, at this stage they are not having any record relating to expenditure incurred;
- in the present case appellant is under a belief that no service tax was payable when the services were given to the Government;
- that there was a general prevalent practice of not paying service tax in respect of advertisement services rendered to Government;
- that when the demand is not sustainable, the question of interest does not arise;
- that simultaneous penalty cannot be imposed under 76 and 78 of the Finance Act, 1994;
- that penalty cannot be imposed under section 77 as it was during the relevant time since the appellant was registered and was filing his returns.

5. Personal hearing in the matter was fixed on 18.12.2017, but since I was busy in a meeting with the Chief Commissioner, personal hearing could not be held. Shri S. J. Vyas, Advocate, who was present for the personal hearing, had to return as the personal hearing could not be held. However, thereafter vide his letter dated 18.12.2017, received on 20.12.2017, Shri



Vyas, Advocate, requested that the matter may be decided on the basis of grounds of appeal. In the letter he further reiterated his submissions made in the grounds of appeal.

6. I have gone through the facts of the case, the grounds of appeal and the averments made in the letter dated 20.12.2017 by Shri Vyas, Advocate. I find that the appellant has contested the impugned OIO on the grounds that the expenses incurred for making the space available on rental charges paid for getting such space for advertisement are not includible in the value of taxable service; that since their business activity closed in 2003-04, they are not having any record relating to expenditure incurred; that in the present case, they were under a belief that no service tax is payable when the services were given to the Government; that there was a general prevalent practice of not paying service tax in respect of advertisement services rendered to Government.

7. The appellant in his grounds has stated that the issue of taxability is settled by the Hon'ble Tribunal in the case of M/s. Prithvi Associates [2006(1)STR 32]. On going through the judgement, I find that the Hon'ble Tribunal had held as follows:

7. In view of the foregoing, we are of the view that the services rendered by the appellants to various State/Central Government departments amount to advertisements and the appellants are required to pay service tax on the same.

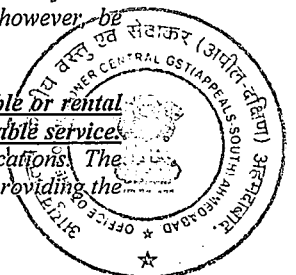
8. It has also been contended before us that the demand of duty is barred by limitation inasmuch as the show cause notice for the period 1997-98 to 2001-2002 was raised on 11-4-2003.

9. However, we find that during the period in question, the appellants admittedly did not disclose the fact of providing services to the State/Central Government departments by undertaking the job of displaying the hoardings on the space hired by them on the buses and did not disclose the value of the such services provided by them and did not file any ST-3 returns. It is also noted that prior to period in question, the appellant was paying tax on the service so provided by them but stopped paying the same thereafter without approaching the department and without seeking any clarification from them. In these circumstances, we are of the view that it has been rightly held by the authorities below that the appellant was guilty of omission or failure on their part with an intention to evade payment of duty and have justifiably invoked the longer period of limitation. The appellants have also drawn our attention to a letter dated 18-11-2004 written by Directorate of Information and Broadcasting, Government of Gujarat, addressed to the appellants. In the said letter an opinion has been expressed that service tax is not applicable to the activity of public awareness advertisement. However, the said letter is of November 2004, and has been issued after the show cause notice was raised against to the appellants. As such, the same cannot be made the basis for the appellant to entertain bona fide reasonable belief that the service being provided by them did not attract any service tax. **In view of the foregoing, we do not find any infirmity in the Revenue's action of invoking longer period of limitation.**

10. The appellants have also contended that it is the entire gross amount charged by them from their client which has been taken into consideration for calculating the amount of service tax. Attention has been drawn to Para 4 of the clarification issued by the Ministry vide its circular referred above. For better appreciation, we re-produce the Para 4 of the said notification.

"It is further to be clarified that in relation to advertising agency, the service tax is to be computed on the gross amount charged by the advertising agency from the client for services in relation to advertisements. This would, no doubt, include the gross amount charged by the agency from the client for making or preparing the advertisement material, irrespective of the fact that the advertising agency directly undertakes the making or preparation of advertisement or gets it done through another person. However, the amount paid, excluding their own commission, by the advertising agency for space and time in getting the advertisement published in the print media (i.e. newspapers, periodicals, etc.) or the electronic media (Doordarshan, private TV channels, AIR, etc.) will not be includible in the value of taxable service for the purpose of levy of service tax. The commission received by the advertising agency would, however, be includible in the value of taxable service."

