



सत्यमेव जयते

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

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
0792630506- टेलीफैक्स 07926305136



DIN NO. : 20221264SW000000C88D

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/1374/2022

1/618H-8C

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-003-APP-ADC-72/2022-23**
दिनांक Date : 20-12-2022 जारी करने की तारीख Date of Issue : 21-12-2022

श्री मिहिर रायका अपर आयुक्त (अपील) द्वारा पारित
Passed by Shri Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No **01/AK/SUPDT/GST/2021-22** dated **03.02.2022** issued by the Superintendent, Central Goods and Service Tax, Range-IV, Division Kadi, Gandhinagar Commissionerate

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant

M/s Kaypee Polyfab [GSTIN: 24AAQFK2127E1ZK]
Survey No. 739 and 667/1, Saket Industrial Estate,
Borisana, Kadi, Mehsana - 382715

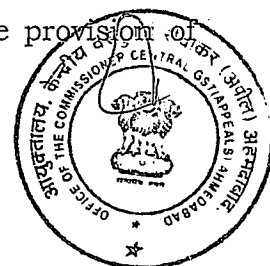
| | |
|-------|---|
| (A) | इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way. |
| (i) | National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017. |
| (ii) | State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017 |
| (iii) | Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand. |
| (B) | Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online. |
| (i) | Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed. |
| (ii) | The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later. |
| (C) | उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority the appellant may refer to the website www.cbic.gov.in . |



ORDER-IN-APPEALBRIEF FACTS OF THE CASE:

M/s. Kaypee Polyfab, Survey No.739 and 667/1, Saket Industrial Estate, Borisana, Tal : Kadi, Dist. Mehsana, Gujarat – 382 715 (hereinafter referred to as the “*appellant*”) has filed the appeal on 13.05.2022 against Order-in-Original No. 01/AK/SUPDT/GST/2021-22 dated 03-02-2022 (hereinafter referred to as the “*impugned order*”) passed by the Superintendent, CGST, Range-IV, Division-Kadi, Gandhinagar Commissionerate (hereinafter referred to as the “*adjudicating authority*”) for excess availment of Transitional Credit amounting to Rs. 1,95,296/-.

2. Brief facts of the case in the present appeal is that the appellant registered under GSTIN 24AAQFK2127E1ZK, are engaged in manufacturing of P P Woven Bags & Fabric classifiable under CTH 3920. The appellant is also availing credit of inputs and capital goods used in or in relation to the manufacture of aforesaid final product under Central Goods and Service Tax Rules, 2017. The appellant has claimed transitional credit of Rs.1,24,31,071/- while submitting **TRAN-1 on 28.09.2017** electronically within time limit of the appointed day as prescribed, the closing balance of CENVAT Credit which was lying in their credit account in terms of Section 140(1) of CGST Act, 2017. However, during the course of scrutiny of **ER-1 filed on 10.07.2017 for the month of June-2017** it was noticed by the department that the closing balance of CENVAT Credit in their account was only Rs. 1,22,35,145/-. Thus, in terms of Section 140(4)(a) of CGST Rules, 2017 they were entitled for a credit of Rs.1,22,34,145/- in Table 5(a) of TRAN-1 return on and not Rs. 1,24,31,071/- as claimed by the appellant and therefore the said appellant has taken excess credit of Rs.1,95,926/-. Thereafter, the appellant was issued a Show Cause Notice dated 19.07.2019 under Section 73 of the CGST Act, 2017 read with Rule 121 of the CGST Rules, 2017 with a demand of excess amount of transitional credit of Rs. 1,95,296/- with interest and penalty under section 50 of the CGST Act, 2017. The adjudicating authority further passed the Order-In-Original No. 01/AK/SUPDT/GST/2021-22 dated 03-02-2022 confirming demand of Rs.1,95,296/- under Section 73(1) along with interest under Section 50 of the CGST Act, 2017 and imposed a penalty under Section 122(2)(a) of the CGST Act, 2017 for wrongly carried forward as transitional credit of Rs.1,95,296/- by stating that the appellant filed **TRAN-1 on 28.09.2017, ER-1 for June-2017 was filed on 10.07.2017 and ST-3 return for the period was filed on 14.08.2017**, and thus the appellant has reasonable opportunity for revised ER-1 & ST-3 so that the Service Tax credit left un-availed can be availed but the appellant failed to avail the same under the provision of Section 140 of the CGST Act, 2017.



