



केंद्रीय कर आयुक्त (अपील)



सत्यमेव जयते

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015, Ambavadi, Ahmedabad-380015

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क फाइल संख्या : File No : **V2(ST)031/A-II/2017-18 / 390-94**
ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-241-17-18**
दिनांक Date : 12-1-2018 जारी करने की तारीख Date of Issue 22/01/18

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No **STC/24/KM/AC/D-111/16-17** Dated **27.02.2017**
Issued by Assistant Commr **STC**, Service Tax, Ahmedabad

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

M/s. JMC Project (India) Ltd.

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 :-

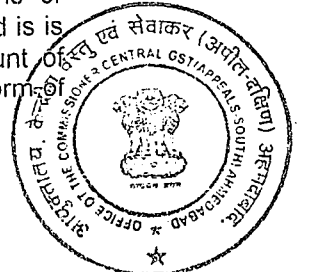
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और 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



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 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 प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1988 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 हैं -

- (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.



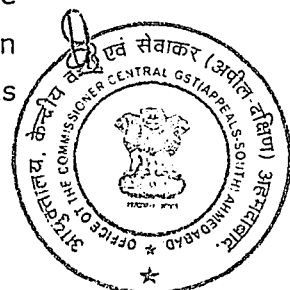
:: ORDER-IN- APPEAL ::

M/s. JMC Projects (India) Pvt. Ltd., A-104, Shapath-4, Opp. Karnavati Club, S. G. Road, Ahmedabad (*hereinafter referred to as 'the appellants'*) have filed the present appeal against Order-in-Original number STC/24/KM/AC/D-III/2016-17 dated 27.02.2017 (*hereinafter referred to as 'impugned order'*) passed by the then Assistant Commissioner, Service Tax, Division-III, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that the appellants were engaged in providing services under the category of 'Consulting Engineer, Erection Commissioning & Installation, Construction Services in respect of Commercial or Industrial Buildings and Civil Structures, Construction of Residential Complex, Transport of Goods by Road, Works Contract Service, Supply of Tangible Goods for use service etc.' and hold valid registration number AAACJ3814EST001. During the course of audit by the CERA team, it was pointed out that according to new Section 71A introduced by the Finance Act, 2003, the service receiver/user of transport operator, has to pay Service Tax for the period from 16.11.1997 to 01.06.1998 and to file return within six months from 14.05.2005.

3. From the books of account of the appellants, it was revealed that the appellants had paid ₹43,50,356/- on account of freight/transportation charges. However, they had not paid Service Tax on it so far. Thus, it was concluded that the appellants had contravened the provisions of Rule 6 of the Service Tax, 1994 read with Section 68 of the Finance Act, 1994 in as much as they had failed to make the deposit of Service Tax to the government exchequer. Therefore, a show cause notice, dated 09.01.2008, was issued to the appellants which was adjudicated by the adjudicating authority vide the impugned order. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax amounting to ₹2,17,518/- under Section 73 of the Finance Act, 1994. He ordered the appellants to pay interest under Section 75 and imposed penalty under Sections 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order the appellant has preferred the present appeal. They argued that the impugned order is a non-speaking one and in violation to the principles of natural justice. They claimed that they are not liable to pay Service Tax despite retrospective amendment in Section 68 and 71A of the Finance Act, 1994. They further claimed that they did not avail abatement of 75% on the taxable value as alleged in the show cause notice. They also argued that the demand is time barred as the period in dispute is from 16.11.1997 to 31.05.1998 and the show cause notice was



issued on 09.01.2008.

5. Personal hearing in both the matters was granted and held on 18.12.2017. Smt. Priyanka Kalwani, Advocate, appeared before me on behalf of the respondents and stated that the demand is time barred as the period in dispute is from 16.11.1997 to 31.05.1998 and the show cause notice was issued on 09.01.2008.

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral and written submissions made by the respondents at the time of personal hearing.

