



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 : 20230264SW000000CB2D

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/2515/2022 / ६६०३-०७
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-154/2022-23
दिनांक Date : 07-02-2023 जारी करने की तारीख Date of Issue 21.02.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. 37/WS08/AC/HKB/2022-23 दिनांक: 31.05.2022 passed by Assistant
Commissioner, CGST, TAR Section, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Dalal Shankerji Jepaji
7B, Akhilesh Society,
Nr. Mona Park, Jivraj Park,
Vejalpur Road, 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 :

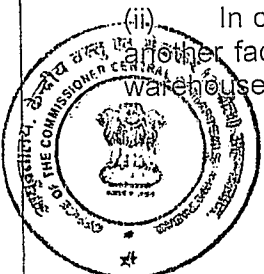
Revision application to Government of India:

(i) 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 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 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.



- (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 हो।

- (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 रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

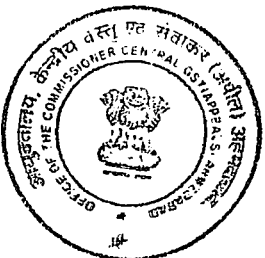
The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं 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 की 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 Appellate 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 अनुसूचि-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.

70 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.

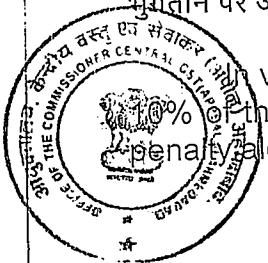
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (xxviii) amount determined under Section 11 D;
(xxix) amount of erroneous Cenvat Credit taken;
(xxx) 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 the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

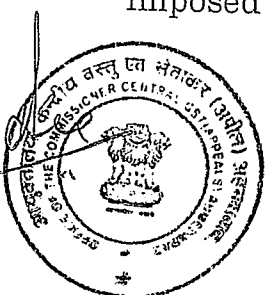
The present appeal has been filed by M/s. Dalal Shankerji Jepaji, 7B, Akhilesh Society, Near Mona Park, Jivraj Park, Vejalpur Road, Ahmedabad (hereinafter referred to as the "appellant") against Order in Original No. 37/WS08/AC/HKB/2022-23 dated 31.05.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, TAR Section, Commissionerate : Ahmedabad South [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case are that the appellant were not registered with the Service Tax department. As per the information received from the Income Tax Department, the appellant had earned substantial income from services amounting to Rs.10,03,724/- during F.Y. 2014-15. However, the respondent did not obtain service tax registration and did not pay service tax on this service income. The appellant was requested vide letters dated 24.07.2020 and 08.09.2020 to submit the documentary evidence in respect of their income. However, they failed to submit the required details/documents. Therefore, the appellant were issued Show Cause Notice bearing No. CGST/Div-VIII/O&A/TPD/257/AGMP5990N/2020-21 dated 21.09.2020 wherein it was proposed to :

A. Demand and recover the service tax amounting to Rs.1,24,060/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.

B. Impose penalty under Sections 77(1), 77(2) and 78 of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned order wherein the demand of service tax amounting to Rs.1,24,060/- was confirmed along with interest. Penalty amounting to Rs.1,24,060/- was imposed under Section 78 of the Finance Act, 1994. Penalty amounting to Rs.10,000/- each was imposed under Section 77 (1) and 77(2) of the Finance Act, 1994.