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

- i. The impugned order confirming demand with interest and penalty is not correct and is required to be set aside. It is not in dispute that the credit of disputed amount Rs.1,95,296/- was available to the appellant under the Excise Act and it is also not in dispute that the said credit was not actually availed under the Excise Act but was considered under the Transitional provision.
- ii. The impugned order refers to Circular No. 207/5/2017-S.T., dated 28.9.2017 to suggest that the correct method was to revise the return within 45 days and to take credit as per revised return, referring to the cases where payment of tax was made after 31-7-2017 which issued much after expiry of the said period i.e 45 days and thus suggesting method is of little or no use.
- iii. The appellant submitted that once the eligibility of credit is not in doubt, the credit should not be rejected on technical grounds. They relied on Bombay High Court's decision in the case of Heritage Lifestyles and Developers and Private Limited Vs Union of India - 2020 (11) TMI 235 as per Para 22 to 25.
- iv. The appellant had not utilized the credit and the same still is in balance. They submitted supported evidence as per month-wise credit balance in their ITC ledger, and therefore no question of interest liability.
- v. The further contended that when the credit is eligible and when there is technical denial, the question of penalty should not arise. The credit is not used till date and penalty should not be imposed and therefore order for penalty is to be set aside.

PERSONAL HEARING :

4. Personal hearing in the present appeal was held on 22.11.2022, Shri. S J Vyas, Authorised Representative, appeared in person on behalf of the appellant in the present appeal. During P.H. he has submitted that they have nothing more to add their written submission till date.

DISCUSSION AND FINDINGS:

5. I have gone through the facts of the case, written submissions made by the 'appellant'. I find that the main issue to be decided in the instant case is whether the Transitional Credit of Rs. 1,95,296/- should be allowed or not being non revising the ER-1 & ST-3 returns while submitting TRAN-1 under Section 140 of the CGST, Act, 2017 read with Rule 117 of the CGST Rules, 2017 and as per CBIC's Circular No. 207/5/2017-S.T., dated 28.9.2017.

5.1 I have carefully gone through the facts of the case available on records and submissions made by the 'appellant' in the appeal Memorandum. I find that the



adjudicating authority is not disputing the credit of Rs. 1,95,296/- which was available to the appellant as per books of accounts and which was further claimed by the appellant under TRAN-1 submission on 28.09.2017 but denying only due to non revising their ER-1 & ST-3 returns in time, under Section 140 of the CGST Act, 2017 read with Rule 117 of the CGST Rules, 2017 and as per CBIC's Circular No. 207/5/2017-S.T., dated 28.9.2017.

From the available records, submissions of the appellant as well as discussions and findings mentioned in the impugned order by the adjudicating authority, I do not find any dispute about the entitlement and availing CENVAT credit of Rs. 1,95,296/- which was claimed under TRAN-1 on 28.09.2017 after stipulated time period as per CBIC's Circular No. 207/5/2017-S.T., dated 28.9.2017. I find that the appellant has submitted Service Tax Credit Register in their appeal memorandum showing the Ledger Account for the period from 1st April 2017 to 30th June 2017, the appellant has submitted invoice-wise and month-wise details and calculation sheet of CENVAT credit amounting to Rs.1,95,296/- towards payment of Service Tax, was available to them and as shown in their books of accounts.

