



आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाडी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065- टेलीफैक्स 07926305136



DIN : 20211264SW0000010941

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1376/2021 / 5163 705167
- ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-77/2021-22**
दिनांक Date : **16-12-2021** जारी करने की तारीख Date of Issue 17.12.2021
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. **Kalol/DC/D.Khatik/26/ST/2020-21** दिनांक: **27.01.2021**
issued by Deputy Commissioner, CGST & Central Excise, Division Kalol, Gandhinagar
Commissionerate
- ध अपीलकर्ता का नाम एवं पता Name & Address of the **Appellant / Respondent**

M/s Shakti Infra Con
New Rajdhani Bungalows,
Survey No. 657, Borisna-Serisa Road,
Kalol, Gandhinagar

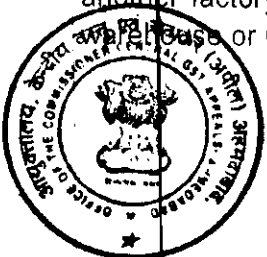
कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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 :
- (ii) 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।
- (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 factory 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 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।

(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 ईए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का 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 संलग्नरकम 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.

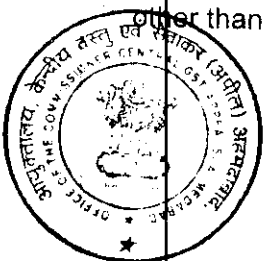
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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, Girdhar 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश 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.

- (54) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) के प्रतिअपीलो 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)-

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

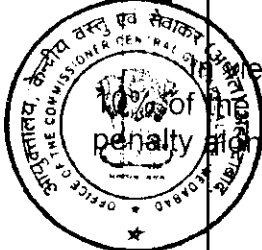
⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है.

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:

- (cxlv) amount determined under Section 11 D;
- (cxlvi) amount of erroneous Cenvat Credit taken;
- (cxlvii) 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।



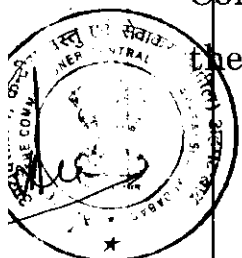
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute."

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Shakti Infra Con, Near Rajdhani Bungalows, Survey No.657, Borisana –Serisa Road, Kalol, District: Gandhinagar (hereinafter referred to as the appellant) against Order in Original No. Kalol/DC/D.KHATIK/26/ST/2020-21 dated 27-01-2021 [hereinafter referred to as “*impugned order*”] passed by the Deputy Commissioner, CGST, Division-Kalol, Commissionerate : Gandhinagar [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case is that the appellant is holding Service Tax Registration No. ABWPS3779H1ZE and engaged in providing Works Contract Services for the construction of residential complex. During the course of audit of records of the appellant by departmental audit officers for the period from April, 2016 to June, 2017, three issues regarding non payment/short payment of service tax were observed and the issues were taken as Revenue Paras in Final Audit Report No.415/Excise/2019-20 dated 30.10.2019. Revenue Para 1 was regarding non payment/short payment of service tax on works contract service for original works involving service tax amounting to Rs.12,32,934/-. Revenue para 2 was regarding non payment of service tax on legal consultation services involving service tax amounting to Rs. 3,000/-. Revenue Para 3 was regarding non payment of service tax on GTA services for inward freight involving service tax amounting to Rs.18,734/-.

2.1 The appellant was issued a SCN bearing No. 189/19-20/CGST(Audit) dated 06.11.2019 from F.No. VI/1(b)-13/AP-68/CIR-X/18-19 wherein it was proposed to recover the service tax amount of Rs.12,32,934/- involved in Works Contract services; Rs.3,000/- on Legal Consultancy services and Rs.18,734/- on GTA services 3,26,481/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with interest



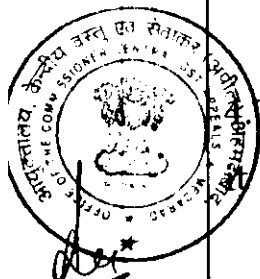
under Section 75 of the Finance Act, 1994, and impose penalty under Section 78 of the Finance Act, 1994.

3. The said SCN was adjudicated vide the impugned order and the demand for service tax was confirmed along with interest. Penalty was also imposed under Section 78 of the Finance Act, 1994.