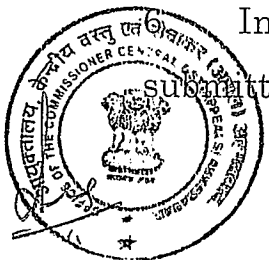


4. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

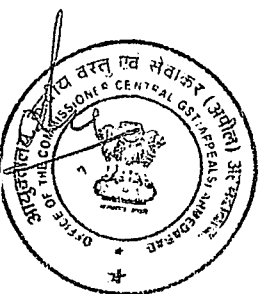
- i. They have not suppressed the value of taxable services received or provided in the situations enumerated in the proviso to Section 73 (1) of the Finance Act, 1994 and, therefore, invocation of extended period of limitation is without jurisdiction and legally untenable.
- ii. The impugned order has been passed contrary to the facts on record due to the very fact that issuance of SCN dated 21.09.2020 is barred by limitation.
- iii. The adjudicating authority has erred in calculating the tax liability on ex-duty basis rather than cum duty basis as provided under Section 67(2) of the Finance Act, 1994 since they have not charged separate amount of tax in the invoices raised by them.
- iv. The service tax liability has been determined on accrual basis contrary to receipt basis as provided in proviso to Rule 6 (1) of the Service Tax Rules, 1994. The service tax liability has been calculated on the basis of amount shown in the ITR for the year under consideration, rather than calculating the same on receipt basis in terms of the said Rule, as they are a Proprietary concern.
- v. Interest on the service tax should not be levied under Section 75 of the Finance Act, 1994.
- vi. When there is no suppression of facts or wilful mis-statement on their part, imposition of penalty under Section 78 is unwarranted.
- vii. Penalty under Section 77 of the Finance Act, 1994 should not be imposed.

5. Personal Hearing in the case was held on 05.01.2023. Shri Bhavik D. Khandeliya, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum and in supplementary paper book submitted on 03.01.2023.

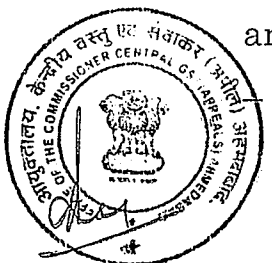
In the supplementary paper book filed on 03.01.2023, the appellant submitted, inter-alia, that :



- From the provisions of Section 73 (1) of the Finance Act, 1994 it is clear that for the purpose of issuance of show cause notice, there must be non-levy, or non payment or short levy or short payment or erroneous refund. Merely because there is a difference between the receipts as shown in Form 26AS and/or in ITR when compared to service tax returns, the difference *ipso facto* does not lead to non levy or short levy or non payment or short payment.
- The adjudicating authority has erred in law by issuing SCN dated 21.09.2020 beyond the period of limitation as prescribed under Section 73 (1) of the Finance Act, 1994.
- The last date/due date filing return for the period from 01.04.2014 to 30.09.2014 is 25.10.2014 and the five years therefrom comes to on or before 14.11.2019. Similarly the last date/due date for filing return for the period 01.10.2014 to 31.03.2015 is 25.04.2015 and the five years therefrom comes to on or before 25.04.2020. The SCN issued on 21.9.2020 is, therefore, barred by limitation.
- The extension of limitation by the Hon'ble Supreme Court would not apply for issuance of SCN as Chapter V of the Finance Act, 1994 has been omitted and the saving clause as per Section 174 of the CGST Act, 2017 also do not protect the aforesaid extension.
- Reliance is placed upon the judgment in the case of Reliance Industries Ltd. – (2020) 116 Taxmann.com 201 (Gujarat); J.P.Jani, Income Tax Officer, Circle IV, Ward-G, Ahmedabad and Anr. Vs. Induprasad Devshanker Bhatt – (1969) 72 ITR 595 (SC); Sales Tax Officer, Circle-I, Jabalpur Vs. Hanuman Prasad – 1967 AIR SC 565; Kolhapur Canesugar Works Ltd. Vs. UOI – 2000 (119) ELT (SC); Keshavan Madhava Menon Vs. State of Bombay – AIR 1951 SC 128; Thirumalia Chemical Ltd. V. UOI – (2011) 6 SCC 739; Baiju A.A. Vs. State Tax Officer, SGST Department and Anr. – 2020 KLT 1 233; Judgment of Telengana High Court in the case of Sri Sri Engineering Work & Ors. Vs. Dypy. Commissioner & Ors dated 05.07.2022; Maharaja Crane Services Vs. Commissioner of CGST, Chandigarh – Appeal No. ST/60390/2020-Ex (CESTAT Chand.).