5.2 I find that the appellant had not utilized credit till date and same is still in balance. I here would like to refer to the Section 140 of the CGST Act, 2017 which is re-produced as under:

Section 140 of CGST Act, 2017:

"140. (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

- (i) where the said amount of credit is not admissible as input tax credit under this Act; or*
- (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or*
- (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.*

(2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed: Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.—For the purposes of this sub-section, the expression "unavailed CENVAT credit" means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods



by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

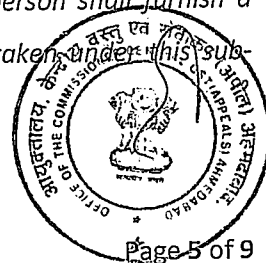
(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely:—

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act: Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under this Act, shall be entitled to take, in his electronic credit ledger,—

- (a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and
- (b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day: Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days: Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this section.



(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely: (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act; (ii) the said registered person is not paying tax under section 10; (iii) the said registered person is eligible for input tax credit on such inputs under this Act; (iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and (v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

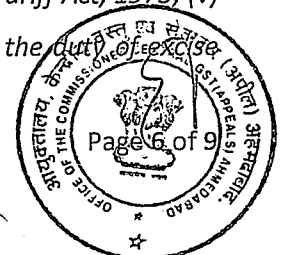
(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any services received prior to the appointed day by an Input Service Distributor shall be eligible for distribution as credit under this Act, within such time and in such manner as may be prescribed, even if the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by him, in respect of the period ending with the day immediately preceding the appointed day within such time and in such manner as may be prescribed: Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier: Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act: Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such credit can be reclaimed within such time and in such manner as may be prescribed, subject to the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.—For the purposes of sub-sections (1), (3), (4) and (6), the expression “eligible duties” means— (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957; (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975; (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975; (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985; (vi) the duty



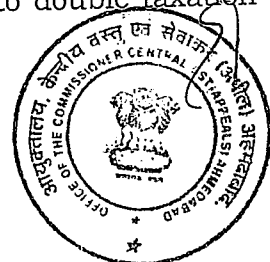
specified in the Second Schedule to the Central Excise Tariff Act, 1985; and (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001, in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2.—For the purposes of sub-section (1) and (5), the expression “eligible duties and taxes” means (i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957; (ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975; (iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975; (v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985; (vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; (vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and (viii) the service tax leviable under section 66B of the Finance Act, 1994, in respect of inputs and input services received on or after the appointed day.

Explanation 3.—For removal of doubts, it is hereby clarified that the expression “eligible duties and taxes” excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975.”

5.3 I find that, the Section 140 of the CGST Act, 2017 provides

- (i) for a substantive right which cannot be curtailed or defeated on account of the procedural lapses;
- (ii) The entitlement of the credit of carry forward of the eligible duties is a vested right of the claimant;
- (iii) The right to carry forward the CENVAT credit is a constitutional right;
- (iv) It is arbitrary, irrational and unreasonable to discriminate in terms of the time limit to allow the availment of the input tax credit with respect to the purchase of the goods and services made in the pre-GST regime and post-GST regime and the same could be termed as violative of **Article 14** of the Constitution of India;
- (v) By not allowing the right to carry forward the CENVAT credit for not revising the returns and not able to file the form GST TRAN-1 within the due date would definitely have a serious impact on the working capital of the appellant and such action could be termed as violative of **Article 19(1)(g)** of the Constitution of India;
- (vi) The liability to pay GST on sale of stock or services availed carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter.



5.4 I refer to the decision by Madras High Court, in the case of **Tara Exports v. Union of India, reported in 2019 (20) G.S.T.L. 321 (Madras)**, where in the Madras High Court, has held as under :

"8. GST is a new progressive levy. One of the progressive ideal of GST is to avoid cascading taxes. GST Laws contemplate seamless flow of tax credits on all eligible inputs. The input tax credits in TRAN-1 are the credits legitimately accrued in the GST transition. The due date contemplated under the laws to claim the transitional credit is procedural in nature. In view of the GST regime and the IT platform being new, it may not be justifiable to expect the users to back up digital evidences. Even under the old taxation laws, it is a settled legal position that substantive input credits cannot be denied or altered on account of procedural grounds."

