



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7th Floor, GST Building,
Near Polytechnic,

सातवीं मंजिल, पोलिटेक्निक के पास,
आम्बावाडी, अहमदाबाद-380015

Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)1/Ahd-South/2018-19
Stay Appl.No. /2017-18

5259 / 05263

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-024-2018-19
दिनांक Date : 29-06-2018 जारी करने की तारीख Date of Issue

19/7/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 03/AC/Div-I/KN/2017-18 दिनांक: 28.02.2018 issued by
Assistant Commissioner, Div-I, Central Tax, Ahmedabad-South

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

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

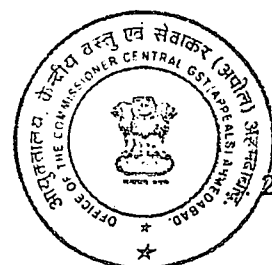
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

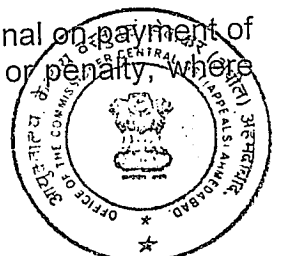
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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 has been filed by M/s. Jyoti Builders, Mangaldas Estate, Satyanarayan Nagar, Amraiwadi, Ahmedabad- 380 060 [for short – “appellant”] against OIO No. 3/AC/Div I/KN/2017-18 dated 28.2.2018 passed by Assistant Commissioner, CGST, Division I, Ahmedabad South Commissionerate [for short – “adjudicating authority”].

2. Based on information, an investigation was conducted against the appellant and it was noticed that though they had provided services under works contract service to M/s. Gujarat State Police Housing Corporation Limited [for short –GSPHC], the appellant had failed to discharge the service tax on the income received against the said services. A show cause notice dated 19.10.2015, was therefore issued to the appellant inter alia demanding service tax of Rs. 19,09,439 along with interest and further proposing penalty on the appellant under sections 77 and 78 of the Finance Act, 1994.

3. This notice was adjudicated vide the aforementioned impugned OIO dated 28.2.2018 wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on the appellant under sections 77 and 78 of the Finance Act, 1994.

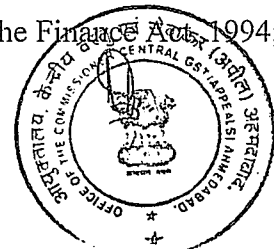
4. Feeling aggrieved, the appellant has filed this appeal on the below mentioned grounds:

- the appellant denies the averments, contentions and allegations made in the order;
- that the relevant documents were furnished to the department and hence suppression cannot be invoked;
- that prior to 1.7.2012, the services provided to GSPHC are in the nature of *non commercial activity* & is excluded from coverage under the taxable category of works contract services;
- that the staff quarters constructed for police are in the nature of personal use as residence and is therefore excluded from the category of works contract services and construction services from 1.7.2012 onwards in terms of notification no. 25/2012-ST dated 20.6.2012;
- that extended period is not invocable;
- that penalty under section 78 and 77 cannot be imposed.

5. Personal hearing in the matter was held on 11.6.2018 wherein Shri Janak Tanna, CA, appeared on behalf of the appellant and reiterated the grounds of appeal.

6. The issue to be decided in this appeal is whether the appellant is liable for service tax in respect of the services provided to GSPHC for the period from 2010-11 to 2014-15 or otherwise.

7. The allegation by the Revenue is that the appellant was providing services relating to construction of police housing quarters, which upto 30.6.2012 would merit classification under works contract service and thereafter the activities would fall under the purview of the definition of service in terms of Section 66B(44) read with section 66D of the Finance Act, 1994;



that the income received from GSPHC was liable for service tax in terms of CBEC circular no. 116/10/2009-ST dated 15.9.2009; that the appellant had failed to produce any documents which would support their claim for exemption.

8. The adjudicating authority in her impugned OIO dated 28.2.2018, relying on the aforementioned circular held that the service provided to GSPHC was not exempted as they are only a Government undertaking and would not fall within the category of government body/authority for which construction services are exempted; that they had failed to provide documentary evidence to prove that the services rendered by them were actually to GSPHC.

9. I find that both the show cause notice and the impugned OIO rely on CBEC's circular no. 116/10/2009-ST dated 15.9.2009, to hold that the service provided by the appellant is liable to service tax. I would therefore, like to quote the circular in its entirety viz.

*Subject :Leviability of Service tax on construction of canals by Government agencies –
Regarding.*

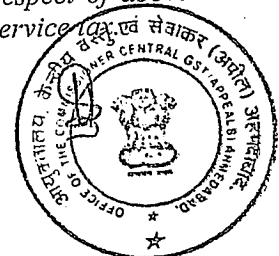
On a reference being received by the Board, two following issues were examined for a clear understanding of facts. The first is regarding leviability of service tax on construction of canals for Government projects.

1. As per Section 65(25b) of the Finance Act, 1994 "commercial or industrial construction service" means —

- (a) construction of a new building or a civil structure or a part thereof; or
- (b) construction of pipeline or conduit; or
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is —
 - (i) used, or to be used, primarily for; or
 - (ii) occupied, or to be occupied, primarily with; or
 - (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

2. Thus the essence of the definition is that the "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

3. The second issue is about Government taking up construction activity of dams, irrigation projects, buildings or infrastructure construction etc. through turnkey or EPC (Engineering Procurement & Construction) mode. The said service is covered under Section 65(105)(zzzza) of Finance Act, 1994. The said section itself excludes works contract in respect of dams, tunnels, canals of irrigation projects, road, airports, railways, transport terminals & bridges executed through such turn-key or EPC mode. Hence works contract in respect of above works even if done through turn-key or EPC mode are exempt from payment of service tax.



