



**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 : 20220264SW000000FF9C

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/1507/2021 / 5168 - 32
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-003-APP-93/2021-22
दिनांक Date : 21-01-2022 जारी करने की तारीख Date of Issue 07.02.2022
- आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. Kadi/ST/DC-DKKadi/31/2020-21 दिनांक: 27.02.2021 issued by Deputy Commissioner, CGST & Central Excise, Division. Kadi, Gandhinagar Commissionerate
- ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Shayar Construction Co.
158/1, Opp. O.N.G.C Colony,
At-Merda, Taluka-Kadi,
Dist-Mehsana

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 :

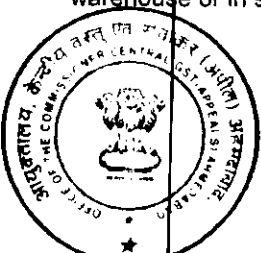
Revision application to Government of India:

(i) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत 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।

(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 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 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 विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले 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 हों।

(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 भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता ई का मुख्य शीर्ष के अंतर्गत धारा 35-ई 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.

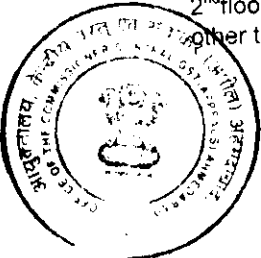
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-ई 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 Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि-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 कान्यायालय शुल्क विकट 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.

- (6) 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। हलांकि, 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.

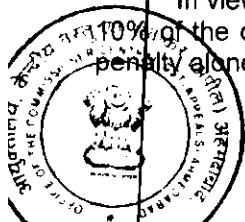
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (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.

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड वियादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड वियादित 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. Shayar Construction Co., 158/1, Opp. ONGC Colony, At: Merda, Taluka : Kadi, District : Mehsana, Gujarat (hereinafter referred to as the appellant) against Order in Original No. Kadi/ST/DC-DKKadi/31/2020-21 dated 27.02.2021 [hereinafter referred to as "*impugned order*"] passed by the Deputy Commissioner, CGST, Division : Kadi, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that the appellant are engaged in the business of laying of underground and over ground pipelines etc. for their clients M/s.ONGC, M/s.IOCL etc. for which they are holding Service Tax Registration No. ABEPR1777NST001 under the category of Commercial/Industrial Building and Civil Structures. On scrutiny of the ST-3 returns filed by the appellant for the period from April, 2013 to September, 2013, it was observed that they had charged Rs.1,74,20,435/- from their clients towards the taxable service provided by them under the category of 'Construction services other than Residential Complex, including Commercial/Industrial Buildings or Civil Structures' for which service tax amounting to Rs.7,10,544/- was paid by them after availing abatement of 67% of the gross service value in terms of Sr.No.1 of Notification No. 30/2012-ST dated 20.06.2012. However, the said notification does not provide for any abatement and the notification is in respect of service tax payable under reverse charge under Section 68 (2) of the Finance Act, 1992. It, therefore, appeared that the appellant had short paid service tax amounting to Rs.14,42,622/- for the period from April, 2013 to September, 2013. The appellant was called upon to submit various documents viz. copies of Income Ledger, Invoice, Work Orders, Balance Sheet for the F.Y. 2013-14 but the appellant failed to submit the same.

2.1 The appellant was issued SCN No. V.ST/15-223/Dem/OA/14-15 dated 20.04.2015 demanding service tax amounting to Rs.14,42,622/- under Section 73 (1) of the Finance Act, 1994 along with interest under Section 75 of the

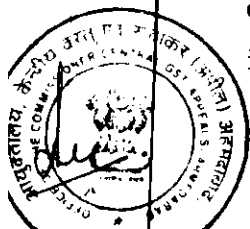


Finance Act, 1994. Imposition of penalty was also proposed under Section 76, 77(2) and 78 of the Finance Act, 1994.