- The valuation of service tax has been done on the basis of ex-duty rather than cum-duty irrespective of the fact that they had not collected service tax from their customers.
- Reliance is placed upon the judgment in the case of CCE Vs. Maruti Udyog – 2002 AIR SCW 1039 which was applied in various other judgments.
- Considering cum duty value of receipts, the total receipts excluding service tax liability comes to around Rs.8,93,311/- and service tax liability comes to around Rs.1,10,413/- and invoice value is Rs.10,03,724/-.
- Service tax has been erroneously determined on accrual basis rather than on receipt basis, available to small service providers as per Rule 6 (1) of the Service Tax Rules, 1994. As their gross receipts did not exceed Rs. 50 lakhs in the previous F.Y. 2013-14 and being individual/proprietor, they are squarely covered under the aforesaid rule and, therefore, liability to pay service tax will be on receipt basis.
- Current year receipts are Rs.11,07,607/- which also includes receipts of the previous year and they are not liable to pay service tax on the entire bills/invoices of F.Y. 2014-15 due to non receipt of payment in the current year, as is evident from the Balance Statement of Sundry Debtors.
- Reliance is placed upon the judgment in the case of Commissioner of Service Tax, Ahmedabad Vs. Purni Ad. (P) Ltd. – (2011) 33 STT 230 (Ahmedabad – CESTAT) and Tempest Advertising (P) Ltd. Vs. Commissioner of Central Excise and Customs (2007) 9 STT 168 (Bang. CESTAT).
- As the demand of service tax is erroneous, the consequential levy of interest is requested to be dropped.
- Levy of penalty under Section 78 of the Finance Act, 1994 is not automatic. Element of mens rea is essential for levy of penalty.
- Reliance is placed upon the judgment in the case of Commissioner of Service Tax, Bangalore Vs. Motor World – 2012 (27) STR 225 (Kar.) and Motilal Padampat Sugar Mills Co Ltd. Vs. State of Uttar Pradesh (1979) 118 ITR 326.



7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the additional written submissions filed by the appellant and the materials available on records. The issue before me for decision is whether the impugned order confirming the demand of service tax amounting to Rs.1,24,060/-, in the facts and circumstances of the case, is legal and proper or otherwise. The demand pertains to F.Y. 2014-15.

8. It is observed from the materials available on record that the appellant have, in their submissions made in the course of the appeal contested the confirmation of demand of service tax on various counts. However, it is seen from the impugned order that the appellant had, except for submitting copies of Balance Sheet, P&L Account, Form 26AS and Capital Account of the appellant, not made any submissions before the adjudicating authority. None of the issues raised by the appellant in their appeal memorandum have been made before the adjudicating authority. The adjudicating authority has at Para 21 of the impugned order recorded that "*Here, it is considered that the said Noticee had ample time to throw light on their activity and defend themselves against the service tax liability. However, they have chosen to remain silent and therefore it can be easily considered that they don't deny their service tax liability as demanded vide show cause notice under reference*". Thereafter, the adjudicating authority has proceeded to hold that appellant as liable to pay service tax and, accordingly, confirmed the demand.

8.1 It is further observed that the appellant was called for personal hearing on three different dates by the adjudicating authority, which was not attended by the appellant. Thereafter, the case was adjudicated ex-parte by the adjudicating authority. 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 three adjournments as contemplated in Section 33A of the



Central Excise Act, 1944 were not been granted to the appellant. It is pertinent 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.”

8.2 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 is directed to file their written submissions before the adjudicating authority as well as submit all the relevant documents in support of their claim, within 15 day of the receipt of this order. The adjudicating authority shall consider the submissions as well as the documents submitted by the appellant and decide the case afresh after affording the appellant the opportunity of personal hearing.

9. In view of the above, the impugned order is set aside and the matter remanded back to the adjudicating authority for adjudication afresh in terms of the directions contained in Para 8.2 above. The appeal filed by the appellant is allowed by way of remand.

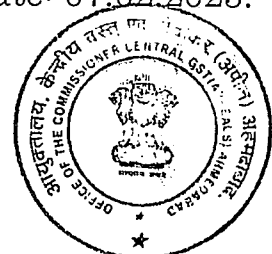
10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

(Signature)
75 February, 2023..
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 07.02.2023.

Attested:

(Signature)
(N.Suryanarayanan. Iyer)
Assistant Commissioner (In situ),
CGST Appeals, Ahmedabad.



BY RPAD / SPEED POST

To

M/s. Dalal Shankerji Jepaji,
7B, Akhilesh Society,
Near Mona Park, Jivraj Park,
Vejalpur Road, Ahmedabad

Appellant

The Assistant Commissioner,
CGST, Division- VIII,
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.

