

आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क:
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

द्वितीय तल, जी एम टी भवन / 2nd Floor, GST Bhavan
 रेस कोर्स रिंग रोड, / Race Course Ring Road,
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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	पुन अर्पण सं / Order No.	दिनांक / Date
	V2/242/GDM/2017	11/JC/2017-18	29-08-2017

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-230-2018-19

आदेश का दिनांक / Date of Order:	24.12.2018	अपील आदेश की तारीख / Date of issue:	26.12.2018
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
 Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ महायुक्त आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट, जामनागर / गान्धिधाम द्वारा उद्घोषित/ जारी की गई अपील आदेश से उत्पन्न /
 Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-

M/s Deep Construction Company, 224, Mani Complex, Plot No. 84, Sector-8, Eutch, Gandhidham-370201.

इस आदेश (अपील) ने व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील जमा कर सकता है।/
 Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

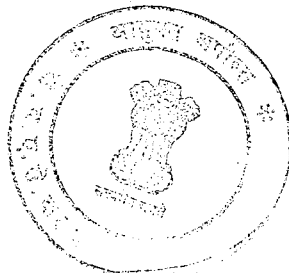
(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत निम्नलिखित जगह की जा सकती है।/
 Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1994 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, केन्द्र ब्लॉक नं. 2, आर.के. परम, नई दिल्ली, को की जानी चाहिए।/
 The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Param, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताना गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (बिल्केट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन अमावा अहमदाबाद- 380016 को भी जानी चाहिए।/
 To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 6 के अन्तर्गत निर्धारित फीज में प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की मात्रा के आधार पर अपील का मूल्य निर्धारित है, अपील का मूल्य 5 लाख या उससे कम, 5 लाख रुपय या 50 लाख रुपय तक अथवा 50 लाख रुपय से अधिक है तो, अपील का मूल्य 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के महायुक्त रजिस्ट्रार के नाम से किसी भी मासिक/त्रैमासिक बैंक खाते द्वारा किया जाना चाहिए। सर्वोपरि जमा का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयं आदेश (स्ट. आर्डर) के लिए आवेदन-पत्र का मूल्य 500/- रुपये का निर्धारित शुल्क जमा करना होगा।/
 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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत प्रस्तावित नियमावली, 1994, के नियम 9(1) के अन्तर्गत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश का विरोध अपील की गयी है, उसका प्रति साथ में संलग्न करें (उत्तम से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की मात्रा के आधार पर अपील का मूल्य निर्धारित है, अपील का मूल्य 5 लाख या उससे कम, 5 लाख रुपय या 50 लाख रुपय तक अथवा 50 लाख रुपय से अधिक है तो, अपील का मूल्य 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के महायुक्त रजिस्ट्रार के नाम से किसी भी मासिक/त्रैमासिक बैंक खाते द्वारा किया जाना चाहिए। सर्वोपरि जमा का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयं आदेश (स्ट. आर्डर) के लिए आवेदन-पत्र का मूल्य 500/- रुपये का निर्धारित शुल्क जमा करना होगा।/
 The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.



:: ORDER IN APPEAL ::

M/s. Deep Construction Company, 224, Mani Complex, Plot No. 84, Secor-8, Gandhidham (Kutch) - 370201 (hereinafter referred to as 'appellant') filed present appeal against Order-In-Original No. 11/JC/2017-18 dated 29.08.2017 (hereinafter referred to as "the impugned order") passed by the Joint Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant had not paid service tax on construction of Storage Godowns, Admin Building, Drains, etc. in backup area of Berth No. 13 at Kandla Port to M/s. Rivierra Projects Pvt. Ltd. and also not paid service tax on construction of weighbridges within boundary area of Kandla port to M/s. RAS Infra Port Pvt. Ltd. during FY 2012-13 and FY 2013-14 and alleged to have short paid service tax on repairs and maintenance of warehouses/sheds service provided to M/s. ACT Logistics, Gandhidham, during the said period. Show Cause Notice No. V.ST/15-4/Audit-III/ADC-14/2016-17 dated 4.11.2016 was issued to the appellant demanding Service Tax of Rs. 50,85,851/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") along with interest under Section 75 of the Act and for imposition of penalty under Section 77 and under Section 78 of the Act. The lower adjudicating authority vide impugned order confirmed Service Tax of Rs. 50,80,851/- along with interest and imposed penalty of Rs. 10,000/- under Section 77 of the Act and imposed penalty of Rs. 50,80,851/- under Section 78 of the Act.

