

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-1) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(GTA)34/STC-III/2016/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-266-16-17

दिनांक Date 23.03.2017 जारी करने की तारीख Date of Issue

श्री उमाशंकर आयुक्त (अपील-1) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise
Ahmedabad

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

Arising out of Order-in-Original No **05/SUPDT/STR-MEH/2015-16** dated **10.05.2016** Issued by:
Superintendent, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The Appellants/Respondents

M/s. Indian Oil Coporation Ltd.

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the
following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

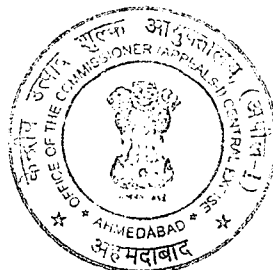
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल
कम्पाउण्ड, मेधाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20,
Meghani Nagar, New Mental Hospital Compound, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील
सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा
सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए
(उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित
सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की
मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी
होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए
5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या
उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) 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. 1000/- where the amount of service tax & interest
demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest
demanded & penalty levied is 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.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 & (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) 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, 1984 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।

4. 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,

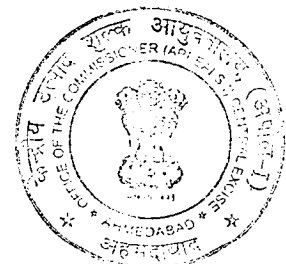
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

(4)(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।

(4)(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

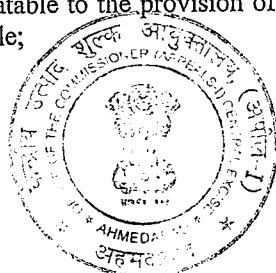
M/s. Indian Oil Corporation Limited, Sidhpur Terminal, Sujanpur State Highway, Sidhpur, Patan, Gujarat-384151 [for short - 'appellant'] has filed this appeal against OIO No. 5/Supdt./STR-MEH/2015-16 dated 10.5.2016, passed by the Superintendent, Service Tax Range Mehsana, Division Gandhinagar, Ahmedabad-III Commissionerate[for short - 'adjudicating authority'].

2. A show cause notice dated 9.10.2015 was issued to the appellant in terms of section 73(1A) of the Finance Act, 1994, alleging that during the period from 1.10.2013 to 31.3.2015, the appellant had not discharged their service tax liability on the correct taxable value in as much as they had not included the toll charges, reimbursed by them to the transporters in the taxable value [under section 67 of the Finance Act, 1994] for the purpose of payment of service tax on GTA. The appellant is liable to pay service tax on reverse charge mechanism under the provisions of Rule 2(1)(d)(v) of the Service Tax Rules, 1994 on GTA.

3. The adjudicating authority vide his impugned OIO dated 10.5.2016, confirmed the demand of service tax of Rs. 25,082/-, along with interest and further imposed penalties under sections 76 and 77 of the Finance Act, 1994.

4. Feeling aggrieved, the appellant has filed this appeal on the grounds that:

- (a) the impugned order is not sustainable and needs to be set aside;
- (b) for the transportation activity undertaken only service charges are paid;
- (c) that the agreement also stipulates that while transporting petroleum products, entry/transit/bridge/toll taxes paid by the transporter would be reimbursed separately by the appellants at actuals subject to production of original receipts evidencing payment;
- (d) the toll charges are paid for access to road and cannot form part of consideration for transportation services provided by transport contractors;
- (e) toll charges do not have any nexus to the service of transportation of goods availed by the appellants;
- (f) the appellants discharge service tax on fixed transportation charges and not on toll charges as the consideration paid for availing services of transportation of goods are only the transportation charges;
- (g) whether the transporter carries the goods or traverses through the route empty the toll charges have to be paid, meaning thereby that toll charges are to be paid for traversing through that route and not for transportation of goods of the appellants;
- (h) the payment of toll charges is ultimately made because of levy imposed by the state government/highway authority;
- (i) that they would like to rely on the case of Inox Air Products Limited [2014-TIOL-803-CESTAT-MUM],; OIA no. RPS/161/NSK/2013 dated 29.5.2013 and OIA No. 223-225/SVS/PKL/2013 dated 11.4.2013;
- (j) that the transporters pay toll charges as 'pure agent' on their behalf and fulfil all the condition/stipulation under Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006;
- (k) that the payment of toll charges is ultimately made by the appellant and not by the transporter on account of transportation of goods;
- (l) that they would like to rely on the case of Link Intime India Private limited [2015(38) STR 705], Pharnalinks Agency [2015(37) STR 305];
- (m) that reimbursement of toll taxes is not relatable to the provision of transportation service but is for the usage of road by the vehicle;



