



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



केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलीफैक्स 07926305136

DIN : 20220264SW000000F1DA

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1614/2021 / 6439 - 43
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-003-APP-105/2021-22
दिनांक Date : 24-02-2022 जारी करने की तारीख Date of Issue 25.02.2022
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 43/AC/MEH/CGST/20-21 दिनांक: 16.02.2021 issued by
Assistant Commissioner, CGST & Central Excise, Division Mehsana, Gandhinagar
Commissionerate
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s Shivalik Corporation
Praful S. Prajapati, Shreefal Heights,
E-602, Sardar Chowk, Kudasana,
Gandhinagar

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:

- (i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।
- (ii) 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 :
- (iii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

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



(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के दिनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूला-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इका मुख्य शीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2ndमाला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Giridhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर 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 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.

- (14) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) के प्रति अपील के मामले में कर्तव्यमांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवाकर के अंतर्गत, शामिल होगा "कर्तव्य की मांग" (Duty Demanded)-

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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

- (xxv) amount determined under Section 11 D;
- (xxvi) amount of erroneous Cenvat Credit taken;
- (xxvii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

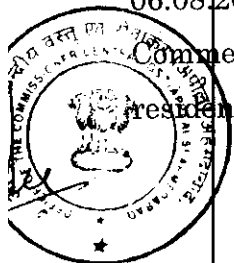


ORDER-IN-APPEAL

The present appeal has been filed by M/s. Shivalik Corporation, Opp. Suraj Dairy, R S No.14, Vijapur, Himmatnagar Highway, Vijapur – 382287 (hereinafter referred to as the appellant) against Order in Original No. 43/AC/MEH/CGST/20-21 dated 16-02-2021 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division : Mehsana, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are holding Service Tax Registration No. ACEFS2143JSD001 and are engaged in construction of residential complexes. During the course of audit of the records of the appellant for the period from F.Y.2014-15 to F.Y. 2017-18 (upto June, 2017) by the officers of CGST Audit Commissionerate, Ahmedabad, and on reconciliation of the income shown in their financial statements with those shown in their ST-3 returns, it was noticed that there was a difference in the income shown by the appellant in their financial records and the ST-3 return. It, therefore, appeared that the appellant had not disclosed to the department that they had provided services to their customers on which income was earned by them. Therefore, the appellant appeared to have suppressed the consideration received by them on services provided to their customers, in their ST-3 returns. Further, there was a difference in showing receipts for the F.Y. 2014-15 to F.Y. 2017-18 (upto June, 2017), therefore, the service tax amounting to Rs.36,132/- was liable to be demanded and recovered from them.

2.1 It was also observed during the course of audit that the appellant had availed abatement of 75% for the F.Y. 2014-15 and F.Y. 2015-16 under Notification No. 26/2012-ST dated 20.06.2012. From letter dated 06.08.2019 of the appellant, it was seen that their project consisted of Commercial units also. The appellant submitted that there were 95 residential homes and 92 shops in the project. The abatement rate allowed



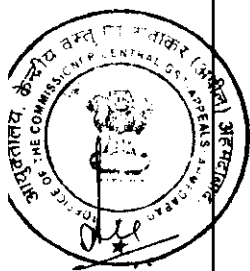
for Commercial Units was only 70% during the said period in terms of Notification No. 26/2012-ST dated 20.06.2012 whereas the appellant had availed abatement of 75%. The differential service tax payable, on account of availment of excess abatement of 5%, amounted to Rs.3,21,971/-.

2.2 The appellant was issued Show Cause Notice bearing No. F.No.VI/1(b)-73/Shivalik Corporation/IA/18-19/AP-58 dated 16.10.2019 wherein it was proposed to demand and recover the service tax amounting to Rs.36,132/- and Rs.3,21,921/- under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. Imposition of Penalty was also proposed under Section 78(1) of the Finance Act, 1994.

3. The said SCN was adjudicated vide the impugned order wherein the demand for Service Tax was confirmed under Section 73(1) of the Finance Act, 1994 along with interest. Penalty equal to the service tax confirmed was also imposed under Section 78 of the Finance Act, 1994.

4. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds :

- i. Personal Hearing was not conducted. The first letter for Personal Hearing dated 01.02.2021 was issued through mail for PH on 04.02.2021 granting merely three days for preparation. They had sent mail to the department on 03.02.2021 and 05.02.2021 stating that as the firms is dissolved some time would be required to study all the matters. They were also in the process of appointing new Chartered Accountant. However, the request was totally ignored and two further letters dated 04.02.2021 and 08.02.2021 were issued for PH on 08.02.2021 and 10.02.2021. Without granting any further opportunity and within six days the impugned order was issued. Hence, no opportunity for representing their case or submitting reply to the SCN was provided to them. Hence, the impugned order has been issued in violation of the principles of natural justice.