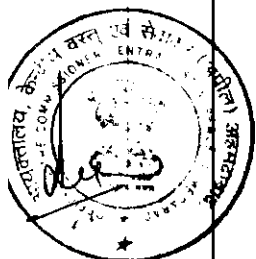
4. Being aggrieved with the impugned order, the appellant has filed the instant appeal on the following grounds :

- i. The Audit for the period 2011-2015 has been concluded and department has allowed deduction of value of undivided land and has taken receipts on Cum tax basis. It has been settled issue for years and the same has been disputed in the impugned order.
- ii. The adjudicating authority has erred in computation of service tax liability on the ground that Rule 2A of the Determination of Value of Service portion in the execution of works contract has not been adhered.
- iii. No interest is payable in the case where demand itself is not payable. They rely upon the decision in the case of Pratibha Processors Vs. UOI – 1996 (88) ELT 12 (SC).
- iv. There was no malafide or deliberate intention on their part to evade payment of service tax and the default, if any, is solely on account of the bona fide belief that they were not liable to pay service tax considering the activity being excluded from the ambit of service tax. They rely upon the decisions in the case of : CCE, Trichy Vs. Grasim Industries – 2005 (183) ELT 123 (SC); India Explosive Limited Vs. CC – 1992 (60) ELT 111 (Cal.); Tata Yodagwa Limited Vs. ACCE- 1982 (12) ELT 17 (Cal.) and Cement Marketing Co of India Limited Vs. ACST – 1980 (6) ELT (SC).

1. The appellant filed additional submissions on 02.11.2021 wherein was inter alia submitted that :



- They had carried out construction activities on plot 1 and plot 2. For the period under dispute, activities were mainly carried out on Plot no. 2 and there were negligible receipts, if any, for plot no.1. Construction on plot no. 1 was already completed before the period under disputed. Major receipts during the period covered by Audit were regarding construction activity carried out on plot no. 2 and they have paid service tax at applicable rate considering 40% of works contract value as service portion of the works contract.
- There are 70 units in plot no.1 and the BU permission was received on 30.6.2015. Thereby for any sales made after the said date, service tax is not applicable. Accordingly, the sales amounting to Rs.41,77,000/- made during this period is not taxable under service tax, except past collection on which Rs.38,969/- was discharged.
- There are 80 units in plot no.2 and the BU permission was received on 13.04.2017. Thereby bookings accepted after the date of BU permission is not liable to service tax. Accordingly, the sales amounting to Rs.65,50,000/- is not taxable under service tax. For the bookings accepted before BU permission, but payments received after BU permission, the same were subjected to service tax which was duly discharged.
- In view of Rule 2A of the Determination of Value of Service portion in the execution of a works contract, the land portion is to be excluded from the value of the works contract and is not considered as part of works contract.
- Service Tax is payable on advance receipt of provision of service, whichever is earlier. Typically in a works contract, the value of the entire apartment is fixed with the customer, the payments are received on piecemeal basis. Thus to correlate the exact date of service and advance is very difficult. To avoid any dispute the works contractor keeps on paying service tax on the advance portion of the works contract.



- In any works contract service, the total service tax payable is maximum to the extent of the sales, which is mostly discharged at the time of advance receipt rather than at the time of booking of sales in the financials. The advance payments would start as early as two years earlier than the actual date of sale of flat.
- The total sales consideration that the works contractor receives from each customer is noted in the sale deed executed and is the base for recording sales in the financials. The consideration a works contractor received for a flat is broadly divided into land value and works contract value.
- As per the audited financials, they had sales of Rs.10,52,02,000/- during the period under dispute, out of which Rs.41,77,000/- is towards plot no.1. Hence, the total sales for plot no.2 is Rs.10,08,25,000/-. Out of this, the sales after BU permission is Rs.65,50,000/- and the land value of the units is Rs.1,41,01,370/-. Thereby, the total works contract (material + service) amounts to Rs.8,01,73,630/-. Out of this, service tax on Rs.1,15,75,605/- has already been assessed by the department and discharged by them in the previous period. Thereby, works contract to be discharged for the period under dispute is Rs.6,85,98,025/-.
- Out of the amount of Rs.6,85,98,025/- 60% pertains to material amounting to Rs.4,11,58,815/- and 40% amounting to Rs.2,74,39,210/- pertains to service portion on which service tax is leviable. As they have not collected any amount from the buyer of the flat, this amount is inclusive of service tax.
- They have paid service tax amounting to Rs.34,74,803 during the said period and the service portion on which service tax was paid is amounting to Rs.2,67,53,923/-. Thereby there may be an additional service tax liability on the service portion of Rs.6,85,287/-. The service tax liability of Rs.12,32,935/- is wrongly calculated and the actual tax to be paid is on Rs.6,85,287/- which amounts to Rs.89,385/-.

