



सत्यमेव जयते

आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065 - टेलिफैक्स 07926305136



DIN : 20230164SW000000D13D

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1714/2022 / 253-57
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-130/2022-23
दिनांक Date : 11-01-2023 जारी करने की तारीख Date of Issue 13.01.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. CGST-VI/Ref-12/Aura/AC/DAP/2021-22 दिनांक: 27.01.2022 passed by
Assistant Commissioner, CGST, Division VI, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Aura Business Venture LLP
1st Floor, Akshay Building,
B/H. Vadilal House, 53, Shrimali Society,
Navrangpura, Ahmedabad - 380009

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 :

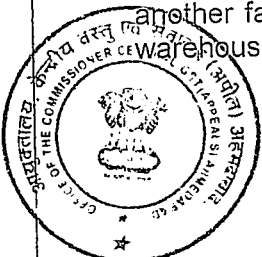
Revision application to Government of India:

(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 सच्चिव, 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 हानिकार खाने 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 प्रकिया 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.



(क) 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।

(A) 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.

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

(B) 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 हों।

(c) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का मुख्य शीर्ष 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 रूपये या उससे कम होतो रूपये 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 सेवा कर 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 को अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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.

15P सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded)-

- a. (Section) खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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.

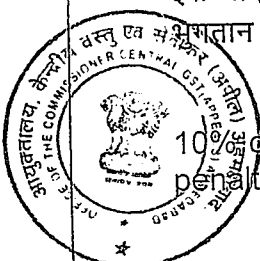
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (cclxxxiii) amount determined under Section 11 D;
(cclxxxiv) amount of erroneous Cenvat Credit taken;
(cclxxxv) amount payable under Rule 6 of the Cenvat Credit Rules.

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

The present appeal has been filed by M/s. Aura Business Venture LLP, 1st Floor, Akshay Building, Behind Vadilal House, 53, Shrimali Society, Navrangpura, Ahmedabad – 380 009 (hereinafter referred to as the “appellant”) against Order in Original No. CGST-VI/Ref-12/Aura/AC/DAP/2021-22 dated 27.01.2022 [hereinafter referred to as “*impugned order*”] passed by the Assistant Commissioner, Division – VI, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

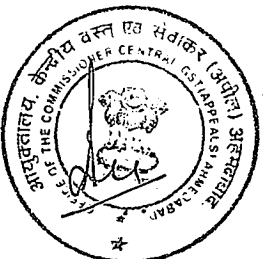
2. Briefly stated, the facts of the case are that the appellant had filed a refund claim for an amount of Rs.21,88,324/- of Service Tax and Rs.30,54,248/- of GST in respect of which services were not provided either wholly or partially. The appellant had submitted that they were service recipient and had booked Villa No. Sapphire – 4, 5 & 6 on 23.01.2017 under Arvind Uplands project of Ahmedabad East Infrastructure LLP (hereinafter referred to as AEIL), who had paid service tax at regular intervals. AEIL had booked income of Rs.7,40,81,550/- and on the said amount, discharged service tax amounting to Rs.21,88,324/- and GST amounting to Rs.30,54,248/-. However, the appellant had received refund of only Rs.7,40,81,550/-. As discrepancies were noticed in the refund claim filed by the appellant, they were issued Show Cause Notice bearing No. CGST/WS06/REF-20/AURA/2021-22 dated 07.12.2021 wherein it was proposed to reject the refund claim in terms of Section 11B of the Central Excise Act, 1944 and Section 54 of the CGST Act, 2017. The SCN was adjudicated vide the impugned order wherein the claim for refund filed by the appellant was rejected.

3. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

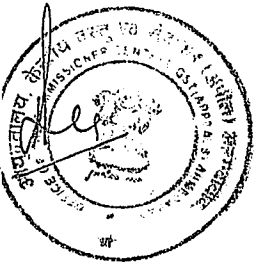
- i. They do not agree with the claim of the adjudicating authority that the refund application is barred by limitation. Rule 6(3) of the Service



- Tax Rules, 1994 provided for adjustment or taking credit of the excess service tax paid in case of cancellation or deficient service.
- ii. With the advent of GST, the adjustment of the amount already paid under the earlier regime was not feasible. In terms of Section 142 (5) of the CGST Act, 2017, refund claim of service tax paid earlier was required to be filed in accordance with the provisions of Service Tax law. Therefore, they had claimed refund on the said lines.
 - iii. The adjudicating authority has failed to appreciate that the present application for refund is made in accordance with Section 142 (3) and 142 (5) of the CGST Act, 2017 according to which these provisions override anything and everything under the erstwhile law except for sub-section (2) of Section 11B of the Central Excise Act, 1944. Therefore, the time limit specified in Section 11B (1) is not applicable under the transitional provisions viz. Section 142 (3) and 142 (5).
 - iv. Time limit to claim refund under Section 11B is only applicable when the amount is a payment of duty/tax/interest. In the present case, the refund application is pertaining to tax paid for which no services were provided. Hence, the tax deposited by the developer would be in the nature of deposit.
 - v. Regarding the bar of unjust enrichment, to prove that the incidence of duty has not been passed on, they submit copy of the ledger account from which it can be seen that AEIL had returned the entire amount received from them except the service tax and GST amount. They also submit copy of Bank Statement of AEIL which shows that the entire amount has been debited from the developer's account except service tax and GST.
 - vi. The judgment in the case of Hot Spot Color Lab Vs. Commissioner, Central Excise – 2019 (28) GSTL 460 MP referred by the adjudicating authority is not applicable in the present case.
 - vii. As no service has been provided, the relevant date of one year from the date of payment as per Section 11B of the Central Excise Act, 1944 cannot be made applicable in the instant case.