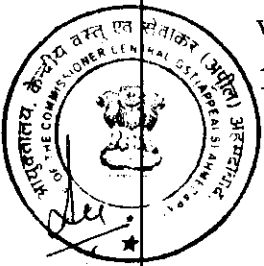


- ii. The SCN was issued in October, 2019 and the department did not act upon it for around 14-15 months till February, 2021 and only a few days were granted for PH and the order was issued even when time of only a month or two was asked by them.
- iii. The above provisions and the CBIC guidelines were completely ignored in passing the impugned order.
- iv. They rely upon the decision in the case of Jay Arts Vs. Commissioner of C.Ex., Mumbai-II – 2006 (202) ELT 144 (Tri.- Mumbai) and Kesari Marine Services Vs. UOI – 2021 (44) GSTL 71 (AP). Their case is squarely covered by the above judgment as not opportunity of PH was provided to them.
- v. During the audit while reconciling the values between the books of accounts and ST-3 there was excess payment of service tax amounting to Rs.50,605/- during F.Y. 2015-16 whereas there was short payment of service tax amounting to Rs.17,901/- and Rs.18,231/- during F.Y. 2014-15 and 2017-18 (1st quarter) respectively. They request time to submit the reconciliation.
- vi. They had already submitted that as there was excess payment of service tax during F.Y. 2015-16 they were under the bonafide belief that the same can be adjusted against the liability and no further amount has to be paid in cash. This fact was also produced before the audit and in their reply to the SCN, however, the same was completely ignored by the adjudicating authority.
- vii. In the impugned order it has been stated that they had not given advance intimation to the department for such excess payment. However, from the reconciliation table (para 18 of the impugned order) itself it is clear that the values in the books of accounts have been tallied with ST-3 returns and if there was any adjustment, the difference would not have been zero.
- viii. They are engaged in the business of construction of residential and commercial units and have claimed abatement under Notification No. 26/2012-ST dated 20.06.2012. They were under the belief that abatement of 75% is available to both residential and commercial units instead of 70% in the case of commercial units. The impugned



order has been issued confirming demand of service tax on excess 5% abatement on both residential and commercial units whereas abatement was properly claimed for residential units.

- ix. As there were various changes which had taken place in calculating the abatement, they were unaware of the same had had mistakenly claimed abatement of 75% on commercial units. Hence, it would not be justifiable to confirm the demand by invoking the extended period.
- x. Due to lack of opportunity of PH they could not provide the relevant documents. The revised calculation showing the bifurcation of value between residential and commercial units would be provided in due course of time.
- xi. The charge of suppression is not sustainable as they were under the bonafide belief that excess payment of service tax in F.Y. 2015-16 can be adjusted against the liability and not further service tax liability is outstanding.
- xii. There is no provision for providing any information of excess payment of tax to the department. Hence, invoking extended period and confirming demand of service tax is not proper.
- xiii. In the case of abatement, it is clear that there had been multiple changes in the abatement rates and it is difficult for a common man to keep track of such changes. Therefore, confirming demand by invoking extended period is not just and proper.
- xiv. As per the provisions of Section 73 of the Finance Act, 1994 where service tax was not paid by reason other than fraud, the period of service of notice shall be thirty months from the relevant date. Accordingly, the service tax liability for the period from April, 2014 to June, 2017 is time barred and is liable to be dropped.
- xv. In the absence of suppression, imposing of penalty under Section 78 is not proper. In absence of demand, question of payment of interest and penalty does not arise. The penalty imposed is not in accordance with the conditions specified in Section 78(1) of the Finance Act, 1994. Hence, even if the demand of service tax is proper, levy of



100% penalty is not proper as the maximum penalty shall be 50% as per the provision of law.

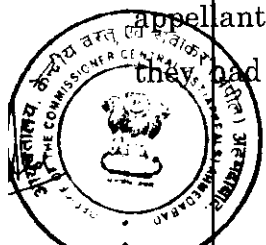
5. Personal Hearing in the case was held on 12.01.2022 through virtual mode. Shri Punit R. Prajapati, Chartered Accountant, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum. He requested to remand the matter before the adjudicating authority as effectively no personal hearing was granted to them.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, submissions made at the time of personal hearing and additional written submissions as well as material available on records. The issue before me for decision is :

- I. Whether the appellant had short paid service tax as ascertained by audit officers on reconciliation of their financial records and ST-3 returns ?
- II. Whether the appellant had short paid service tax by availing excess abatement in respect of Commercial units ?

