



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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By SPEED POST

DIN:- 20230264SW0000111BBB

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/STP/1522/2022-APPEAL/8936-110
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-132/2022-23 and 28.02.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	28.02.2023
(ङ)	Arising out of Order-In-Original No. PLN-AC-STX-60/2021-22 dated 30.03.2022 passed by the Assistant Commissioner, CGST, Division-Palanpur, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Yash Hotel, Radhanpur-Palanpur Highway, Sardarpura, Radhanpur, Patan, Gujarat-385340

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो सकता है।

Any person aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way.

भारत सरकार का पुनरीक्षण आवेदन:-

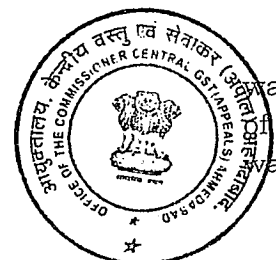
Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा 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 :-

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 :-

(क) 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.



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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

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

(घ) 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।

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.

(2) 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 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 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.

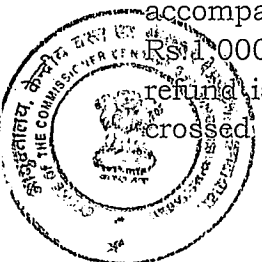
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 :-

(2) उक्तलिखित परिच्छेद 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 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2ndfloor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

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



sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

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

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपीलो 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)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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.

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

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."



अपीलिय आदेश / ORDER-IN-APPEAL

The present appeal has been filed by M/s. Yash Hotel, Radhanpur-Palanpur Highway, At:-Sardarpura, Radhanpur-385340, Patan, (hereinafter referred to as the "appellant") against Order-In-Original No.PLN-AC-STX-60/2021-22, dated 29.03.2022 [hereinafter referred to as the "impugned order"], passed by the Assistant Commissioner, CGST & C.Ex., Division: Palanpur, Commissionerate: Gandhinagar [hereinafter referred to as the "adjudicating authority"].

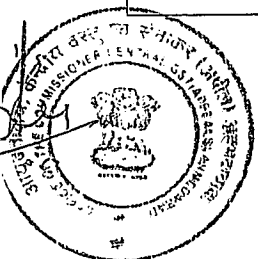
2. Briefly stated, the facts of the case are that the appellant were holding Service Tax Registration No. AABFY1831CSD001 for providing taxable services viz. Restaurant services, Accommodation services in Hotel. As per the information received from the Income Tax department, discrepancies were observed in the total income declared in Income Tax Returns/26AS, when compared with Service Tax Returns of the appellant for the period F.Y. 2015-16. In order to verify the said discrepancies as well as to ascertain the fact whether the appellant had discharged their Service Tax liabilities during the period F.Y. 2015-16, letters dated 16.09.2019 and 18.10.2019 were issued to them by the department. The appellant failed to file any reply to the query. It was also observed by the Service Tax authorities that the appellant had not filed ST-3 returns for the F.Y. 2015-16. It was also observed that the nature of services provided by the appellant were covered under the definition of 'Service' as per Section 65B(44) of the Finance Act, 1994, and their services were not covered under the 'Negative List' as per Section 66D of the Finance Act,1994. Further, their services were not exempted vide the Mega Exemption Notification No.25/2012-S.T., dated 20.06.2012 (as amended). Hence, the services provided by the appellant during the relevant period were considered taxable.

3. In the absence of any other available data for cross-verification, the Service Tax liability of the appellant for the F.Y. 2015-16 was determined on the basis of value of 'Sales of Services under Sales/Gross Receipts from Services (Value from ITR)' as provided by the Income Tax department. Since the appellant had not filed the Service Tax returns, the 'Taxable Value' was considered what the appellant had declared in the Income Tax Returns. Details are as under:-

TABLE

(Amount in Rs.)

Period	Total Income as per ITR-5	Income on which Service Tax paid	Difference of Value	Rate of Service Tax [Including Cess]	Service Tax along with Cess Demanded
	(1)	(2)	(1) - (2) = (3)	(4)	(5)
2015-16	45,98,700	00	45,98,700	14.5 %	6,66,811



4. The appellant was issued a Show Cause Notice vide F.No. AR-V/Yash- Hotel/ST-3-SCN/2020-21, dated 10.06.2020, wherein it was proposed to:

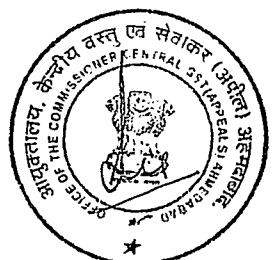
- Demand and recover Service Tax amount of Rs.6,66,811/- under the proviso to Section 73 (1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act,1994 ;
- Impose penalty under Section 76, 77(2), 77(3)(c) and 78 of the Finance Act, 1994.