3. Being aggrieved with the impugned orders, appellant preferred the present appeal, *inter-alia*, on the following grounds: -

(i) The appellant has provided labour service including all tools and tackles, machinery, manpower, etc. for executing the work of storage godown, Admin building, Roads, Drain, Custom fencing, barbed wire fencing, workshop building, electrification, water supply and sewerage, firefighting, paver road in back up area of Berth No. 13 at Kandla port in



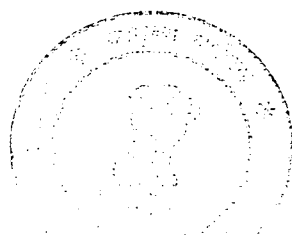
the capacity of sub-contractor to Kandla Port through main contractor, M/s. Rivierra Project Private Limited and provided labour service for construction of weighbridges with office to M/s. RAS Infra Port Private Limited. The appellant claimed exemption vide Entry No. 14(a) of Notification No. 25/2012-ST dated 1.7.2012 since the labour services provided by the appellant related to "original works". It was submitted that the services needed to be considered for improvement, maintenance of the port and its approaches and the appellant had carried out construction within 50 yards of high water mark.

(ii) The lower adjudicating authority vide Para 20.8 of the impugned order has held that service provided by the appellant for construction of godown, admin building, etc. in the back up area of Kandla port is different from original construction pertaining to port, whereas, entire development of Berth No. 13 in the back up area was carried out as per design, terms and conditions of Kandla Port Trust and that any construction made in the notified area within port is covered under the definition of 'port', hence, construction of any part of port is eligible for exemption. The port authorities used to award separate contracts for separate construction work even in the same port area.

(iii) The lower adjudicating authority vide Para 20.9 of the impugned order has held that the appellant can't avail the benefit of Entry No. 29(h) of Notification No. 25/2012-ST dated 1.7.2012, however, the appellant has not claimed benefit of Entry No. 29(h) but claimed to benefit of Entry No. 14(a) of the said Notification.

(iv) The scope of work provided to M/s. ACT Logistics included alteration of damaged structure of shed, roof etc. to make them workable. The department has applied Valuation Rules to determine taxable value of the service. The work related to addition and alteration of abandoned or damaged structure on land is covered under the definition of 'original work'. The lower adjudicating authority has not considered that the appellant has provided 'Works Contract Service' and classified the service under 'Repairs and Maintenance' and taxable

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value determined @ 70% of gross amount charged instead of taxable value @ 40% of gross amount charged. It is submitted to examine the scope of work as mentioned in the contract, since, application of Rule 2(A)(ii)(A) of Service Tax (Determination of Value) Rules, 2006 (hereinafter referred to as "Valuation Rules") by the appellant is correct and legal.

(v) The lower adjudicating authority at Para 4.9 of the impugned order has held that the rates were including service tax and inferred that the appellant was knowing about the applicability of service tax on the services rendered under the contracts. It is submitted that clause of the contract was clarificatory in nature and has always been used in normal course of business and it does not mean that the terms used in context of any tax is actually applicable to such contract. Such contracts are made by service receiver to avoid any dispute in future.

(vi) When no service tax is payable, the question of recovery of interest and imposition of penalty does not arise. Penalty under Section 78 of the Act can be imposed only if there is fraud, collusion, willful misstatement, suppression of facts or contravention of any provisions with intent to evade payment of service tax. There is no finding in the impugned order that the appellant has suppressed facts or committed fraud with intent to evade payment of service tax and therefore, demand is barred by limitation of time.

(vii) No penalty under Section 77 or Section 78 of the Act can be imposed if the appellant proves that there was a reasonable cause for default or failure in terms of Section 80 of the Act. The appellant relied on decisions in the case of On Dot Couriers & Cargo Ltd. reported as 2006 (6) STJ 337 (CESTAT – New Delhi), Municipal Corporation of Delhi reported as 1987 AIR 2316 (SC) and Jagdish Prasad Choudhary reported as 1996 AIR (58) Patna.