(n) that Circular no. 152/3/2012-ST dated 22.2.2012 is applicable to their case; that it is clarified in the circular that toll is a matter enumerated at serial number 59 in List II (State List) in the seventh schedule of the Constitution of India and toll fee paid by the user is not covered by any of the taxable service;

(o) that Tribunal in various cases has held that reimbursable expenses are not includible in the taxable value;

(p) that reimbursable expenses are includible in the value of service only subsequent to the amendment to Section 67 of the Finance Act, 1994, w.e.f. 14.5.2015;

(q) that invocation of extended period is not correct; that no penalty is leviable under section 77 and 76 of the Finance Act, 1994.

5. Personal hearing in the matter was held on 17.2.2017, wherein Shri Dineshchandra Chauhan, Assistant Manager(Finance) of the appellant appeared before me and reiterated the submissions advanced in the grounds of appeal. He also submitted a letter dated 17.2.2017, summarising the grounds raised in the appeal.

6. I have gone through the facts of the case, the appellant's grounds of appeal, letter dated 16.2.2017 and the oral submissions made during the course of personal hearing. The question to be decided in the present appeal is, whether the toll charges, reimbursed by appellant to the transporters, is to be included in the taxable value [under section 67 of the Finance Act, 1994] for the purpose of payment of service tax on GTA.

7. Since the dispute revolves around Section 67 of the Finance Act, 1994, the relevant extracts of the same, as was in vogue, is reproduced below, for ease of reference:

SECTION 67. Valuation of taxable services for charging service tax. —

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation. — For the purposes of this section, —

(a) ["consideration" includes any amount that is payable for the taxable services provided or to be provided;.....

7.1 Vide Finance Act, 2015 [Act No. 20 of 2015], with effect from 14.05.2015,

Explanation, for clause (a) of Section 67 of the Finance Act, 1994 was amended. The extracts of the amendment is reproduced below for ease of reference:



§

111. **Amendment of section 67.** — In section 67 of the 1994 Act, in the *Explanation*, for clause (a), the following clause shall be substituted, namely :—

'(a) "consideration" includes —

- (i) any amount that is payable for the taxable services provided or to be provided;
- (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
- (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'

[emphasis supplied]

8. Inclusion of expenditure which is reimbursed in the value of taxable services is no longer *res integra*. The Hon'ble Tribunal in various judgements has clearly held that reimbursable expenses would not form part of the taxable value. Head notes of some of the judgements are reproduced below for ease of reference:

[a]Sangmitra Agency [2007 (8) STR 233 (Tri. - Chennai)]

Valuation (Service tax) - Clearing and Forwarding Agent - Reimbursement on actuals Service tax on remuneration received from principals paid - Charges reimbursed to appellants by principals towards freight, labour, electricity, telephone, etc. not included in value - Impugned charges reimbursed on actual basis, not includible - Service tax paid adopting remuneration /commission for clearing and forwarding goods upheld - Impugned order set aside - Sections 65(25) and 67 of Finance Act, 1994 - Rule 6(8) of Service Tax Rules, 1994. [2007 (6) S.T.R. 185 (Tribunal) relied on]. [paras 2, 5]

[b]Nilalohita Enterprises [2007 (6) STR 318 (Tri. - Kol)]

Stay of order - Valuation (Service tax) - Reimbursements - Includibility in taxable value - No clear cut case brought out by Revenue for considering inclusion of reimbursements in taxable value - Prima facie no case in favour of Revenue - Stay of impugned order as sought by Revenue not granted - Matter having recurring effect and early hearing granted - Impugned order to operate till disposal - Section 86 of Finance Act, 1994. [paras 1, 5]

[c]Reliance Industries Limited [2008 (12) STR 345 (Tri. - Abad.) & 2011 (23) STR J226 (S.C.)]

Valuation (Service tax) - Reimbursement of expenses - Includibility of - Inclusion of reimbursable expenses incurred towards travelling allowance to consulting engineers sought - Impugned issue settled by Tribunal decisions - Departmental instructions clarifying that expenses incurred on account of reimbursable expenses not includible in taxable value - Impugned orders set aside - Section 67 of Finance Act, 1994. [paras 1, 2, 3]

[d]Rolex Logistics Private Limited [2009 (13) STR 147 (Tri. - Bang.)]