- viii. Reliance is placed upon OIA No.AHM-SVTAX-000-APP-023-17-18 dated 29.05.2017 passed by the Commissioner (Appeals), Ahmedabad in the case of Panchratna Corporation, Ahmedabad.
- ix. Similar view was taken in the case of Addition Advertising Vs. UOI – 1998 (98) ELT 14 (Guj.).
- x. Reliance is also placed upon the decision of the Commissioner (Appeals-III), Mumbai vide OIA No. NA/GST/A-III/MUM/84/2020/-21 dated 25.08.2020 in the case of Mr. Haresh V. Kagrana (HUF).
- xi. Reliance is also placed upon the judgment in the case of CH.Ramaraju Vs. Commissioner of C.Ex., Chennai – Final Order No. 941/2005 dated 06.07.2005 and Sarvjeet Kaur Vs. Commissioner of Central Excise, Gurgaon – Final Order No. A/93/2004-NB (SM) dated 13.01.2004.
- xii. Construction of immovable property is a continuous supply and requires sufficient time to complete the same. The one year time limit is not justifiable in the said case. As the refund application is filed in terms of Rule 6(3) of the Service Tax Rules, 1994, they are not bound to satisfy the conditions of Section 11B of the Central Excise Act, 1944.
- xiii. It is settled position in law that procedural aspect should not take away substantial benefits from the taxpayers. The service tax law did not provided for any restriction on the adjustment of service tax paid on booking and cancelled thereafter, against output service tax liability for subsequent bookings.
- xiv. Reliance is as placed upon the FAQ issued on Banking, Insurance and Stock Broker Section by CBIC wherein at Question No. 71 it has been specifically clarified that any service tax paid before 30.06.2017 for services to be provided but subsequently not provided shall be eligible for refund under Section 142 (5) of the CGST Act, 2017.
- xv. As regards filing of separate application for service tax and GST, it is submitted that filing of manual or online application either for service tax or GST is merely procedural and the adjudicating authority has merely commented and rejected the refund claim for not following certain procedure. However, the adjudicating authority has not commented on the eligibility of the refund claim. Hence, the eligible



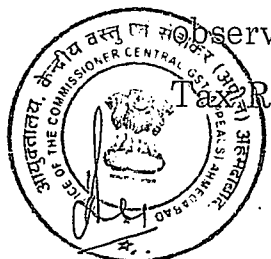
refund of GST be granted and not rejected on account of procedural lapse.

xvi. Regarding the contention that it is not ascertainable whether the claim for refund is inclusive of Service Tax/GST or otherwise, it is submitted that the amount refunded to them by AEIL is exclusive of Service Tax/GST – only the basis amount of transaction has been refunded to them by AEIL. Copies of Ledger of customer, Refund Voucher and Bank Statement of AEIL are submitted.

4. Personal Hearing in the case was held on 05.01.2023. Shri Jitendra Kumar Chopra and Ms. Nancy Shah, Chartered Accountants, appeared on behalf of appellant for the hearing. They reiterated the submissions made in appeal memorandum. They stated that they would submit one case law as part of additional written submission. However, the appellant did not file any additional written submission.

5. I have gone through the facts of the case, submissions made in the Appeal Memorandum as well as submissions made at the time of personal hearing and the material available on records. The issue before me for decision is whether the impugned order rejecting the claim for refund of Rs.52,42,572/-, in the facts and circumstances of the case, is legal and proper or otherwise.

6. It is observed that the appellant have filed a single application claiming refund of service tax amounting to Rs.21,88,324/- and GST amounting to Rs.30,54,248/-. The adjudicating authority has at Para 6 of the impugned order held that the refund claim is not appropriate as the claim for refund of service tax has to be filed manually/offline and the claim for GST has to be filed as per Circular No.125/44/2019-GST dated 18.11.2019. In this regard, it is observed that the refund of service tax are governed by the provisions of Section 11B of the Central Excise Act, 1944 as made applicable vide Section 83 of the Finance Act, 1994. It is further observed that in the present case, the provisions of Rule 6 (3) of the Service Tax Rules, 1994 are applicable to the refund of service tax claimed by the



appellant. In case the person claiming refund is aggrieved by the order of the adjudicating authority, subordinate to the Principal Commissioner or Commissioner of Central Excise, an appeal is to be filed before the Commissioner (Appeals) in terms of Section 85 of the Finance Act, 1994.