11. In terms of the above clarification, **the expenses incurred for making the space available or rental charges paid for getting such space for advertisements are not includible in the value of taxable services.** As such, the quantum of tax is required to be re-quantified in terms of the above clarifications. The appellants have also contended that in some of the cases, they were only hiring the space and providing the



same to the Government agencies, who were themselves displaying the boards, etc. on such space. We agree with the ld. Advocate that in such a case, the activity of hiring the space and providing the same to a person, who uses it for advertisements will not meet the definition of advertisement, thus attracting no tax on the same.

[emphasis added]

The aforementioned order of the Tribunal was upheld by the Hon'ble Supreme Court which dismissed the departmental appeal[2015 (40) STR 625 (SC)].

8. As far as the question of non inclusion of expenses is concerned, the law on the subject is clear, that it is not includible. However, for availing the benefit, the appellant has to provided documentary evidence/proof. The adjudicating authority has specifically mentioned in para 18 of his impugned order, that no evidence has been provided. I find that nothing has been provided with the appeal papers except for the contention that since they had closed their business they were not in a position to provide the evidence/documents. Since no evidence is forthcoming, the question of granting relief does not arise. Hence, I am not in a position to grant the relief sought for by the appellant. Thus the confirmation of the demand by the adjudicating authority is therefore upheld.

9. As far as the question of delay in adjudication is concerned, the adjudicating authority has mentioned that the case was placed in call book. Further on going through the judgement of the Hon'ble Supreme Court of India, I find that the verdict in the departmental appeal, was delivered only on 26.8.2015. Thus, the contention raised by the appellant about delay in adjudication does not appear to be tenable, since it was not within the control of the department more so since the departmental appeal was pending before the Hon'ble Supreme Court of India.

10. Now coming to the question of penalty, the appellant has contested that penalty is not imposable in this case. I find that the demand has been made invoking the extended period. Infact, the case contains elements for invoking extended period and therefore as far as penalty under Section 78 is concerned, I uphold the same. As far as penalty imposed under Section 76 of the Finance Act, 1994 is concerned, the appellant has relied upon the case law of Raval Trading Company [2016 (42) STR 210 (Guj.)], wherein the Hon'ble High Court of Gujarat, on the question of simultaneous imposition of penalty under Sections 76 and 78, held as follows:

7. The additional question framed today pertains to simultaneous penalties under Sections 76 and 78 of the Finance Act, 1994. Section 78 of the Finance Act, 1994, provides for penalty where any service tax was not levied or not paid, or having short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of Chapter 5 of the Finance Act or of the Rules made thereunder with the intent to evade payment of service tax. During the period in question, i.e., the period from 9-7-2004 to 31-3-2006, Section 78 of the Finance Act, 1994, did not contain a further proviso, which, as noted above, which added with effect from 16-5-2008. The further proviso reads as under :

"Further provided that if the penalties is payable under this section, the provisions of Section 76 shall not apply."

8. Section 76 of the Finance Act, 1994, pertains to peralty for failure to pay service tax. As it stood at the relevant time this provision provided that any person who is liable to pay service tax in accordance with

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the provisions of Section 68 or the Rules made under Chapter 5, but fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of Section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues or at the rate of one per cent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax. The proviso to Section 76 provided that the total amount of the penalty payable in terms of the said provision shall not exceed fifty per cent of the service tax payable. This Section 76 of the Finance Act, 1994, has been substantially amended with effect from 14-5-2015 to which we would make a reference at later stage.

9. It can thus be seen that at the relevant time Section 78 of the Finance Act, 1994, provided for penalty in cases of tax not being levied or paid, or short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or wilful misstatement, etc., whereas Section 76 covered the cases of non-payment of tax on any ground whatsoever. The penalty that authority could impose under Section 78 is hundred per cent of the amount of the service tax evaded. On the other hand, the penalty under Section 76 which could be imposed is at the fixed amount per day for the entire duration of the failure to deposit the tax which, in any case, would not exceed fifty percent of the service tax payable.