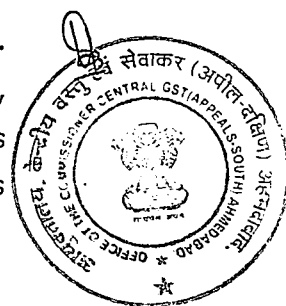
7. The issue involved in the present appeal is demand of Service Tax on Goods Transport Operator service received by the appellants during the period from 16.11.1997 to 01.06.1998. Prior to introduction of Notification No. 41, 42 & 43/97(ST), all dated 05.11.97 only "service provider" was required to pay GTO service tax as per section 68 of FA, 1994. Notification No. 41, 42 & 43/97(ST), all dated 05.11.97 was operative from 16.11.97 to 02.06.98 and recipient of GTO service were made to pay service tax. There was no amendment in act to pay service tax by "recipient of service" but those notifications provided that "recipient of service" to pay tax. Erstwhile law does not provide for payment of GTO Service Tax by GTO service receiver. To cover up defect in law Government vide Finance Bill, 2003-

- a. Inserted Section 71A in FA, 1997 and rule 7A in service tax rules 1994. Section 71A and rule 7A inserted vide Finance Bill, 2003 provided for filing ST-3B returns, for period 16.11.97 to 02.06.98, within six month from 13.05.2003
- b. Inserted proviso in section 68(1) retrospectively for period 16.11.97 to 02.06.98. In newly inserted proviso in section 68(1), it was stated that one who pays freight to GTO is required to pay the service tax (even if he is receiver of service).

Though said defects were covered up by inserting (a) Section 71A, (b) proviso to Section 68(1) and (c) rule 7A in Service Tax Rule, but through oversight, recovery provision in Section 73 for recovery in cases of type (i) 71A GTO returns defaulters and recovery in cases of type (ii) non-payer or short payer of GTO Service Tax, was not amended.

Now, the first question of law is whether in absence of Section 71A (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in recovery Section 73 of the Finance Act, 1994 levy of any short duty or non-levy for period from 16.11.1997 to 01.06.1998 can be demanded or not.

To again remove defect in legislation, Finance Act (No. 2), 2004 w.e.f. 10.09.2004 amended Section 73 to include all offence under Finance Act, 1994 under Section 73. Therefore from 10.09.2004 above defects in cases of type (i) and (ii) were rectified. Now, the second question of law is



whether or not the amended Section 73 vide Finance Act (No. 2), 2004 w.e.f. 10.09.2004 can be used retrospectively so as to recover non-payment of GTO Service Tax for the period from 16.11.1997 to 01.06.1998. I observe that the Finance Act, 2003 introduced a Proviso under sub-section (1) of Section 68 of the Finance Act, 1994 that the liability to pay Service Tax was on the person providing taxable service, and not on the recipient. Simultaneously Section 71A came to be introduced by the Finance Act, 2003 casting the liability on the service recipient to file a return within six months from the date on which the Finance Bill, 2003 receives assent of the President. The third question of law is whether or not the demand is barred by limitation of time.

8. Regarding first question of law, I am of considered view that the section governing the issue of show cause notice, i.e. recovery Section 73 left to be amended Finance Act, 2003. In absence of Section 71A of the Finance Act, 1994 (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in Section 73 of the Finance Act, 1994, no levy of any short duty or non-levy can be demanded. Show cause notices issued under Section 73 to such persons were not maintainable as those persons, though brought under the purview of Section 71A, were still not covered under the recovery Section 73. Class of persons who come under Section 71A were not brought under the net of Section 73. The section still had the language that the show cause notice can be issued if there is default in filing of return only under Section 70 and whereas the recipient of GTO services were to file the return under section 71A. This lacuna was followed by a number of judgments. In the case of L. H. Sugar Factories Ltd. vs. The Commissioner of Central Excise, Meerut-II [2004 (165) E.L.T. 161 (Tri. - Del.)], It was held that L. H. Sugar Factories Ltd. was required to submit the return under Section 71A therefore, show cause notice could not be issued under Section 73 as show cause notice can only be issued in the case of assesseees who are liable to file return under Section 70. I find that this present issue is identical to the issue in CESTAT order number A/11323/2015, dt.14.09.2015 in the case of M/s. Apar Industries Ltd. A show cause notice dated 18.08.2005, was issued to M/s. Apar Industries Ltd. to demand Service Tax on Goods Transport Operator service received by them during the period from 16.11.1997 to 01.06.1998, in terms of the amendment introduced vide Section 158 of the Finance Act, 2003. In the said decision of M/s. Apar Industries Ltd. it was held that till the point of time Section 73 of the Finance Act, 1994 came to be substituted w.e.f. 10-9-2004 provisions of the said section could not be made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. Further, I find that this present issue is also identical to the issue in the case of Eimco Elecon [2010 (20) STR 603 (Guj)]. In Eimco Elecon case, a show cause notice dated 11.11.2004 was