4. Personal hearing was attended by Shri Abhishek P. Doshi, Chartered Accountant, who reiterated the grounds of appeal and submitted that they have provided original construction service in respect

of Godowns, Admin Building, Roads, Drains, Customs fencing, work shop buildings etc. within the area of Kandla port within 50 yards of high water mark and within customs notified area in the area of Berth No. 13 of Kandla port; that they have not availed benefit of Entry No. 29(h) but Entry No. 14(a) of Notification No. 25/2012-ST dated 1.7.2012 i.e. construction of original works pertaining to Kandla port; that works contract service to ACT Logistics is not repairs and maintenance but original work only as major renovations have been done to make abandoned/fully damaged buildings/godowns workable; that the mention of 'service tax included in the value' in the contract does not mean that service tax is leviable; that service tax is not payable and hence, no interest is payable and no penalty is imposable.

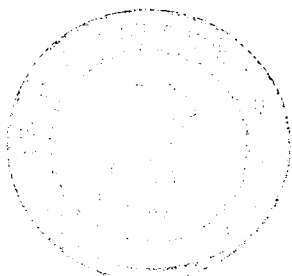
Findings:

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and submissions made by the appellant. The issues to be decided in the present appeal are: -

(i) whether the impugned order confirming demand of service tax on construction service provided within Kandla port area is correct or not; and

(ii) whether confirmation of short payment of service tax on major renovation work carried out on abandoned/damaged godowns/buildings by the appellant within Kandla port is correct or otherwise.

6. Regarding services provided by the appellant in the capacity of sub-contractor to Kandla Port through main contractor, M/s. Rivierra Project Private Limited, the lower adjudicating authority has held that the appellant has provided labour service for construction of storage godowns, administration building, electrification, barbed wire fencing, water supply and sewerage, firefighting and paver road in the backup area of Berth No. 13 at Kandla port whereas, the appellant has contended that service tax is exempted under Sr.No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012 for construction, erection,



commissioning or installation of original work for construction of port. I would like to reproduce the relevant entry of Notification No. 25/2012-ST dated 20.6.2012, which reads as under: -

14. Services by way of construction, erection, commissioning, or installation of original works pertaining to -

(a) an airport, port or railways, including monorail or metro;

6.1 I find that Entry No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012 exempts service tax on construction, erection, commissioning of original works pertaining to port. The term 'original works' has been defined in Explanation 1 to Rule 2A(ii)(B) of Valuation Rules which states that: -

"original works" means-

- (i) all new constructions;
- (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
- (iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(Emphasis supplied)

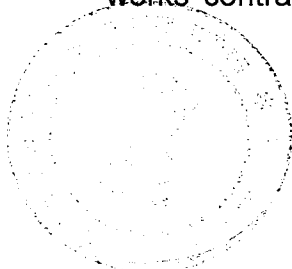
6.2 I find from work order dated 27.9.2012 issued by M/s. Riviera Project Private Limited that the appellant was required to carry out construction of storage godowns, administration building, barbed wire fencing, etc. in the backup area of Berth No. 13. Therefore, the findings of the lower adjudicating authority that the appellant has provided only labour service is not correct. I also find that the appellant has contended that they carried out the said work within 50 yards of high-water mark which has not been disputed. Hence, I find that the appellant has provided construction service to Kandla Port and correctly falls within the definition of 'port' as provided under Section 2(q) of Major Ports Act, 1963 read with definition of 'limit' under Section 4(3) of Indian Ports Act, 1908, which is exempted from payment of service tax vide Sr.No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012 and therefore, confirmation of demand of service tax is not tenable and not legal and proper.

7. Regarding services provided by the appellant to M/s. RAS Infraport Pvt. Ltd., Gandhidham for construction of weighbridge and office building at Berth No. 13 at Kandla Port, the lower adjudicating authority has held that the appellant has not provided service for construction of port and therefore, service tax is not exempted under Sr.No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012. I find from the facts of the case the appellant has constructed new weighbridge and new office building near Berth No. 13 at Kandla port which are required to be necessarily considered 'original works' and erection, commissioning, or installation of original works pertaining to port is exempted from service tax vide Sr.No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012, therefore I hold that no service tax can be demanded from the appellant for the said services and thus, confirmation of demand of service tax for these services under the impugned order cannot be allowed to sustain and has to be set aside.

