



सत्यमेव जयते

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

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



DIN : 20221164SW000000D796

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STD/8/2022 / 5183 - 32
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-083/2022-23  
दिनांक Date : 22-11-2022 जारी करने की तारीख Date of Issue 30.11.2022  
आयुक्त (अपील) द्वारा पारित  
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. 02/Ref/RBB/AC/Div-I/2021-22 दिनांक: 15.09.2021 passed by Assistant Commissioner, CGST, Division-I, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

**Appellant**

- The Assistant Commissioner  
CGST, Division I, Ahmedabad South  
Room No. 402, 4<sup>th</sup> Floor, CGST Bhavan,  
Nr. Polytechnic, Ambawadi, Ahmedabad – 380015

**Respondent**

- M/s Jas Infra LLP  
4/C, Archana Industrial Estate,  
Opposite Ajit Mills, Rakhial,  
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, 4<sup>th</sup> 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 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 2<sup>nd</sup> माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.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.

- (58) 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)-

- (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.

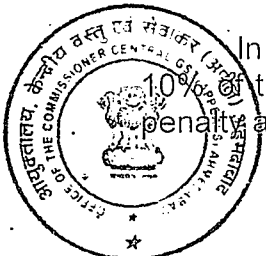
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

- (clx) amount determined under Section 11 D;
- (clxi) amount of erroneous Cenvat Credit taken;
- (clxii) 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 the Assistant Commissioner, CGST, Division-I, Commissionerate- Ahmedabad South (hereinafter referred to as the appellant), on the basis of Review Order No. 41/2021-22 dated 15.12.2021 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. 02/Ref/RBB/AC/Div-I/2021-22 dated 15.09.2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division-I, Commissionerate- Ahmedabad South [hereinafter referred to as "*adjudicating authority*"] in the case of M/s. Jas Infra LLP, 4/C, Archana Industrial Estate, Opposite Ajit Mills, Rakhial, Ahmedabad [hereinafter referred to as the respondent].

2. Briefly stated, the facts of the case is that the respondent were holding Service Tax Excise Registration No. ADFPD4986LST001 and engaged in providing taxable services as defined in Section 66E (b) of the Finance Act, 1994. The respondent had filed a refund claim for an amount of Rs.1,47,12,180/- on the ground that the service tax paid by them had been returned to their clients on account of cancellation of bookings (towards sale of offices/shops in commercial building) and returning of the booking amount to the respective clients. The refund was claimed for the period from August, 2017 to July, 2019 during which the bookings were cancelled. It appeared that the refund claim filed by the respondent was barred by limitation.

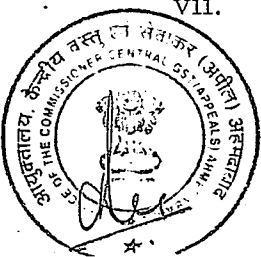
2.1 Therefore, the respondent were issued Show Cause Notice No. V/16-07/Ref/Div-I/19-20 dated 11.12.2019 for rejection of the refund claim. The SCN was adjudicated vide OIO No. 12/Ref/MK/DC/Div-I/19-20 dated 24.01.2020 and the refund claim was rejected. Being aggrieved, the respondent filed an appeal before the Commissioner (Appeals), Ahmedabad, who vide OIA No. AHM-EXCUS-001-APP-89/2020-21 dated 31.03.2021 set aside the OIO dated 24.01.2020 and remanded the matter back to the adjudicating authority. In the denovo proceedings, the case was adjudicated vide the impugned order and refund amounting to Rs.1,08,25,898/- was sanctioned to the respondent while



the refund claim amounting to Rs.38,86,282/- was rejected as the same was not substantiated by the respondent.