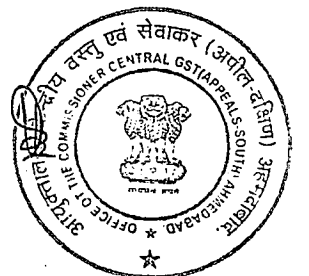
issued, demanding Service Tax for the period from 16.07.1997 to 02.06.1998 of Goods Transport Operator service as per the amendment of the Finance Act, 2003. The Tribunal set aside the demand, and was upheld by Hon'ble High Court. The relevant portion of the said decision is reproduced below:-

"3.It is not in dispute that till Finance Act, 2003 introduced a Proviso under sub-section (1) of Section 68 of the Finance Act, 1994 the liability to pay Service Tax was on the person providing taxable service, and not on the recipient. Simultaneously Section 71A came to be introduced by the Finance Act, 2003 casting the liability on the service recipient to file a return within six months from the date on which the Finance Bill, 2003 receives assent of the President. However, even after this amendment, the Apex Court has noted that in absence of Section 71A of the Finance Act, 1994 (which has retrospectively been introduced w.e.f. 16-7-1997) appearing in Section 73 of the Finance Act, 1994 no levy of any short duty or non-levy could have been demanded."

In view of above I hold that recovery cannot be enforced as there was no provision of recovery in erstwhile Section 73 as stood before its amendment in Finance Act (No. 2), 2004.

9. Now, I proceed to decide second question of law i.e whether or not recovery can be enforced by resorting to amended Section 73 by Finance Act (No. 2), 2004. I find that said amendment in section 73 vide Finance Act (No. 2), 2004 w.e.f. 10.09.2004 which is prospective in nature. Show cause notice, dated 09.01.2008 was issued after the said amendment in Section 73 but for previous period from 16.11.1997 to 01.06.1998 I am of considered view that recovery cannot be enforced by said amendment in Section 73 as it is not of retrospective nature.

10. Now, I proceed to decide third question of law i.e. limitation of time to issue notice. The short issue required to be decided in the present appeal is whether show cause notice issued on 09.01.2008 is within the period of limitation under the Finance Act, 1994 wherein demand has been issued for the period 16.11.1997 to 01.06.1998 as per the retrospective amendment. Rule 7A, which deals with returns of GTO service, was inserted vide Service Tax (amendment) rules 2003 w.e.f. 14.05.2003, according to which, return was also to be furnished for the period from 16.11.1997 to 01.06.1998 within six months from 13.05.2003 (date of assent of Finance Bill 2003 by president), failing which, all the consequences like interest and penalty

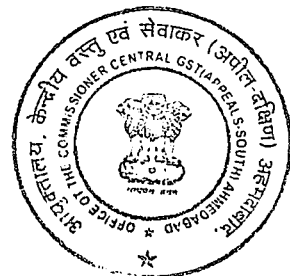


were to be followed. Period of six months ended on 13.11.2003. Show cause notice issued between 13.11.2003 and 12.11.2004, i.e., within one year, is valid in eyes of law. Further, till the point of time, Section 73 of the Finance Act, 1994 came to be substituted with effect from 10.09.2004, provisions of the said section could not be made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. I am of considered view that this show cause notice was issued on 09.01.2008, therefore, it is barred by limitation.