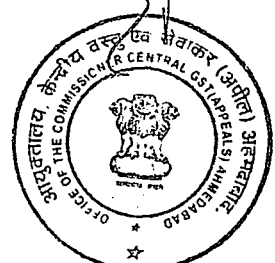
5.5 I also further refer to the decision by the Gujarat High Court, in the case of **Indsur Global Ltd. v. Union of India, reported in 2014 (310) E.L.T. 833 (Gujarat)**, wherein the H'ble Gujarat High Court has held as under:

"41. C.B.E. & C. Flyer No.20, dated 1.1.2018 had clarified as under:

"(c) Credit on duty paid stock : A registered taxable person, other than manufacturer or service provider, may have a duty paid goods in his stock on 1st July 2017. GST would be payable on all supplies of goods or services made after the appointed day. It is not the intention of the Government to collect tax twice on the same goods. Hence, in such cases, it has been provided that the credit of the duty/tax paid earlier would be admissible as credit."

42. Article 300A provides that no person shall be deprived of property saved by authority of law. While right to the property is no longer a fundamental right but it is still a constitutional right. CENVAT credit earned under the erstwhile Central Excise Law is the property of the writ-applicants and it cannot be appropriated for merely failing to file a declaration in the absence of Law in C/SCA/5758/2019 CAVJUDGMENT this respect. It could have been appropriated by the government by providing for the same in the CGST Act but it cannot be taken away by virtue of merely framing Rules in this regard."

5.6 In view of the foregoing facts, I am of the opinion that the appellant is not deprived by their legitimate right and therefore allow to claim CENVAT credit of Rs. 1,95,296/- in form GST TRAN-1 so as to enable them to claim transitional credit of the eligible credit in respect of the services availed in their books of accounts on the appointed day in terms of Section 140 of the Act. It is further opined that the due date contemplated under Rule 117 of the CGST Rules for the purposes of claiming transitional credit is procedural in nature and thus should not be construed as a mandatory provision.



5.7 Further, I hold that the confirming the demand of wrongly carried forwarded transitional credit of Rs. 1,95,296/- along-with interest under Section 50 of CGST Act, 2017 and imposing penalty under Section 122 of the CGST Act, 2017 is not legal & proper. Hence, the appeal filed by the appellant is succeed on the grounds discussed above. Needless to say, the verification of transitional credit on merit is not examined in this proceedings. Therefore, any claim of transitional credit filed in consequence to this Order may be examined by the appropriate authority for its admissibility on merit in accordance with Section 140 of the CGST Act, 2017 and Rules made thereunder.

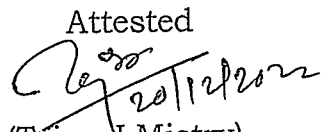
6. In view of above discussions, the *impugned order* passed by the *adjudicating authority* is set aside for being not correct, legal and proper and as per law to the above extent. Accordingly, I allow the appeal of the "Appellant" without going into merit of all other aspects in terms of Section 140 of the CGST Act, 2017 read with CGST Rules, 2017.

7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।
7. The appeal filed by the appellant stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)

Date: 20.12.2022

Attested

(Tejas J Mistry)
Superintendent,
Central Tax (Appeals), Ahmedabad



By R.P.A.D.

To

M/s. Kaypee Polyfab [GSTIN 24AAQFK2127E1ZK],
Survey No.739 and 667/1, Saket Industrial Estate, Borisana, Tal : Kadi,
Dist. Mehsana, Gujarat - 382 715.

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad
3. The Commissioner, Central GST & C.Ex, Commissionerate-Gandhinagar.
4. The Dy / Assistant Commissioner, CGST & C.Ex, Kadi -Division, Gandhinagar Commissionerate.
5. The Additional Commissioner, Central Tax (System), Gandhinagar.
6. The Superintendent, CGST, Range-IV, Division-Kadi, Gandhinagar Comm'te.
7. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
7. Guard File.
8. P.A. File.