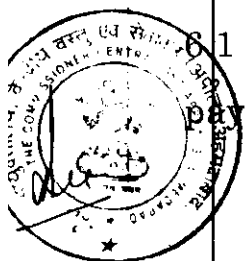


- The value of services has been calculated to be Rs.7,95,70,833/- (net of land contribution) by the department and based on this the service tax demand has been worked out. However, the working of the value of service has not been shared in the SCN or in the impugned order. It is not clear whether the land value has been deducted from the above value arrived at by the department.
- The department has also taxed receipts received on sales after BU permission of plot no.2 amounting to Rs.41,77,000/-, which is sale of immovable property and outside purview of service tax.
- The amount collected by them from the customer is cum tax i.e. including the value of service tax. This fact has been ignored by the adjudicating authority while calculating the liability and while passing the impugned order.
- The calculations provided by the department is hypothetical, while they have made efforts to reconcile the figures based on sales as per audited financials and as per which the short payment calculated in the impugned order is misleading and wrong.

5. Personal Hearing in the case was held on 02.11.2021 in physical mode. Shri Malav Ajmera, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum and in their additional written submission.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. The issue to be decided in this case is whether the impugned order confirming the demand against the appellant alongwith interest and penalty is legally sustainable. The demand pertains to period April, 2016 to June, 2017.

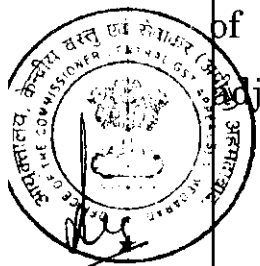
8.1 I find that though the appellant are not challenging the short payment of service tax by them on works contract service provided by



them during the period under dispute, they have contested the computation of the amount of service tax short paid by them. I find that the appellant have submitted before the adjudicating authority that there was a short payment of service tax amounting to Rs. 26,258/-. However, in their written submission filed in the course of the present appeal, they have contended that the service tax short paid is amounting to Rs.89,385/-. Therefore, there is no consistency even in the calculation of the appellant regarding the amount of service tax short paid by them.

6.2 I find that the appellant have also contended that the value of taxable service computed by the department includes the value of the land, the sales booked under GST after receipt of BU permission, which are required to be excluded from the computation. They have further contended that the amount charged by them from their customers is cum tax, but the department has calculated their liability on the total amount. The appellant have also contended that the working of the value of service has not been shared in the SCN or in the impugned order.

6.3 I find that though the appellant had contested the computation of the taxable value of services before the adjudicating authority, the same was rejected summarily on the grounds that the appellant had not provided any evidencing documents for verification. I find that no detailed findings have been recorded by the adjudicating authority on the submissions made by the appellant. It is not also clearly forthcoming from the material on record whether the appellant had made their submission before the adjudicating authority along with documents in support of their contentions. Be that as it may, the appellate authority cannot be expected to undertake the basic exercise of computation of demand, which ought to have been done by the adjudicating authority before passing the impugned order.

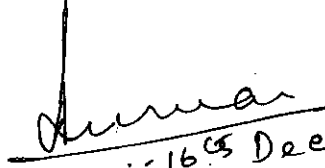


7. In view of the above, I am of the considered view that the matter is required to be decided afresh after considering the submissions of the appellant regarding the computation of the value of taxable services. Therefore, I remand back the matter to the adjudicating authority to decide the matter afresh after providing the appellant the calculation sheet showing how the value of taxable services and the demand for service tax short paid was worked out. The appellant shall, within 30 days of receipt of the calculation sheet, submit all the documents in their support before the adjudicating authority, who shall thereafter, adjudicate the case by recording his findings on each of the submissions of the appellant.


8. Accordingly, the impugned order is set aside with the above directions and the appeal of the appellant is allowed by way remand.

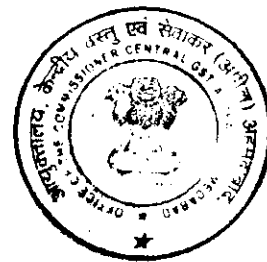
9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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


 (Akhilesh Kumar)
 Commissioner (Appeals)
 Date: .12.2021.

Attested:


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



BY RPAD / SPEED POST

To

M/s. Shakti Infra Con,
 Near Rajdhani Bungalows,
 Survey No.657. Borisna –Serisa Road, Kalol,
 District: Gandhinagar

Appellant

The Deputy Commissioner,

Respondent

CGST & Central Excise,
Division- Kalol,
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.