Hon'ble High Court of Gujarat's decision in the case of CCE & Cus, Vadodara-1 vs. Eimco Elecon Limited (supra) on the same issue was that the show cause notice dated 11.11.2004 for the period 16.7.1997 to 02.6.1998 was considered to be time barred. It is observed that Hon'ble High Court of Gujarat had passed the following observation while holding that no short levy can be demanded from the Respondent in that case even after the retrospective amendment was brought into operation by the Revenue as per amendments carried out in Section 68(1) and Section 73 and addition of Section 71A of the Finance Act, 1994. Recipient of GTO services was made liable to file return by Section 71A and Section 73 was amended by Finance (No. 2) Act, 2004 to enable demand of Service Tax from persons falling under section 71A; therefore, such persons could not be asked to pay Service Tax prior to such amendment w.e.f. 10-9-2004 and show cause notice issued under amended Section 73 vide Finance (No. 2) Act, 2004 w.e.f. 10.09.2004 for recovery of period prior to 10.09.2004 was invalid. In the case of CCE, Vadodara-II V/S Welspun Gujarat Stahl Rohren Ltd. [200-TIOL-108-CESTAT-AHM], the Tribunal held regarding time limitation of issuance of show cause notice relating to filing of Return by the recipients of the said service that the show cause notice must be issued within one year from the relevant date which was the 14/11/2003 i.e. date of insertion of Section 71A in Finance Act through budget 2003. The judgment reported in 2010-TIOL-1208-CESTAT-AHM in case of CCE, Vapi vs. M/s. Mutual Industries Ltd. in which the CESTAT again dismissed the appeal of the department. The view taken by the Hon'ble Tribunal was that demand for the period from 16.07.1997 to 15.10.1998 was confirmed on the basis of retrospective amendments in FA, 1994 and Service Tax rules. In such a case, the question of suppression of facts, fraud or collusion does not arise. So, show cause notice issued after one year but within 5 years is no more sustainable. Thus, I hold that the demand issued in the present case is not maintainable as time barred.

11. In the case of L. H. Sugars Limited vs. CCE Meerut-II [2004 (165) E.L.T. 161 (Tri. - Del.)], the observation of the Tribunal is reproduced as below-

"Service Tax - Liability to pay - Person receiving taxable service of goods transport operators is not liable to tax -



Even though these persons are deemed liable to pay tax under Section 69 of Finance Act, 1994 (as amended) as liability to file returns is cast on them only under Section 71A ibid, and not under Section 70 ibid, they are not covered under Section 73 ibid - Liability under Section 73 ibid covers case of assesseees who are liable to file return under Section 70 ibid - Accordingly, they are not liable to pay tax. [paras 6, 7, 8] "

Thus, I find that above decision was upheld by the Hon'ble Supreme Court and it is squarely applicable to the present case.

12. Therefore, in view of the discussion held above, I set aside the impugned order and allow the appeals filed by the appellants.

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

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

उमा शंकर

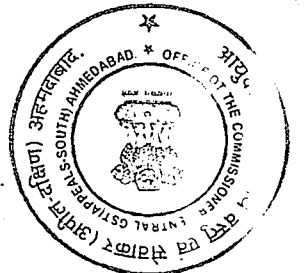
(उमा शंकर)

CENTRAL TAX (Appeals),
AHMEDABAD.

ATTESTED

S. DUTTA
(S. DUTTA) 12/01/18
SUPERINTENDENT,
CENTRAL TAX (APPEALS),
AHMEDABAD.

To,



M/s. JMC Projects (India) Pvt. Ltd.,
A-104, Shapath-4,
Opp. Karnavati Club, S. G. Road,
Ahmedabad- 380 015.

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner, Central Tax, Ahmedabad (South).
- 3) The Dy./Asst. Commissioner, Central Tax, Division-VII (Satellite),
Ahmedabad (South).
- 4) The Asst. Commissioner (System), Central Tax, Hq., Ahmedabad (South).
- 5) Guard File.
- 6) P. A. File.



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