5. The said Show Cause Notice was adjudicated vide the impugned order wherein:

- Demand for Rs.6,66,811/- was confirmed under the proviso to Section 73(1) of the Finance Act, 1994;
- Interest was imposed to be recovered under Section 75 of the Finance Act, 1994;
- Penalty amounting to Rs.6,66,811/- was imposed under Section 78 of the Finance Act, 1994;
- Penalty of Rs.10,000/- was imposed under Section 77(2) of the Finance Act, 1994;
- Penalty of Rs.10,000/- was imposed under Section 77(3)(c) of the Finance Act, 1994.

6. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on following grounds:

- They were engaged in providing lodging and boarding in Hotel rooms. The tariff per night for occupancy of each room was fixed at Rs. 900/- . During the period under reference, they had claimed exemption under Entry No. 18 of Notification No.25/2012-S.T.
- During the period under reference the turnover of the appellant was Rs.45,98,700/-. However, the said turnover consists of room tariff accommodation fixed at Rs. 900/- per night. Thus, they had correctly claimed the exemption under Notification No.25/2012-S.T., as the declared tariff did not exceed Rs.1000/-.
- The Superintendent, Palanpur had issued notice demanding service tax on entire turnover without verifying the facts of the case of the appellant.
- They has furnished sales ledger, tariff and copy of invoices before the adjudicating authority i.e. Assistant Commissioner, Palanpur but the adjudicating authority had arbitrarily / mechanically confirmed the demand and issued the order merely for non submission of entry book.
- Invocation of Section 73(1) of the Finance Act, 1994 is not justifiable.

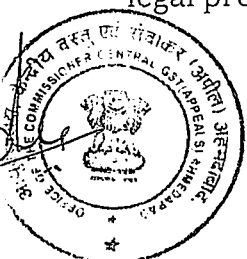


- The adjudicating authority had failed to appreciate that as the declared tariff per night by them was less than Rs.1000/- per night, the provisions of Gujarat Tax on Luxuries (Hotel and Lodging Houses) Act, 1977 is not applicable in their case.
- Thus, the adjudicating authority has erred in law and on facts in invoking extended period of limitation under Section 73 of the Finance Act, 1994.
- The adjudicating authority has erred in initiation of Service Tax proceedings after repeal of the erstwhile Finance Act, 1994 and Rules thereof.
- The adjudicating authority has erred in law and facts in confirming demand of Rs. 6,66,811/- .
- The adjudicating authority has erred in levy of penalty of Rs. 6,66,811/- under Section 78 of the Finance Act, 1994 and levying the interest on Rs. 6,66,811/- under Section 75 of the Finance Act, 1994.
- The adjudicating authority has erred in levy of penalty of Rs. 10,000/- under Section 77(2) of the Finance Act, 1994 and levy of penalty of Rs. 10,000/- under Section 77(3) of the Finance Act, 1994.

7. It is observed that the appellant is contesting the demand of Service Tax along with interest & also imposition of penalty totally amounting to Rs.13,53,622/- [i.e. Service Tax Rs.6,66,811/-, Penalty Rs.6,66,811/-, Rs.10,000/- & Rs.10,000/-] confirmed / imposed under Section 73(1), Section 78 , Section 77(2) and Section 77(3)(c) of the Finance Act, 1994 , respectively. Upon scrutiny of the appeal papers filed by the appellant on 27.05.2022, it was noticed that they had submitted DRC-03 dated 27.05.2022 showing payment of Rs. 50,011/- towards pre-deposit in terms of Section 35F of the Central Excise Act, 1944.

8. The CBIC had, consequent to the rollout of the Integrated CBIC-GST Portal, vide Circular No.1070/3/2019-CX, dated 24.06.2019, directed that from 1st July, 2019 onwards, a new revised procedure has to be followed by the taxpayers for making arrears of Central Excise & Service Tax payments through portal "CBIC (ICEGATE) E-payment". Subsequently, the CBIC issued Instruction dated 28.10.2022 from F.No.CBIC-240137/14/2022-Service Tax Section-CBEC, wherein it was instructed that the payments made through DRC-03 under CGST regime is not a valid mode of payment for making pre-deposits under Section 35F of the Central Excise Act, 1944 and Section 83 of the Finance Act, 1994.