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 77 (1) (a), 77 (2) and 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. They are involved in undertaking composite contracts for supply and construction, procure the construction material and construct the site for which a lump sum consideration is charged from the customer. They have carried out the work of laying of gas pipeline for ONGC and IOCL with material for which they have opted to pay service tax under works contract service.
- ii. They have opted for the composition scheme of Works Contract for paying service tax in respect of the services provided to ONGC and IOCL. They had not taken cenvat credit on any inputs used in the said service. They are, therefore, eligible for the composition scheme and their service tax liability is Rs.8,61,266/- against which they have already paid Rs.7,10,544/-. The demand without following the valuation rule is not justifiable.
- iii. They are a proprietary concern and accordingly are liable to pay 50% of the service tax under reverse charge in terms of Sr.No.9 of Notification No.30/2012-ST dated 20.06.2012. Their service tax liability, therefore, amounts to Rs.4,30,633/- against which they have already paid Rs.7,10,544/-. The excess amount of Rs.2,79,911/- is refundable to them.
- iv. The wrong mention of the serial number of Notification No.30/2012-ST dated 20.06.2012 was by clerical mistake and a procedural lacuna on their part.
- v. The SCN for the period from April, 2013 to September, 2013 was issued on 20.04.2015 whereas the facts were in the knowledge of the department since 2013. The extended period cannot be invoked as there is no suppression or willful mis-statement on their part.



- vi. Penalty also cannot be imposed as they have not suppressed any information from the department and there was no willful mis-statement on their part. They were of the belief that their activities were not taxable, which cannot be treated as suppression from the department. They rely upon the judgment of the Hon'ble Gujarat High Court in the case of Steel Case Ltd.
- vii. Penalty is not imposable under Section 77 as there is no short payment of service tax.
- viii. For imposing penalty there should be an intention to evade payment of service tax. They have always been under the bonafide belief that they are not liable for payment of service tax. There was no intention to evade payment of service tax. They rely upon the decision in the case of Hindustan Steel Ltd. Vs. The State of Orissa - AIR 1970 (SC) 253. Kellner Pharmaceuticals Ltd Vs. CCE - 1985 (20) ELT 80, Pushpam Pharmaceuticals Company Vs. CCE - 1995 (78) ELT 401 (SC), CCE Vs. Chemphar Drugs and Liniments - 1989 (40) ELT 276 (SC).
- ix. Penalties under Section 76 and 78 cannot be simultaneously imposed. They rely upon the decision in the case of : The Financers Vs. CCE, Jaipur - 2007 (8) STR 7 (Tri.-Del); Commissioner of Central Excise, Ludhiana Vs. Pannu Property Dealer - 2009 (14) STR 687 (Tri.-Del); Commissioner of C.Ex, Chandigarh Vs. City Motors - 2010 (19) STR 486 (P&H); CCE Vs. Cool Tech Corporation (P&H); and CCE Vs First Flight Courier Ltd - 2011 (22) STR 622 (P&H).
- x. The issue involved is of interpretation of statutory provision and therefore, penalty cannot be imposed. They rely upon the decision in the case of :- Bharat Wagon & Engg. Co Ltd. Vs. Commissioner of C.Ex., Patna - (146) ELT 118 (Tri.-Kolkata); Goenka Woolen Mills Ltd Vs. Commissioner of C.Ex., Shillong - 2001 (135) ELT 873 (Tri.-Kolkata); Bhilwara Spinners Ltd Vs. Commissioner of C.Ex, Jaipur - 2001 (129) ELT 458 (Tri._Del).

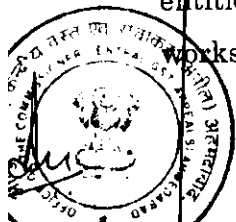
5. Personal Hearing in the case was held on 17.11.2021 through virtual mode. Shri Vipul Khandhar, CA, appeared on behalf of the appellant for the hearing. He reiterated the submissions made in appeal memorandum.



6. I have gone through the facts of the case, submissions made in the Appeal Memorandum and the submissions made at the time of personal hearing. The issue before me for decision is ~~whether the~~ abatement in respect of the taxable value of services availed by the appellant in the facts and circumstances of the case is proper or otherwise. The demand for service tax is for the period from April, 2013 to September, 2013.

7. I find that the appellant is engaged in providing service of laying of underground and over ground pipelines for their customers and they have filed the ST-3 returns under the category of 'Construction services other than Residential Complex, including Commercial/Industrial Buildings or Civil Structures' of laying of over ground and underground pipelines, leakage repair works etc. With the introduction of the Negative List of Services regime w.e.f. 01.07.2012, the classification of services was no more relevant to the levy and payment of service tax. The applicability of service tax is to be determined on the basis of Section 65B of the Finance Act, 1994, the Declared Services in terms of Section 66E of the Finance Act, 1994 and the Negative List of Services in terms of Section 66D of the Finance Act, 1994. Therefore, the definitions of services under Section 65 of the Finance Act, 1994 are not relevant to the issue as the demand pertains to the period post the introduction of the negative list of services regime.