8. Regarding short payment of service tax on the services provided to M/s. ACT Logistics, the lower adjudicating authority has held that the appellant had provided repair & maintenance service with all materials which attracts valuation of service, for payment of service tax, under Rule 2A(ii)(B) of the Valuation Rules and hence, the appellant was required to pay service tax on 70% of gross value of service. However, the appellant has contended that the scope of work provided to M/s. ACT Logistics included major work/renovations of abandoned/fully damaged godowns/buildings to make them workable and that such work of abandoned or damaged structure on land is covered under the definition of 'original work' and I have no option but to agree with the submissions of the appellant that they have provided services, which fall under original work as explained in Explanation 1 to Rule 2A(ii)(B) of Valuation Rules reproduced under Para 6.1 above.

8.1 I would like to reproduce Rule 2A of the Valuation Rules, which reads as under: -

RULE 2A. Determination of value of service portion in the execution of a works contract. — Subject to the provisions of section 67, the value of



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service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely: -

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods or in goods and land or undivided share of land, as the case may be transferred in the execution of the said works contract.

Explanation. - For the purposes of this clause, -

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause;

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely :-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

Provided that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.

(B) in case of works contract, not covered under sub-clause (A), including works contract entered into for, -

(i) maintenance or repair or reconditioning or restoration or servicing of any goods; or

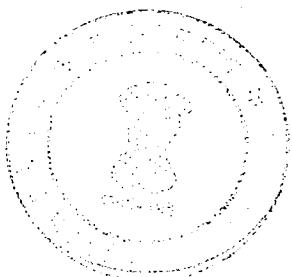
(ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of immovable property,

service tax shall be payable on seventy per cent. of the total amount charged for the works contract

8.2 From the above, I find that Rule 2A(ii)(A) of Valuation Rules provides that in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for such works. In the present case, the appellant submitted copy of work order dated 10.2.2015 issued by M/s. ACT Logistics, Gandhidham to the appellant to execute work of shed repairing including floor repairing with materials so as to make godown operative and restore it in workable condition. Thus, there is no doubt that the appellant carried out original works in terms of Sr.No. (ii) of definition of 'original works' as provided under Explanation 1. The appellant has rendered service of repair, renovation of godowns/sheds with material and therefore the services provided by the appellant fall within the definition of 'works contract' as provided under Section 65B(54) of the Act which reads as under: -

"works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

8.3 In view of the above, I find that the appellant has executed works contract for original works and therefore, they correctly determined



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assessable value @ 40% of gross value charged towards services rendered by them in this regard and paid service tax at the appropriate rate. Hence, there is no short payment of service tax as alleged in the impugned SCN and confirmed in the impugned order.

9. In view of my above findings, I hold that services of construction of godown, admin building, barbed wire fencing, etc. provided in the backup area of Berth No. 13 at Kandla port through M/s. M/s. Riviera Project Private Limited and the services of construction of weighbridge and office building in backup area at Berth No. 13 at Kandla port through M/s. RAS Infraport Pvt. Ltd., Gandhidham are exempted from service tax vide Sr.No. 14(a) of Notification No. 25/2012-ST dated 20.6.2012 and no service tax is recoverable from the appellant. I further hold that the appellant has correctly paid service tax on 40% of the gross amount charged towards works contract service executed for original works to M/s. ACT Logistics, Gandhidham. Hence, I set aside the impugned order and allow the appeal filed by the appellant.

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

9.1. The appeal filed by the appellant is disposed off in above terms.

सहायक,
ए. एम. पोस्ट
अधीक्षक (आपील्स)

(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD.

To,

M/s. Deep Construction Company, 224, Mani Complex, Plot No. 84, Secor-8, Gandhidham (Kutch) - 370201	मे. दीप कन्स्ट्रक्शन कं. २२४, मनी कॉम्प्लेक्स, प्लॉट नं. ८४, सैक्टर - ८, गांधीधाम (कच्छ) - ३७०२०१
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Copy to:

- 1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information please.
- 2) The Commissioner, CGST & Central Excise, Kutch Commissionerate, Gandhidham for necessary action.
- 3) The Assistant Commissioner, CGST Division, Gandhidham for further necessary action.
- 4) Guard File.

