



सत्यमेव जयते

आयुक्त(अपील)का कार्यालय
Office of the Commissioner (Appeals)

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



DIN : 20230364SW000000C852

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STD/01/2023 / 9881 - 65
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-192/2022-23
दिनांक Date : 24-03-2023 जारी करने की तारीख Date of Issue 27.03.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. CGST-VI/Dem-09/Hotel Kalash/AC/DAP/2022-23 दिनांक: 23.05.2022
passed by Assistant Commissioner, CGST, Division-VI, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. The Assistant Commissioner
CGST Division-VI, Ahmedabad South
3rd Floor, APM Mall, Anand Nagar Road,
Satellite, Ahmedabad - 380015

Resondent

1. M/s Hotel Kalash Residency
202, Vishwa Complex,
Near Navrangpura Bus Stand,
Opposite Navrangpura Jain Derasar,
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 :

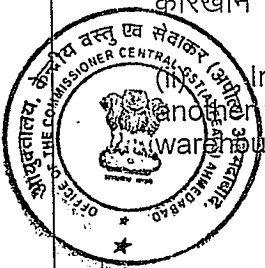
Revision application to Government of India:

(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 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।

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।

(द) 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 अपोल 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.

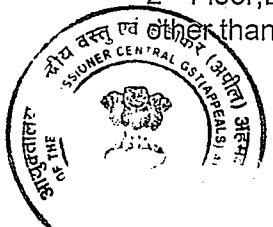
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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 पढ़ी 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.

- 4^प 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.

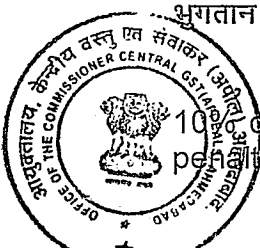
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (xcvii) amount determined under Section 11 D;
(xcviii) amount of erroneous Cenvat Credit taken;
(xcix) 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."

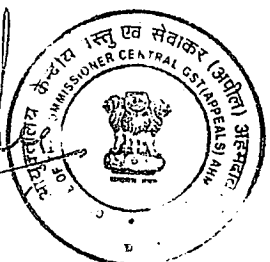


ORDER-IN-APPEAL

The present appeal has been filed by the Assistant Commissioner, CGST, Division-VI, Commissionerate Ahmedabad South (hereinafter referred to as the "appellant"), on the basis of Review Order No. 39/2022-23 dated 22.08.2022 passed by the Principal Commissioner, Central GST, Ahmedabad South Commissionerate in terms of Section 84 (1) of the Finance Act, 1994, against Order in Original No. CGST-VI/Dem-09/Hotel Kalash/AC/DAP/2022-23 dated 23.05.2022 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division-VI, Commissionerate Ahmedabad South [hereinafter referred to as "*adjudicating authority*"] in the case of M/s. Hotel Kalash Residency, 202, Vishwa Complex, Near Navrangpura Bus Stand, Opposite Navrangpura Jain Derasar, Ahmedabad-380 009 [hereinafter referred to as the "respondent"].

2. Briefly stated, the facts of the case are that the respondent were registered with the Service Tax department and holding Registration No. AAGFH1273ASD001. As per the information received from the Income Tax Department, it appeared that the respondent had earned substantial income from services amounting to Rs.1,25,08,401/- during F.Y. 2015-16 but in their ST-3 returns they had declared taxable value amounting to only Rs. 44,95,434/-. Hence, it appeared that the respondent had not paid service tax amounting to Rs. 12,01,945/- on this differential income amounting to Rs. 80,12,967/-. The respondent was requested vide letter dated 14.10.2020 to submit documentary evidence in respect of the income mentioned above. However, the respondent failed to submit the required details/documents. Therefore, the respondent was issued Show Cause Notice bearing No. V/WS06/O&A/SCN-323/2020-21 dated 26.12.2020 wherein it was proposed to :

- A. Demand and recover the service tax amounting to Rs. 12,01,945/- under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994.



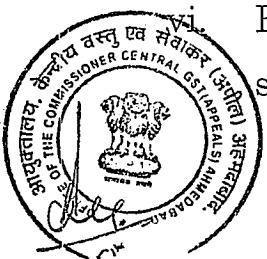
B. Impose penalty under Sections 77(1)(c), 77(2) and 78 of the Finance Act, 1994.

3. The SCN was adjudicated vide the impugned order wherein the demand of service tax amounting to Rs. 2,261/- was confirmed under the proviso to Section 73(1) along with interest under Section 75 of the Finance Act, 1994. Penalty amounting to Rs. 10,000/- was imposed under Section 77(2) of the Finance Act, 1994.