7.1 From the SCN and the impugned order, I find that the appellant had claimed the benefit of Sr.No.1 of Notification No. 30/2012-ST dated 20.06.2012 and also claimed abatement @67% of the gross value charged for the service provided by them. It is observed that Sr. No.1 of the said notification pertains to insurance service and, is therefore, not applicable to the service provided by the appellant. Further, the said notification is in respect of the service tax payable under reverse charge in terms of Section 68 (2) of the Finance Act, 1994. Therefore, the appellant was denied the benefit of payment of service tax under reverse charge in terms of Sr. No. 1 of the said notification by the adjudicating authority. As against this, the appellant have contended that it was a clerical mistake on their part and they are entitled to the benefit of Sr.No.9 of the said notification which is in respect of works contract service. The appellant have also claimed the benefit of



Composition scheme under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

7.2 As regards the claim of the appellant for the benefit of composition scheme in terms of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, I find that the same is not tenable inasmuch as Notification No. 32/2007-ST dated 22.05.2007 vide which the said Rules were introduced has been rescinded by Notification No.35/2012-ST dated 20.06.2012.

7.3 Regarding the claim of the appellant that the service provided by them is works contract service and their eligibility to the benefit of Sr.No.9 of Notification No.30/2012-ST dated 20.06.2012, I find that there is no material on record to indicate whether the service provided by the appellant falls within the ambit of 'Works Contract' service as defined under Section 65B (54) of the Finance Act, 1994. The appellant had raised this claim before the adjudicating authority. However, I find the issue has not been dealt with by the adjudicating authority while passing the impugned order and no findings have been recorded in this regard in the impugned order.

8. I am, therefore, of the view that the issue is required to be remanded back to the adjudicating authority to consider the claim of the appellant that the service provided by them is 'Works Contract' and their eligibility to Sr.No.9 of Notification No.30/2012-ST dated 20.06.2012. If it is found that the service provided by the appellant is in fact Works Contract service as claimed by them, they would be eligible for abatement applicable to work contract. They would also be eligible for the benefit of Sr.No.9 of the said Notification No.30/2012-ST dated 20.06.2012 and merely because they had mentioned the wrong serial number in their ST-3 returns the same would come in the way of their entitlement to the benefit of the said notification. I, therefore, set aside the impugned order and remand back the case to the adjudicating authority for denovo adjudication in light of the directions contained hereinabove.

The appellant have also contested the demand confirmed vide the impugned order on the grounds of limitation. In this regard, I find that the



issue has been dealt with by the adjudicating authority at Para 7.1.2 of the impugned order and it has been clearly stated that the SCN was issued within the normal period of limitation. I do not find any infirmity in the finding of the adjudicating authority and, therefore, I reject the contention of the appellant as regards limitation.

10. I find that the demand, confirmed by the impugned order, was raised by a SCN which was under Section 73 (1) of the Finance Act, 1994. That being the case, it cannot be alleged that the appellant has indulged in fraud, willful mis-statement or suppression of facts. Therefore, the ingredients for imposing penalty under Section 78 (1) of the Finance Act, 1994 are not present in the instant case. I am of the view that the adjudicating authority has erred in imposing penalty under Section 78 of the Finance Act, 1994. Accordingly, the penalty imposed under Section 78 of the Finance Act, 1994 in the impugned order is set aside. I find that penalty has not been imposed under Section 76 of the Finance Act, 1994 in view of the penalty imposed under Section 78 of the Finance Act, 1994. As the matter is being remanded back to the adjudicating authority for denovo proceedings, the issue of imposition of penalty under Section 76 of the Finance Act, 1994 is left open for the adjudicating authority to decide upon.

11. In view of the above findings and discussions, the impugned order is set aside and the matter is remanded back the case to the adjudicating authority for denovo adjudication in light of the directions contained hereinabove.

12. 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.

Attested:

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

Akhil Kumar
21st January, 2022
(Akhilesh Kumar)
Commissioner (Appeals)
Date: .01.2022.



BY RPAD / SPEED POST

To

M/s. Shayar Construction Co.,
158/1, Opp. ONGC Colony,
At: Merda, Taluka : Kadi,
District : Mehsana, Gujarat

Appellant

The Deputy Commissioner,
CGST & Central Excise,
Division- Kadi,
Commissionerate : Gandhinagar

Respondent

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.