10. Since the demand is in respect of construction of police housing quarters, what is relevant from the above circular if at all would be para 3 supra, which only states that works contract by Government, in respect of works viz construction of dams, irrigation projects buildings or infrastructure construction through turnkey or EPC mode are exempt from payment of taxes. Now I do not get the logic as to how this would apply since the adjudicating authority has only stated that GSPHC who had engaged the appellant was not a Government body/authority but a Gujarat Government undertaking.

11. CBEC vide its circular no. 332/16/2010-TRU dated 24.5.2010 has clarified a similar matter, viz.

Subject :Leviability of Service Tax on construction of residential houses by National Building Corporation Limited (NBCC) for Central Government officers - Regarding.

Please refer to your letter No. E.D.(F)/Service Tax/2010, dated 20th May, 2010 seeking clarification on the above subject.

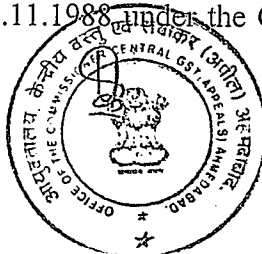
2. The matter has been examined. The activity of building new residential complexes falls within the definition of taxable service, namely, 'Construction of Complexes'. Normally, the type of complex proposed to be built by NBCC falls within the definition of residential complexes. However, as per definition, the residential complex (for Service Tax purposes) does not include a complex which is constructed by a person directly engaging any other person for designing/planning/construction and is intended for personal use as residence by such person. The definition also explains that personal use includes promoting use of such property as residence by another person on rent or even without consideration.

3. As per the information provided in your letter and during discussions, the Ministry of Urban Development (GOI) has directly engaged the NBCC for constructing residential complex for Central Government officers. Further, the residential complexes so built are intended for the personal use of the GOI which includes promoting the use of complex as residence by other persons (i.e. the Government officers or the Ministers). As such the GOI is the service receiver and NBCC is providing services directly to the GOI for its personal use. Therefore, as for the instant arrangement between Ministry of Urban Development and NBCC is concerned, the Service Tax is not leviable. It may, however, be pointed out that if the NBCC, being a party to a direct contract with GOI, engages a sub-contractor for carrying out the whole or part of the construction; then the sub-contractor would be liable to pay Service Tax as in that case, NBCC would be the service receiver and the construction would not be for their personal use.

[emphasis added]

The appellant himself has in his appeal papers contended that they had provided services to GSHPC as a sub contractor and therefore, going by the clarification of the Board, they are liable to discharge service tax. This would hold good for the period upto/prior to 1.7.2012, when the negative tax regime was introduced.

12. Further, the appellants contention that the staff quarters constructed by them for GSPHC are in the nature of personal use as residence by the employees of GSPHC is not a correct argument. As is already stated the services rendered were in respect of construction of police housing quarters. M/s. GSPHC was incorporated on 1.11.1988 under the Companies Act, 1956



with 100% shareholding subscribed by the Gujarat State Government. The main objectives as per the memorandum and articles of association, as listed in their website is as follows:

- To undertake construction of residential, non-residential and all others type of buildings required for Gujarat Police, Jails, Home Guards and for other in the state of Gujarat.
- To engage in the business of builders, contractors, engineers, architects, surveyors, estimators and designers in respects of all type of police buildings, office accommodations, residential buildings, administrative offices etc. including maintenance thereof.
- Introducing innovative ideas for buildings and designs.
- To undertake all kinds of construction & allied works as also welfare activities required for the Gujarat Police and others entrusted by the Government from time to time.
- To carry out the above works departmentally or through approved contractors or both.
- To formulate and various housing schemes for serving and retired employee in the Police Department, Government of Gujarat.

Therefore, the contention that the staff quarters constructed by the appellant for GSPHC are in the nature of personal use as residence, for their employees, is not true. In view of the foregoing, I find that confirmation of the demand for the period upto 1.7.2012 along with interest and equivalent penalty, is upheld.

13. Now I will take up the demand in respect of the period from 1.7.2012 when the negative list regime was introduced. It is the appellant's claim that they are specifically excluded from the coverage and purview of service tax vide mega notification no. 25/2012-ST dated 20.6.2012 under entry 12(f) and 29(h). Now, the entries relied upon is reproduced below for ease of reference:

Exemptions from Service tax — Mega Notifications

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely :-

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) to (e); or

(f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act;

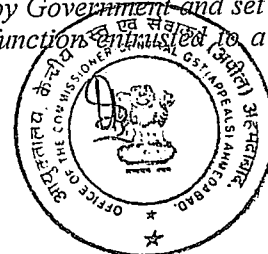
29. Services by the following persons in respective capacities -

(a) to (g); or

(h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;

2. Definitions. - For the purpose of this notification, unless the context otherwise requires, -

(s) "governmental authority" means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;



14. On going through 12(f), 29(h) and the definition of governmental authority, supra, I find that GSHPC falls within the purview of governmental authority and therefore the services provided by the appellant to GSHPC for the period from 1.7.2012 after the introduction of negative list, is not leviable to service tax since they are eligible for the benefit of notification No. 25/2012-ST dated 20.6.2012. Therefore the demand for the period from 1.7.2012 to 2014-15, is set aside.

15. In view of the foregoing, the demand from 2010-11 upto 30.6.2012 is upheld along with interest and equivalent penalty under section 78 of the Finance Act, 1994. The demand for the period from 1.7.2012 to 2014-15, along with interest and penalty imposed for the said period, is set aside. The penalty imposed by the adjudicating authority under section 77 is also upheld.

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

16. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date 29.6.2018

Attested



(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

M/s. Jyoti Builders,
Mangaldas Estate,
Satyanarayan Nagar,
Amraiwadi,
Ahmedabad- 380 060

Copy to:-

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