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

- i. The adjudicating authority has erred in dropping the demand of service tax amounting to Rs. 11,99,684/- without recording any findings on the merit of the case.
- ii. No finding has been recorded as to how it has been concluded that the income of Rs. 55,79,135/- is exempted income and how it is covered by Serial No. 18 of Notification No. 25/2012-ST dated 20.06.2012. It only appeared to the adjudicating authority that the said income is covered by the said exemption Notification.
- iii. The adjudicating authority has decided the matter on the basis of what appeared to him and not on the basis of any documentary evidence.
- iv. The adjudicating authority has without verification of required documents like invoice/ledger concluded that the declared tariff of a unit of accommodation is below one thousand rupees per day or equivalent and allowed exemption in terms of the said Notification.
- v. No finding has been given as to how the respondent is eligible for benefit of Notification No. 26/2012-ST dated 20.06.2012 and are liable to pay service tax on sixty per cent of the total taxable value of the income charged for services provided regarding accommodation in hotels, inn, guest house etc.

Exemption under Notification No. 26/2012-ST dated 20.06.2012 is subject to the condition that cenvat credit has not been availed for



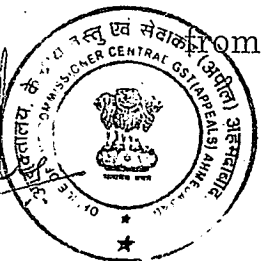
providing the taxable services. No finding has been recorded on fulfilment of conditions of the said Notification.

- vii. The adjudicating authority has at one place found that service tax not paid is liable to be demanded under the proviso to Section 73(1) of the Act. In the very next sentence, he has found that the respondent has voluntarily paid applicable service tax before issuance of SCN, hence, there is no suppression of facts and no penalty is leviable under Section 78(1) of the Act. There is contradiction in the finding of the adjudicating authority.
- viii. The finding is bad in law as for demanding service tax, extended period is invoked and therefore, penalty under Section 78 is mandatory. Reliance is placed upon the judgment in the case of UOI Vs. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC) and UOI Vs. Rajasthan Spinning and Weaving Mills – 2009 (238) ELT 3 (SC).

5. Personal Hearing in the case was held on 03.03.2023. Shri Jayesh Chandala, Chartered Accountant, appeared on behalf of the respondent for the hearing. He submitted copy of the reply submitted by them before the adjudicating authority along with documents as cross-objection. He stated that the demand has been raised because they had not filed the ST-3 returns for October, 2015 to March, 2016. However, they had paid the applicable service tax.

6. In the cross-objection submitted during the course of personal hearing, the respondent have, contended, inter alia, as under :

- The gross value of service provided by them during October, 2015 to March, 2016 was Rs. 80,12,967/- for which no service tax return was filed. Due to which there is a difference in the gross value as per ST-3 returns and ITR.
- They have made payment of service tax amounting to Rs. 1,07,539/- and Rs. 1,18,511/-.
- They submit copies of ITR for F.Y. 2015-16, ST-3 returns for the period from April to September, 2015, Audit Report for F.Y. 2015-16,

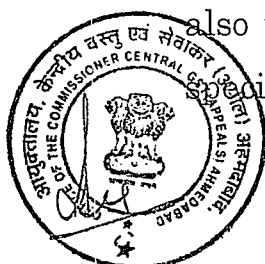


worksheet for calculation of gross turnover and service tax calculation for the period from October, 2015 to March, 2016 and service tax challans.

7. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the cross-objections filed by the respondent and the materials available on records. The issue before me for decision is whether the impugned order passed by the adjudicating authority dropping the demand of service tax amounting to Rs. 11,99,684/-, in the facts and circumstances of the case, is legal and proper. The demand pertains to the period F.Y. 2015-16.

8. I find that the respondent was issued SCN on the basis of the data received from the Income Tax Department and the respondent was called upon to submit documents/details in respect of the service income earned by them. However, the respondent failed to submit the same. Thereafter, the respondent was issued SCN demanding service tax by considering the differential income earned by them as income earned from providing taxable services. The respondent have contended in their cross-objection to the appeal as well before the adjudicating authority that the difference in income reported in the ITR and the ST-3 returns was on account of the fact that they had not filed the ST-3 return for the period from October, 2015 to March, 2016. However, they had paid the service tax for the said period. Considering the submissions of the respondent, the adjudicating authority had allowed the benefit of Notification No. 25/2012-ST dated 20.06.2012 and Notification No. 26/2012-ST dated 20.06.2012 and dropped the demand of service tax amounting to Rs. 11,99,684/-.

8.1 It is observed that the appellant department has filed the present appeal on the grounds that the adjudicating authority has not given any finding as to how the respondent is eligible for exemption under Notification No. 25/2012-ST dated 20.06.2012 and that the adjudicating authority has also not given any finding as to whether the respondent had fulfilled the specified condition of not availing cenvat credit to be eligible for the benefit



of Notification No.26/2012-ST dated 20.06.2012. In this regard, it is observed that the adjudicating authority has at Para 12 of the impugned order recorded that he had gone through the ledgers of income for the period under dispute. It is also observed that the respondent had submitted before the adjudicating authority copy of their ST-3 returns filed for the period from April, 2015 to September, 2015. The respondent have also submitted a copy of the same as part of their cross-objection.