9. In terms of Section 35F of the Central Excise Act, 1944, an appeal shall not be entertained unless the appellant deposits 7.5% of the duty in case where duty and penalty are in dispute or 7.5% of penalty where such penalty is in dispute. Relevant legal provisions are reproduced below:-



“SECTION 35F: Deposit of certain percentage of duty demanded or penalty imposed before filing appeal. — The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal —

(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the [Principal Commissioner of Central Excise or Commissioner of Central Excise];”

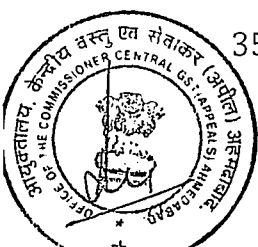
10. The appellant was, therefore, called upon vide letter F.No. GAPPL/COM/STP/1522/2022-APPEAL, dated 24.11.2022 to make the pre-deposit in terms of Board's Circular No.1070/3/2019-CX, dated 24.06.2019 read with CBIC Instruction dated 28.10.2022 and submit the document evidencing payment within 10 days of the receipt of this letter. They were also informed that failure to submit proof of pre-deposit would result in dismissal of the appeal for non-compliance in terms of Section 35F of the Central Excise Act, 1944. A reminder letter F.No. GAPPL/COM/STP /1522/2022-APPEAL dated 19.12.2022 was also issued to the appellant to make the pre-deposit and to submit the document evidencing payment within 7 days of the receipt of the letter

11. However, no communication was received from the appellant, nor did they submit evidence of pre-deposit in terms of Board's Circular No.1070/3/2019-CX, dated 24.06.2019. It is observed that though sufficient time was granted to the appellant to make the payment of pre-deposit in terms of Circular No.1070/3/2019-CX, dated 24.06.2019, they have failed to furnish proof of revised payment of pre-deposit of 7.5% of the duty/ Tax made in terms of CBIC Instruction dated 28.10.2022 issued from F.No.CBIC-240137/14/2022-Service Tax Section – CBEC.

12. I find it relevant to mention that the Instruction dated 28.10.2022 was issued by the CBIC consequent to the directions of the Hon'ble Bombay High Court in the case of Sodexo India Services Pvt. Ltd. Vs. UOI and Ors. in Writ Petition No. 6220 of 2022, which is reproduced below :

“8 Therefore, it does appear that the confusion seems to be due to there being no proper legal provision to accept payment of pre-deposit under Section 35F of the Central Excise Act, 1944 through DRC-03. Some appellants are filing appeals after making pre-deposit payments through DRC-30/GSTR-3B. In our view, this has very wide ramifications and certainly requires the CBI & C to step in and issue suitable clarifications/guidelines/answers to the FAQs. We would expect CBI & C to take immediate action since the issue has been escalated by Mr.Lal over eight months ago.”

13. In terms of CBIC's Instruction dated 28.10.2022, I find that the payment made vide DRC-03 cannot be considered as valid payment of pre-deposit. In terms of Section 35F of the Central Excise Act, 1944, the Tribunal or Commissioner (Appeals), as the

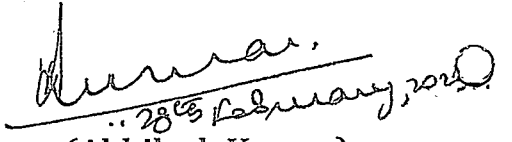


case may be, shall not entertain any appeal unless the appellant has deposited 7.5% of the duty, in case where duty or duty and penalty are in dispute. These provisions have been made applicable to appeals under Section 85 of the Finance Act, 1994. Hence, this authority is bound by the provisions of the Act and has no powers or jurisdiction to interpret the mandate of Section 35F in any other manner. As such, I hold that for entertaining the appeal, the appellant is required to deposit the amounts in terms of Section 35F, which was not done. I, therefore, dismiss the appeal filed by the appellant for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944.

14. In view of the above, the appeal filed by the appellant is dismissed for non-compliance of the provisions of Section 35F of the Central Excise Act, 1944 as made applicable to Service Tax vide Sub-section (5) of Section 85 of the Finance Act, 1994.

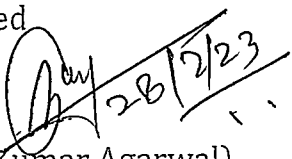
15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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


.. 28th February, 2023
(Akhilesh Kumar)
Commissioner (Appeals)

Date: 28.02.2023

Attested


(Ajay Kumar Agarwal)
Assistant Commissioner [In-situ] (Appeals)
Central Tax, Ahmedabad.



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3. The Assistant Commissioner, CGST & C.Ex., Division-Palanpur, Commissionerate: Gandhinagar.
4. The Superintendent (System), CGST, Appeals, Ahmedabad. (for uploading the OIA).
- ✓ 5. Guard File.
6. P.A. File.