3. 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 sanctioning the refund by merely relying upon the order dated 29.06.2017 of the Commissioner (Appeals), Ahmedabad in the case of M/s. Panchratna Corporation, Ahmedabad.
- ii. However, the view of the appellate authority is contrary to law, facts and evidences on record inasmuch as the respondent had made payment of the said amount by GAR Challan under Major Head 0044, which is nothing but service tax.
- iii. The service provider has shown receipts of consideration for providing construction services in the ST-3 returns and accordingly paid service tax on the advances toward construction services which is a continuous supply of service. Therefore, the amount paid by the service provider was not a deposit but service tax.
- iv. The statute does not provide that the liability to pay service tax would arise only after the service is provided, rather it provided that service tax is payable once payment towards the service is received. Therefore, the service tax paid was by the service provider on the amount received from the service recipient and its refund would be governed by Section 11B of the Central Excise Act, 1944.
- v. The service tax was paid between F.Y. 2013-14 to June, 2017 without any protest and the refund claim was filed on 31.10.2019 i.e. after more than three years from the relevant date of payment of service tax. Therefore, the refund claim was hit by limitation as per Section 11B of the Central Excise Act, 1944.
- vi. The decision in the case of C.C.E & S.T, Bhavnagar Vs. Madhvi Procon Pvt. Ltd – 2015(38) STR 74 (Tri.-Ahmd.) has been distinguished in the case of Benzy Tours & Travels Pvt. Ltd. Vs. Commissioner of S.T., Mumbai-I – 2016 (43) STR 625 (Tri.-Mum.).
- vii. The adjudicating authority has failed to appreciate the judgment in the case of Assistant Commissioner of S.T., Chennai Vs. Nataraj and Venkat Associates – 2015 (40) STR 31 (Mad.).



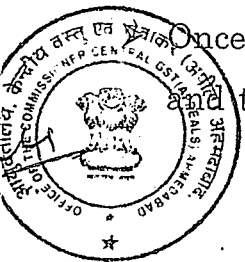
- viii. The adjudicating authority has wrongly placed reliance upon the decision in the case of Commissioner of Central Excise (Appeals), Bangalore Vs. KVR Construction in Writ Appeal No. 2992-2993 of 2009 (T-TAR) decided on 18.11.2010 – 2012 (26) STR 195 (Kar.).
- ix. The adjudicating authority has also relied upon the decision in the case of Addition Advertising Vs. UOI – 1998 (98) ELT 14 (Guj.) which is also not squarely applicable in the instant case.

4. Personal Hearing in the case was held on 22.11.2022. Shri Abhishek Shah, Chartered Accountant, appeared on behalf of respondent for the hearing. He submitted a written submission as cross-objection to appeal and reiterated the submissions made therein.

5. The respondent has in their cross-objections filed on 22.11.2022, inter alia, contended that :

- The application for refund was already rejected once on the ground of limitation and the matter is discussed in details in the appeal filed by them earlier and it was decided in their favour. However, the appeal has been filed on the same grounds.
- The contention that the amount deposited by them at the time of receipt of advances is tax is itself contrary to law. Construction service contracts are intrinsically linked to consideration being received. Act of rendering of service and its completion is necessary for levy of service tax.
- Due to mutual understanding the deal got cancelled. No one purchases a property just to see it get constructed, the real essence of real estate transaction is that the purchaser gets satisfactory possession of the property. Only then does the service gets provided. It is a fact that the buyer has not been given possession of the property constructed by them. It was always in their possession.
- Section 66E (b) prescribes that the property being constructed must be intended to be sold and that some part of the consideration must be received prior to receipt of completion certificate. They constructed the property and intended to sell it but the deal got cancelled and the intent could not materialize.

Once a customer takes back the entire consideration due to some reasons the providers refund the entire amount, the question that service



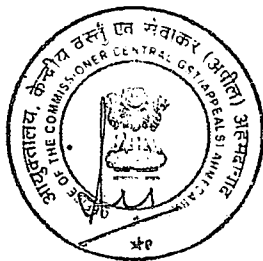
was provided cannot arise. Based on the above submission and facts of the case, levy of service tax on a service not rendered is illegal and unauthorized and has to be refunded.

- They had paid service tax at the time of collection of advance from the buyer. The intended service was never completed as the buyer cancelled the booking before the construction was completed and the possession and title was handed over. Accordingly, the amount that was paid by them was never meant to be paid as tax.
- The order in the case of Natraj and Venkat Associates – 2015 (40) STR 31 (Mad.) has been discussed in the earlier order and the same was taken into consideration and the order was passed in their favour.
- Regarding the applicability of Benzy Tours and Travels P. Ltd, it is stated in the order passed by the Commissioner (Appeals) that the judgment issued by the jurisdictional appellate authority would prevail when two contrary decisions are issued in cases of similar facts.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, the cross-objections filed by the respondent and the material available on records. The issue before me for decision is whether the impugned order sanctioning refund of an amount of Rs.1,08,25,898/- is legal and proper.