Valuation (Service tax) - Reimbursements - Includibility of - Service tax liability under Section 67 of Finance Act, 1994 on gross amount received towards services rendered - Reimbursements are not for services rendered but expenditure incurred on behalf of client by service provider - Gross amount for service rendered means only for services rendered - Statutory provision for each taxable service providing for deductions not required - Tribunal decisions holding reimbursements not subject to Service tax, applicable - Reimbursements not includible in taxable value - Section 67 *ibid.* - The gross receipt for the services rendered means only for the services rendered. The amount of money received only for the services rendered not for all the expenditure which is to be incurred normally by the client. Therefore, it is not necessary that for each service, there should be a provision in the Finance Act, 1994 regarding deductions from the gross receipt as held out by the learned Commissioner (Appeals). [para 5]



8.2 It is precisely because of the law as laid down in these judgements, that I do not agree with the reasoning and finding of the adjudicating authority who in para 16 states that 'even before the amendment, it was there in the statute that 'consideration' includes any amount that is payable for the taxable services provided or to be provided. By the aforementioned amendment with effect from 14.5.2015, it became unambiguous that any expenditure or any amount reimbursed to the service provider is includible in the taxable value.' Had the reasoning of the adjudicating authority been true, there was no reason to expand the scope of the term 'consideration' under Section 67 of the Finance Act, 1994. Since the dispute pertains to the period from 1.10.2013 to 31.3.2015, and the amendment is effective only from 14.5.2015, I hold that the toll charges, reimbursed by appellant to the transporters, is not to be included in the taxable value [under section 67 of the Finance Act, 1994] for the purpose of payment of service tax on GTA.

8.3 On the question as to whether the amendment in the explanation under Section 67 of the Finance Act, 1994 is retrospective or prospective, I find that the Hon'ble Supreme Court of India, in the case of Martin Lottery Agencies Limited [2009(14) STR 593(SC)], has held as follows:

35. Reverting to the decision of a Kerala High Court in *CIT v. S.R. Patton* [(1992) 193 ITR 49 (Ker.)] wherein Gujarat High Court's judgment was followed, this Court noticed that explanation was not held to be a declaratory one but thereby the scope of Section 9(1)(ii) of the Act was widened. The law in the aforementioned premise was laid down as under :

"17. As was affirmed by this Court in *Goslino Mario (supra)*, a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. [See also : *Reliance Jute and Industries v. CIT* [(1980) 1 SCC 139]. An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section (See: *Sonia Bhatia v. State of U.P.* [(1981) 2 SCC 585 at 598]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force (See: *Shyam Sunder v. Ram Kumar* [(2001) 8 SCC 24 (para 44)]; *Brij Mohan Laxman Das v. CIT* [(1997) 1 SCC 352 at 354], *CIT v. Podar Cement* [(1997) 5 SCC 482 at 506]. But if it changes the law it is not presumed to be retrospective irrespective of the fact that the phrase used are 'it is declared' or 'for the removal of doubts'.

18. There was and is no ambiguity in the main provision of Section 9(1)(ii). It includes salaries in the total income of an assessee if the assessee has earned it in India. The word "earned" had been judicially defined in *S.G. Pgnatale (supra)* by the High Court of Gujarat, in our view, correctly, to mean as income "arising or accruing in India". The amendment to the section by way of an Explanation in 1983 effected a change in the scope of that judicial definition so as to include with effect from 1979, "income payable for service rendered in India".

19. When the Explanation seeks to give an artificial meaning 'earned in India' and bring about a change effectively in the existing law and in addition is stated to come into force with effect from a future date, there is no principle of interpretation which would justify reading the Explanation as operating retrospectively."

(Emphasis supplied)

36. It is, therefore, evident that by reason of an explanation, a substantive law may also be introduced. If a substantive law is introduced, it will have no retrospective effect.



I find that the amendment to the explanation under section 67 of the Finance Act, 1994, w.e.f. 14.5.2015, has widened the scope of the term 'consideration'. Hence, it cannot be presumed to be retrospective, more so because the amendment to the explanation has effected a change in the scope of the definition of 'consideration'. Thus, even on this footing, I hold that the toll charges, reimbursed by appellant to the transporters, is not to be included in the taxable value [under section 67 of the Finance Act, 1994] for the purpose of payment of service tax on GTA.

10. In view of the foregoing, the appeal is allowed and the impugned OIO dated 10.5.2016, is set aside.

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

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - I)

Date : 23.03.2017

Attested

Vinod Lukose

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

By RPAD.

To,

M/s. Indian Oil Corporation Limited,
Sidhpur Terminal,
Sujanpur State Highway,
Sidhpur, Patan,
Gujarat- 384151

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, Central Excise, Ahmedabad-III.
3. The Deputy/Assistant Commissioner, Central Excise, STR Mehsana, Service Tax Division, Gandhinagar, Ahmedabad-III.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad-III
5. Guard File.
6. P.A.

