

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील -I) का कार्यालय, केन्द्रीय उत्पाद शुल्क, :
: सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास, :
: आंबावाडी, अहमदाबाद— 380015. :

क फाइल संख्या : File No : V2(39)41/Ahd-III/2016-17/Appeal-I / 609-614
V2(39)42/Ahd-III/2016-17/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-249 to 250-16-17

दिनांक Date : 23.02.2017 जारी करने की तारीख Date of Issue _____

श्री उमाशंकर आयुक्त (अपील-I) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-I) Ahmedabad

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-I आयुक्तालय द्वारा जारी मूल
आदेश सं _____ दिनांक : _____ से सृजित

Arising out of Order-in-Original: AHM-CEX-003-ADC-MLM-055-15-16 Date: 26.02.2016
Issued by: Additional Commissioner, Central Excise, Din: Mehsana, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. AS PER ORDER.

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 अंतर्गत नीचे बताए गए मामलों के बारे में
पूवोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर 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 हानि कारखाने 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।

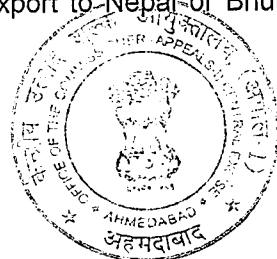
(ii) In case of any loss of goods where the loss occur in transit from a factory to a
warehouse or to another factory or from one warehouse to another during the course of
processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) 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।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया
माल हो।

(c) In case of goods exported outside India export to Nepal-or Bhutan, without payment of
duty.



ध 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।

(d) 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 भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष 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 हो तो 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 सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ए0बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

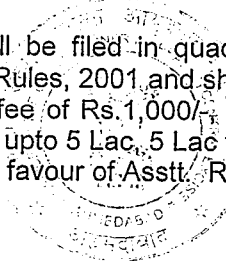
(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) 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 ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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 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 शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय 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 bear 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.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

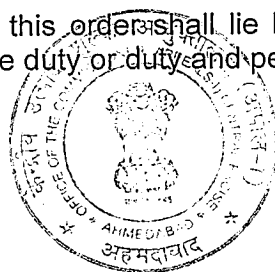
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) 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।

(6)(i) 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

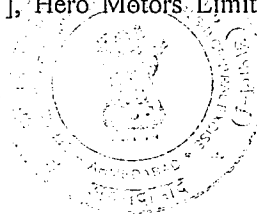
Two appeals have been filed by [a] M/s. Shako Flexi Pack Private Limited, Survey No. 1023/P/13, 1024/14, Ghumasan, Near Sandvik Asia Limited, Ahmedabad, Mehsana Highway, Village Rajpur, Tal. Kadi, District Mehsana, Gujarat [hereinafter referred to as *appellant-1*] and [b] Shri Vivekbhai B Kothari, Director of appellant-1 [hereinafter referred to as *appellant-2*] against OIO No. AHM-CEX-003-ADC-MLM-055-15-16 dated 26.2.2016, issued on 4.4.2016, passed by the Additional Commissioner, Central Excise, Ahmedabad-III Commissionerate (for short - *adjudicating authority*).

2. Briefly stated, the facts are that audit officers, vide para 4 of their Final Audit Report No. Ex-36/2013-14 dated 11.10.2013, issued from F. No. VI/1(b)-192/IA/12-13/AP-III, raised an objection that appellant-1 had utilized CENVAT credit for payment of duty in respect of cylinders on which CENVAT credit of capital goods was availed, in excess of the CENVAT credit taken on the said cylinders, thereby contravening Rule 3(4)(c) of the CENVAT Credit Rules, 2004. Accordingly a show cause notice dated 29.9.2015 was issued to the appellant-1, covering the period from 2010-11 to 2012-2013 demanding CENVAT amounting to Rs. 8,53,309/- along with interest. The notice further proposed penalty on appellant-1 and appellant-2. This show cause notice was adjudicated vide the impugned OIO wherein the adjudicating authority confirmed the demand along with interest and also imposed penalty on the appellant-1 and appellant-2.

3. Feeling aggrieved, both the appellants have filed this appeal, raising the below mentioned averments:

Appellant-1

- (a) the adjudicating authority has overlooked some of the contention of the appellants and proceeded to confirm the demand after invoking extended period of limitation;
- (b) the show cause notice dated 29.9.2015 has invoked section 11A(5) of the Central Excise Act, which was omitted on 14.5.2015;
- (c) that they wish to rely on the case of Cyril Lasardo (Dead)[2004(7) SCC 431], Shukla and Brothers [2010(254) ELT 6(SC)];
- (d) that cylinders are capital goods and the appellant had rightly availed credit on the same and used them in relation to manufacture of duty paid printed polyester films and pouches;
- (e) that ownership of capital goods is irrelevant to decide the eligibility for credit; that they wish to rely on the case of Pepsi Food [2010(254) ELT 284];
- (f) that unless and until the cylinders are physically removed from the factory, there is no excise duty implication;
- (g) that the cylinders do not physically move from the factory of the appellants; that the cylinders purchased from third party vendors are used for manufacture of final products; that the cylinders are sold by the appellants to the customers, such cylinders are never removed outside the factory and only a transfer of ownership of the cylinders takes place;
- (h) that they would like to rely on the case of BPL Electronics [1994(71) ELT 801], Elcon Clipsal India Limited [2002(146) ELT 360, Jamna Auto Industries Limited [2001(130) ELT 181], Hero Motors Limited [2014(310) ELT 729],



- Commissioner of Central Excise, Tiruchirappalli [2015(323) ELT 290 (Mad)], Bilt Industrial Packaging Company [2007(216) ELT 217], and other case laws;
- (i) in the present case there is no requirement to reverse credit of duty paid on cylinders as there is no physical movement of such goods outside the premises the appellants; that there is merely a change of ownership of cylinders;
 - (j) that the entire situation is revenue neutral in as much as excess utilization of credit if any would have led to payment of excise duty through PLA in future;
 - (k) the demand is completely barred by limitation as there is no element which warrants invocation of extended period;
 - (l) that no penalty is imposable on the appellants;
 - (m) that as there is no violation of the provisions of Rule 25(1) of the Central Excise Rules, 2002, the goods are not liable for confiscation.