6.1 Further, in the case of a claim for refund of GST, the application for refund is to be filed in terms of Section 54 of the CGST Act, 2017. In case the person who has applied for refund is aggrieved by the order of the adjudicating authority, he may file an appeal before the Appellate Authority in terms of Section 107 of the CGST Act, 2017. Further, in terms of Rule 109A (1) (b) of the CGST Rules, 2017, an appeal against any order passed under the CGST Act, 2017 by the Deputy or Assistant Commissioner or Superintendent is to be filed before the Additional Commissioner (Appeals). In the instant case, the appellant has also claimed refund of the GST paid by them and the said refund claim is governed by the provisions of Section 54 of the CGST Act, 2017. The rejection of the claim, for refund of GST, by the adjudicating authority – Assistant Commissioner, is appealable before the Additional Commissioner (Appeals) in terms of Rule 109A (1) (b) of the CGST Rules, 2017 read with Section 107 of the CGST Act, 2017. Therefore, the appeal filed by the appellant insofar as it pertains to rejection of the claim for refund of GST has been wrongly filed before this authority.

6.2 However, in the interest of justice, I am of the considered view that the matter is required to be remanded back to the adjudicating authority for passing separate order in respect of the claim for refund of GST to enable the appellant to file proper appeal before the appropriate Appellate Authority in terms of Rule 109A (1) (b) of the CGST Rules, 2017 read with Section 107 of the CGST Act, 2017. Consequently, without going into the merits of the refund claim, the impugned order, to the extent it pertains to the claim for refund of GST, is set aside and remanded back to the adjudicating authority for denovo adjudication. The appellant are directed to file their submissions before the adjudicating authority within 15 days



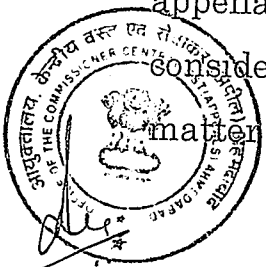
from the receipt of this order and appear before the adjudicating authority as and when called for a personal hearing.

7. Regarding rejection of the claim for refund of service tax, it is observed that the appellant was called for a personal hearing by the adjudicating authority on three different dates viz. 29.12.2021, 07.01.2022 and 17.01.2022. However, neither the appellant appeared before the adjudicating nor did they file any defense reply.

7.1 In terms of Section 33A (1) of the Central Excise Act, 1944, the adjudicating authority shall give an opportunity of being heard. In terms of sub-section (2) of Section 33A, the adjudicating authority may adjourn the case, if sufficient cause is shown. In terms of the proviso to Section 33A (2), no adjournment shall be granted more than three times. I find that in the instant case, three adjournments as contemplated in Section 33A of the Central Excise Act, 1944 have not been granted to the appellant. I find it relevant to refer to the judgment of the Hon 'ble High Court of Gujarat in the case of Regent Overseas Pvt Ltd. Vs. UOI – 2017(6) GSTL 15(Guj) wherein it was held that :

“12. Another aspect of the matter is that by the notice for personal hearing three dates have been fixed and absence of the petitioners on those three dates appears to have been considered as grant of three adjournments as contemplated under the proviso to sub-section (2) of Section 33A of the Act. In this regard it may be noted that sub-section (2) of Section 33A of the Act provides for grant of not more than three adjournments, which would envisage four dates of personal hearing and not three dates, as mentioned in the notice for personal hearing. Therefore, even if by virtue of the dates stated in the notice for personal hearing it were assumed that adjournments were granted, it would amount to grant of two adjournments and not three adjournments, as grant of three adjournments would mean, in all four dates of personal hearing.”

7.2 It is further observed that the appellant have made submissions in their appeal memorandum, which were not made before the adjudicating authority. Therefore, while passing the impugned order, the adjudicating authority did not have the opportunity of considering the submissions of the appellant before arriving at a conclusion. In view of the above, I am of the considered view that in the interest of the principles of natural justice, the matter is required to be remanded back for denovo adjudication. The



appellant are directed to file their submissions before the adjudicating authority within 15 days from the receipt of this order and appear before the adjudicating authority as and when called for a personal hearing.

8. In view of the above, the impugned order is set aside and remanded back to the adjudicating authority for adjudication afresh in terms of the directions contained in Para 6.2 and 7.2 above.

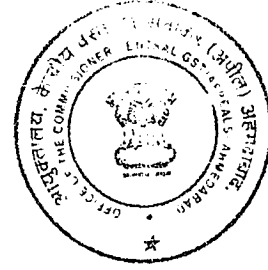
9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

Akhilesh Kumar
(Akhilesh Kumar) 11.01.2023
Commissioner (Appeals)
Date: 11.01.2023.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.



BY RPAD / SPEED POST

To

M/s. Aura Business Venture LLP,
1st Floor, Akshay Building,
Behind Vadilal House,
53, Shrimali Society,
Navrangpura,
Ahmedabad – 380 009

Appellant

The Assistant Commissioner,
CGST, Division- VI,
Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.
(for uploading the OIA)
- ✓ 4. Guard File.
5. P.A. File.