7. I find that the impugned order has been passed in the remand proceedings ordered vide OIA No. AHM-EXCUS-001-APP-89/2020-21 dated 31.03.2021. The relevant Para of the said OIA is reproduced below :

“9. It is a settled position that the adjudicating authority is bound to follow the decisions of the jurisdictional appellate authorities in the similar set of facts, in terms of the principle of judicial precedence. However, in the present case, the adjudicating authority has passed the impugned order without examining the applicability of the judgment of Hon’ble Tribunal, Ahmedabad in case of Madhvi Procon Pvt. Limited {2015 (38) STR 74 (Tri.Ahmd) }, relied upon by the appellant during the adjudication process, and (2) the order dated 29.05.2017 issued by the Commissioner (Appeals), Ahmedabad in case of M/s. Panchratna Corporation, Ahmedabad, to the facts of the present case nor produced any findings thereon to distinguish the same, in the impugned order. Hence, the impugned order has been passed without correct appreciation of judicial pronouncement on the subject and needs to be remanded back to the adjudicating authority to decide the case afresh after analysing the abovementioned two judicial pronouncements.”



7.1 From the materials available on record, it is observed that the OIA dated 31.03.2021 supra has not been challenged by the department and neither has the OIA been set aside by any higher appellate authority. Consequently, the OIA dated 31.03.2021 has attained finality and was binding upon the adjudicating authority. Accordingly, the adjudicating authority has passed the impugned order by following the directions contained in the said OIA dated 31.03.2021.

8. It is further observed that at Para 1 and 2 of the Grounds of Appeal, the findings of the Commissioner (Appeals), Ahmedabad in OIA No. AHM-SVTAX-000-APP-023-17-18 dated 29.06.2017 in the case of Panchratna Corporation, Ahmedabad has been cited and it is contended that the view of the appellate authority is contrary to law, proved facts and evidences on record. Apparently the appellant department has not correctly appreciated the facts available on records. In an appeal filed against the impugned order, the appellant department is disputing the findings of OIA dated 29.06.2017, which is not legally permissible. If the appellant department was aggrieved by OIA dated 29.06.2017, the same should have been challenged by way of appeal before the higher appellate authorities. There is no material on record to indicate that the appellant department has appealed against OIA dated 29.06.2017 and that the said OIA has been set aside by the higher appellate authorities. In such a scenario, OIA dated 29.06.2017 has attained finality and has binding precedence. In any event, in terms of the principles of judicial discipline, the order of the Commissioner (Appeals) is binding on the adjudicating authority unless it is set aside by a higher appellate authority. Therefore, in the instant case, the adjudicating authority was, by adhering to the principles of judicial discipline followed OIA dated 29.06.2017 of the Commissioner (Appeals), correct in coming to the conclusion that limitation under Section 11B of the Central Excise Act, 1944 is not applicable.

9. The appellant department have challenged the impugned order on the issue of applicability of limitation in terms of Section 11B of the Central Excise Act, 1944. However, I find this issue has been already decided in the case of Panchrathna Corporation vide OIA No. AHM-SVTAX-000-APP-023-17-18 dated 29.06.2017. In the said case, it was held at Para 10 of the OIA that "I find that no service at all has been provided the relevant date of one year and





date of payment a per Section 11B of Central Excise Act 1944 cannot be made applicable in the instant case". There is no material on record to indicate that the said OIA has been reversed by any higher appellate authority.

9.1 Considering the directions of the Commissioner (Appeals), Ahmedabad in OIA dated 31.03.2021 supra, the adjudicating authority has by following the OIA in the case of Panchratna Corporation supra and OIA No.AHM-EXCUS-001-APP-89/2020-21 dated 31.03.2021 in the case of Jas Infracon LLP, held at Para 19 of the impugned order that the limitation prescribed under Section 11B of the Central Excise Act, 1944 is not applicable. Since, the said OIAs have not been set aside by any higher appellate authority, the OIAs have attained finality and, consequently, the issue of limitation cannot be raised by the appellant department by way of the present appeal. In the result, I hold that the issue of limitation raised by the appellant department is not legally tenable. Accordingly, I find that the appeal filed by the appellant department is bereft of any merit and is liable to be 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.

Attested:

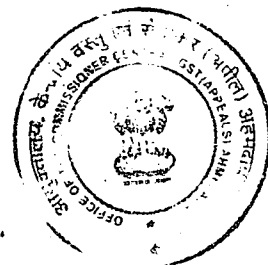
(N.Suryanarayanan. Iyer)  
Superintendent(Appeals),  
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

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

*Akhilesh Kumar*  
22nd November, 2022  
( Akhilesh Kumar )  
Commissioner (Appeals)  
Date: 22.11.2022.



Appellant

M/s. Jas Infra LLP,  
4/C, Archana Industrial Estate,  
Opposite Ajit Mills,  
Rakhial, Ahmedabad

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.