7. It is observed that the appellant have in their appeal memorandum as well during the course of personal hearing stated that they were not granted the opportunity of personal hearing and that their request for adjournment was not considered by the adjudicating authority. The appellant have, therefore, requested that the case be remanded back for denovo adjudication.

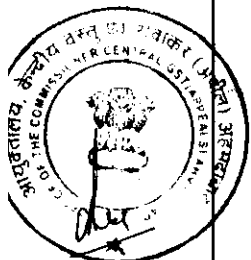
7.1 I find that in the impugned order, it has been recorded at Para 16 that the opportunity of personal hearing was granted on 04.02.2021, 08.02.2021 and 10.02.2021, but nobody appeared for the personal hearing. Thereafter, the case was adjudicated ex-parte. In this regard, the appellant have contended that vide mail dated 03.02.2021 and 05.02.2021 they had sought time on the grounds that their firm was dissolved and



they are in the process of appointing new Chartered Accountant. The appellant have submitted copies of the said letters with their appeal memorandum. On going through mail dated 03.02.2021, I find that the appellant had informed that their firm was closed and they are required to appoint consultant for the hearing. They requested that the hearing be fixed in the month of March, 2021. Further, vide mail dated 05.02.2021 the appellant submitted their contact details and reiterated that contents of their mail dated 03.02.2021. They requested for atleast two to three weeks time and that in the interest of natural justice reasonable time be granted to them. I find that there is nothing in the impugned order to indicate whether the appellant's request for adjournment was taken on record and considered by the adjudicating authority. It is also not forthcoming whether the request of the appellant was accepted or rejected. It is not the case that the appellant did not wish to be heard in person. On the contrary, the appellant have clearly sought time on the grounds stated by them in their mails. In spite of this, the adjudicating authority has proceeded to decide the case ex-parte.

7.2 Further, in terms of Section 33A (1) of the Central Excise Act, 1944, the adjudicating authority shall give an opportunity of being heard. In terms of sub-section (2) of Section 33A, the adjudicating authority may adjourn the case, if sufficient cause is shown. In terms of the proviso to Section 33A (2), no adjournment shall be granted more than three times. In the instant case, I find that request of the appellant was not considered by the adjudicating authority. The adjudicating authority was bound to either accept or reject the request of the appellant. I further find that three adjournments as contemplated in Section 33A of the Central Excise Act, 1944 have also not been granted to the appellant. I also find it relevant to refer to the judgment of the Hon 'ble High Court of Gujarat in the case of Regent Overseas Pvt Ltd. Vs. UOI – 2017 (6) GSTL 15 (Guj) wherein it was held that :

"12. Another aspect of the matter is that by the notice for personal hearing three dates have been fixed and absence of the petitioners on those three dates appears to have been considered as grant of three adjournments as contemplated under the proviso to sub-section (2) of Section 33A of the Act. In this regard it may be noted that sub-section (2) of Section 33A of the Act provides for



grant of not more than three adjournments, which would envisage four dates of personal hearing and not three dates, as mentioned in the notice for personal hearing. Therefore, even if by virtue of the dates stated in the notice for personal hearing it were assumed that adjournments were granted, it would amount to grant of two adjournments and not three adjournments, as grant of three adjournments would mean, in all four dates of personal hearing."

7.3 In view of the above, I am of the considered view that in the interest of the principles of natural justice, the matter is required to be remanded back for denovo adjudication after affording the appellant the opportunity of personal hearing.

8. In view of the above, the impugned order is set aside and the matter remanded back to the adjudicating authority for adjudication afresh. The appellant should attend the personal hearing as and when fixed by the adjudicating authority. Accordingly, the impugned order is set aside and the appeal of the appellant is allowed by way of remand.

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

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

Akhilesh Kumar
15 February 2022
(Akhilesh Kumar)
Commissioner (Appeals)
Date: .02.2022.

Attested:

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



BY RPAD / SPEED POST

To

M/s. Shivalik Corporation,
Opp. Suraj Dairy,
R S No.14, Vijapur,
Himmatnagar Highway,
Vijapur - 382287

Appellant

The Assistant Commissioner,
CGST & Central Excise,

Respondent

Division- Mehsana,
Commissionerate : Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
(for uploading the OIA)
4. Guard File.
5. P.A. File.