10. The tenor, background and the purpose for which the penalty could be imposed under Section 78 of the Finance Act, 1994, is entirely different than in case of Section 76 of the Finance Act, 1994. However, the language of Section 76 did not specifically exclude the situation; otherwise covered under Section 78 namely non-payment of tax on account of wilful misstatement, fraud or collusion, etc. One plausible argument therefore could be that Section 76 would also cover such situations and permit the department to levy a further penalty for default as envisaged under Section 76 of the Act over and above the penalty imposed under Section 78 of the Finance Act, 1994. In order to clarify this position, a further proviso was introduced in Section 78 making it clear that, if the penalty is payable under Section 78, the provisions of Section 76 shall not apply. In other words, with the introduction of further proviso to Section 78 whenever penalty was imposed under Section 78, no further penalty could be levied under Section 76 of the Finance Act, 1994.

11. In view of the nature of this further proviso and the relevant position of the two statutory provisions both pertaining to penalty, we are convinced that the proviso was in the nature of clarificatory amendment and not creating a liability for the first time. Even without the aid to this further proviso to Section 78, one entire plausible view was that the situation envisaged under Section 76 of the Finance Act, 1994, would exclude those cases covered under Section 78 of the Finance Act, 1994. In other words, Section 76 of the Finance Act, 1994, would cover only the cases of non-payment of service tax which are not related to fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the said Chapter or the rules made thereunder with the intent to evade payment of service tax since legislature had already provided for penalty in Section 78 in such situations. Thus further proviso to Section 78 made it explicit which was till then implicit.

12. Section 76 of the Finance Act, 1994, as is now amended with effect from 14-5-2015 gives further credence to this argument. Section 76(1) as it stands after the said amendment provides that where service tax was not levied or not paid or having been short-levied or short-paid, or erroneously refunded for any reason, other than the reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of Chapter 5 or the rules made thereunder with an intent to evade the payment of service tax, the person liable shall in addition to service tax and interest also be liable to pay penalty not exceeding ten per cent of the amount of such service tax. Thus, by way of this amendment, the statute has ensured that Sections 76 and 78 of the Finance Act, 1994, apply in mutually exclusive areas. In other words, the cases of non-payment of tax by reason of fraud or collusion or wilful misstatement or suppression of facts, etc., would be covered under Section 78 of the Finance Act, 1994, and all cases other than those envisaged under Section 78 would be covered under Section 76 of the Finance Act, 1994.

In view of the foregoing, the penalty imposed on the appellant under Section 76 is set aside.

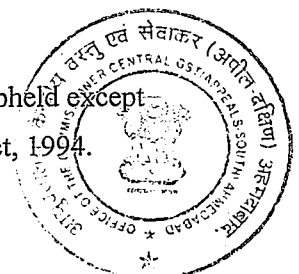
10.1. The appellant has also stated that no penalty is imposable under Section 77 since they were [a] registered with the department and [b] were also filing returns. Section 77 of the Finance Act, 1994, as it stood at the material time, stated as follows:

"77. Penalty for failure to furnish prescribed return – If a person fails to furnish in due time, the return which he is required to furnish under section 70 or the rules made there under, he shall be liable to a penalty which may extend to an amount not exceeding one thousand rupees."

The contention of the appellant has merit. Therefore, the penalty imposed under Section 77 of the Finance Act, 1994 on the appellant, is also set aside.

11. In view of the foregoing, the appeal is partly allowed. The OIO is upheld except for setting aside of the penalty imposed under Sections 76 and 77 of the Finance Act, 1994.

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

उमा शंकर

(उमा शंकर)
आयुक्त (अपील्स)

Date : 29.12.2017

Attested

Vinod Lukose
(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise, Ahmedabad.

By RPAD.

To,
M/s. Pratik Ads.,
404, Aankanksha,
Opp. Vadilal House,
Navrangpura, Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Excise Division-VI, Ahmedabad South.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad South.
5. Guard File.
6. P.A.