Appellant-2

- (a) to invoke provisions of Rule 26(1) of Central Excise Rules, 2002 the person should have knowledge or reason to believe that the goods are liable for confiscation and must have dealt with the goods in the manner specified in the rules;
- (b) appellant was not concerned with any of the above activity in relation to goods in question inasmuch as the scope of work of the appellant is limited to administrative activity;
- (c) that they would like to rely on the case of Godrej Boyce [2002(148) ELT 161], S K and Company [2006(203) ELT 137] and Prompt Castings Private Limited [2012(284) ELKT 641].

4. Personal hearing in respect of both the appeals was held on 17.1.2017, wherein Shri Ishan Bhatt, Advocate appeared on behalf of both the appellants and reiterated the submissions advanced in the grounds of appeal. He also submitted copies of nine case laws to substantiate their grounds.

5. I have gone through the facts of the case, the appellant's grounds of appeal, and submissions made at the time of personal hearing. The question to be decided in the present appeal is whether the confirmation of demand under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944, is correct or otherwise?

6. I find that the adjudicating authority has confirmed the demand on the grounds that:

- in case of any excisable goods on which CENVAT credit is taken at the time of receipt, when sold, at the time of removal of goods, an amount equal to the credit taken is required to be reversed;
- that the credit rules do not provide for debiting an amount higher than the credit originally taken;
- that there was non disclosure of information and willful misstatement of facts while filing ER-1 returns during the relevant period; that the department had no means to verify whether at the time of sale of the capital goods a higher duty amount was debited;



- that since there is a contravention of the provisions of CENVAT Credit rules, the impugned goods are liable for confiscation.

7. The relevant extracts of the CENVAT Credit Rules, 2004, which deals with removal of capital goods is reproduced below, for ease of reference:

“Rule 3. CENVAT credit. -

(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9:

Provided :

Provided further that if the capital goods, on which CENVAT Credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely:--

(a) for computers and computer peripherals:

.....

(b) for capital goods other than computers and computer peripherals @2.5% for each quarter.

(5A) If the capital goods are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value.

[emphasis supplied]

8. Plain reading of the text of the rule, *ibid*, elucidates that the basic condition is - when the inputs or capital goods on which credit is availed, are removed from the factory, the manufacturer shall pay an amount to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice. The appellant has contended that the *cylinders* on which capital goods credit was availed was purchased from third party vendors and were sold by them to their customers; that these cylinders were used by the them in the manufacture of duty paid printed polyester films and pouches; that these cylinders were never removed outside the factory of the appellant; that only a transfer of ownership of the cylinder, took place. It is in this background that the appellant has contended that there is no need for them to pay an amount equal to the credit availed on the cylinders.

9. Before deciding the issue, what needs to be gone into is, was the appellant required to pay the amount under the CENVAT Credit Rules, 2004, in the first place. I find that the adjudicating authority except for stating the law insists on payment of an amount equivalent to the CENVAT credit availed only in case of removal [refer para 22], is silent on whether the goods on which credit is availed, i.e. cylinder, has been removed from the factory of the appellant or otherwise. Rule 5 or 5A of the CENVAT Credit Rules, 2004,



[Handwritten signature]

would be applicable only if the disputed capital goods have been removed. The facts, I find are not properly coming out in the present dispute.

10. In the absence of any clear finding it is not known as to whether the capital goods, in dispute were removed. Therefore, I am left with no choice but to remand the case to the adjudicating authority, to pass a clear finding as to whether the capital goods in question were removed or not as it has a major bearing on the case. While remanding the matter, I rely on the case of M/s. Honda Seil Power Products Ltd [2013(287) ELT 353].

11. In view of the foregoing, the impugned order of the adjudicating authority is set aside and the matter is remanded to the adjudicating authority for compliance of directions as mentioned supra. The adjudicating authority is also directed to observe the principles of natural justice and decide the issue afresh after complying with the directions supra. Both the appeals stand disposed of accordingly.

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

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




(उमा शंकर)

आयुक्त (अपील्स - I)

Date : 23.02.2017

Attested


(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

BY R.P.A.D.

To,

M/s. Shako Flexi Pack Private Limited,
Survey No. 1023/P/13, 1024/14,
Ghumasan,
Near Sandvik Asia Limited,
Ahmedabad Mehsana Highway,
Village Rajpur, Tal. Kadi,
District Mehsana, Gujarat

Shri Vivekbhai B Kothari, Director
M/s. Shako Flexi Pack Private Limited,
Survey No. 1023/P/13, 1024/14,
Ghumasan,
Near Sandvik Asia Limited,
Ahmedabad Mehsana Highway,
Village Rajpur, Tal. Kadi,
District Mehsana, Gujarat

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central Excise, Ahmedabad-III.
3. The Deputy/Assistant Commissioner, Central Excise, Division-Kadi, Ahmedabad-III.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad-III
- ✓ 5. Guard File.
6. P.A.