8.2 I have perused the ST-3 returns filed by the respondent for the period from April, 2015 to September, 2105 and find that the respondent had in their returns claimed the benefit of Notification No. 25/2012-ST dated 20.06.2012 and Notification No. 26/2012-ST dated 20.06.2012. From the grounds of appeal filed by the appellant department as well as the materials available on record, it is observed that the department had never raised any objection to the assessment adopted by the respondent by availing the benefit of the said Notifications for the period from April, 2015 to September, 2015. Further, the service tax calculation submitted by the respondent before the adjudicating authority was arrived at by availing the benefit of the said Notification. The adjudicating authority has rightly accepted the contentions of the respondent and allowed the benefit of the said Notifications and also accepted the calculation of the service tax payable by them, with the modification that the respondent was found to have short paid service tax amounting to Rs. 2,261/- on account of non payment of Swachh Bharat Cess. The appellant department have not brought on record any material to indicate that the respondent was not eligible to avail the benefit of the said Notification. Therefore, without bringing on record any evidence, the appellant department cannot challenge the availment of the said Notifications, particularly considering the fact that the benefit of these Notifications availed by the respondent for the previous quarter has not been objected to by the department. Further, the demand has been raised only on account of difference of income observed on reconciliation of income tax data with those of ST-3 returns. It is also undisputed that the respondent had though not filed the ST-3 returns for October, 2015 to March, 2016, they had paid the applicable service tax on



their own assessment before issuance of SCN. Hence, the contention of the appellant department is not legally sustainable.

8.3 As regards the contention of the appellant department that the adjudicating authority has not given any finding as to whether the respondent had fulfilled the condition of Notification No.26/2012-ST dated 20.06.2012 i.e. whether they had not availed cenvat credit, it is observed that the respondent had in their ST-3 returns for the period from April, 2015 to September, 2015 indicated that they have not availed cenvat credit. I have perused the ST-3 returns filed by the respondent for the said period and find that the respondent have not availed any cenvat credit. Therefore, there was no reason for the adjudicating authority to deny the benefit of the said Notification in the absence of any evidence indicating that the respondent had availed cenvat credit. Considering these facts, I am of the considered view that there is no merit in the contentions of the appellant department.

9. The appellant department has also contended that there is a contradiction in the impugned order inasmuch as the adjudicating authority has confirmed the demand under the proviso to Section 73(1) of the Finance Act, 1994 but held that there was no suppression on the part of the respondent and therefore, was not liable for penalty under Section 78(1). It is the contention of the appellant department that once service tax has been demanded by invoking the extended period, imposition of penalty under Section 78 of the Finance Act, 1994 is mandatory. I have considered the contention of the appellant department and find that it is not clear whether the appellant department seeks dropping of the demand of service tax confirmed by the adjudicating authority or imposition of penalty under Section 78 of the Finance Act, 1994. The appellant department has not challenged the finding of the adjudicating authority that there was no suppression of facts on the part of the respondent. The natural corollary is that the demand of service tax confirmed by the adjudicating authority by invoking extended period is not legally sustainable as the same is not as per provisions of law. The appellant department has, without challenging the



finding of the adjudicating authority of there being no suppression of facts, sought imposition of penalty under Section 78 of the Finance Act, 1994. It is an undisputed fact that if there is no suppression of facts, the extended period of limitation cannot be invoked. The confirmation of demand of service tax under the proviso to Section 73(1) of the Finance Act, 1994 is not a subject matter of the present appeal and therefore, the same is not being dealt with. However, considering the fact that the adjudicating authority has clearly held that there was no suppression of facts on the part of the respondent and considering that this has not been challenged by the appellant department, I am of the considered view that the contention of the appellant department regarding imposition of penalty under Section 78(1) of the Finance Act, 1994 is totally devoid of merit and, hence, rejected.

10. In view of the facts discussed hereinabove, I uphold the impugned order and reject the appeal filed by the appellant department.

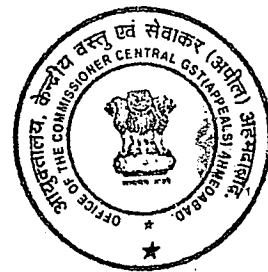
11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

Akhilesh Kumar
24 March, 2023
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 24.03.2023.

Attested:

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



BY RPAD / SPEED POST

To

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

Appellant

M/s. Hotel Kalash Residency,
202, Vishwa Complex,
Near Navrangpura Bus Stand,
Opposite Navrangpura Jain Derasar,
Ahmedabad-380 009

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.



