



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:- 20230664SW0000616904

(क)	फाइल संख्या / File No.	GAPPL/COM/STP/2421/2022-APPEAL 12152-58
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-038/2023-24 and 30.05.2023
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	12.06.2023
(ङ)	Arising out of Order-In-Original No. PLN-AC-STX-20/2022-23 dated 26.04.2022 passed by the Assistant Commissioner, CGST, Division-Palanpur, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Bhavesh Jaswantlal Thakkar, Sarbhara, 62, Ambica Sak Market, Near Jalaram Mandir, Gungadi Road, Patan - 384265

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 हों।

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 ईए-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 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.

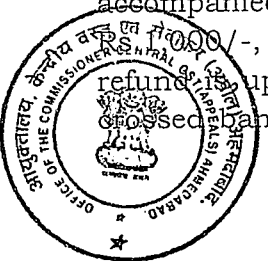
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 :-

(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 2nd floor, 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.10,000/-, 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 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 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)।

- (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।

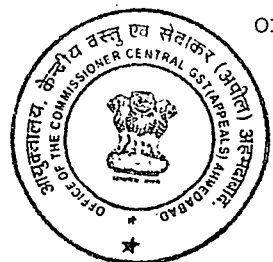
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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



ORDER-IN-APPEAL

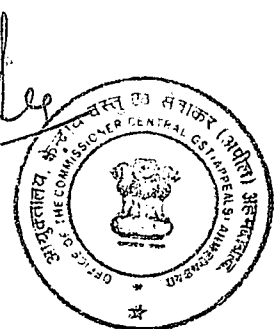
The present appeal has been filed by M/s. Bhavesh Jaswantlal Thakkar, Sarbhara, 62, Ambika Sak Market, Near Jalaram Mandir, Gungadi Road, Patan – 384265 (hereinafter referred to as “the appellant”) against Order-in-Original No.PLN-AC-STX-20/2022-23 dated 26.04.2022 (hereinafter referred to as “the impugned order”) passed by the Deputy Commissioner, Central GST, 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. ADVPT7829CSD001. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the FY 2016-17, it was noticed that there is difference of value of service amounting to Rs. 21,68,511/- during the FY 2016-17, between the gross value of service provided in the said data and the gross value of service shown in Service Tax Returns filed by the appellant for the FY 2016-17. The appellant were called upon to submit clarification for difference along with supporting documents, for the said period. However, the appellant had not responded to the letters issued by the department.

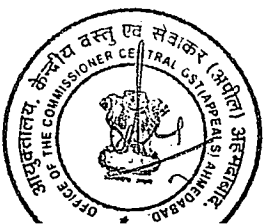
2.1 Subsequently, the appellant were issued Show Cause Notice No. AR-V/BHAVESH J. THAKKAR/ST-3-SCN/2020-21 dated 17.06.2020 demanding Service Tax amounting to Rs. 3,25,276/- for the period FY 2016-17, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 76, Section 77(2), Section 77(3)(c) and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 3,25,276/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period FY 2016-17. Further, (i) Penalty of Rs. 3,25,276/- was imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994; and (iii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1)(c) of the Finance Act, 1994.

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



- The appellant were giving goods on hire during FY 2016-17 that amounted to transfer of right to use goods, which is deemed sale. The appellant were of the bonafide belief that such transfer of right to use goods is considered as deemed sale and it attracts levy of VAT and not service tax. Accordingly, the appellant have paid due VAT thereon.
- The appellant submitted that entire catering income of Rs. 21,68,510/- for the year 2016-17 is in respect of charges received for transfer of right to use goods and none of this amount is received for any service in terms of provisions of the Finance Act, 1994.
- The appellant were engaged in transferring right to use any goods by transfer of possession and control of its property when it was giving goods for use. Under the terms with their customers, they were giving various goods viz. tables, chairs, fans, etc. for their use at the location of the customers and against such transfer of right to use, the appellant was charging them on the basis of quantity of goods provided to the customer. They have submitted three sample bills issued by them and a CA certificate dated 29.06.2022 confirming the above facts.
- When the appellant have paid applicable VAT on the transaction of allowing right to use any goods that is considered as deemed sale, the value of said transaction cannot be subjected to levy of service tax. In support of their stand the appellant have relied upon the judgment in the case of Imagic Creative P. Ltd. Vs. CCT – 2008 (9) STR 337 (SC).
- The show cause notice presumes that the entire income received by them as reflected in their Income Tax Return was for consideration of providing services. Such show cause notice in itself is infructuous and therefore the impugned order arising out of such infructuous notice not tenable. In support of their stand the appellant have relied upon the judgment in the case of Kush Constructions Vs. CGST, NACIN – 2009 (24) GSTL 606 (Tri.-All.).
- As they have not charged or recovered any service tax, hence, even where the service tax is payable, the value should be treated as inclusive of service tax as per Section 67(2) of the Finance Act, 1994.
- As service tax itself is not payable on transfer of right to use any goods which is deemed to be sale of goods, the question of ordering recovery of interest under Section



75 of the Finance Act, 1994 and penalties under Section 77 of the Finance Act, 1994 cannot be imposed.

- There was no fraud of collusion or willful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or the rules made thereunder with intent to evade payment of service tax, therefore, the penalties cannot be imposed and extended period of limitation cannot be invoked in the case.

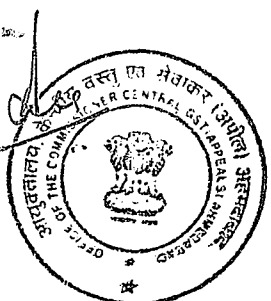
4. Personal hearing in the case was held on 13.03.2023. Shri Nandesh Barai, Chartered Accountant, and Shri Nilesh V. Suchak, Chartered Accountant, appeared on behalf of the appellant for personal hearing. They submitted a written submission during hearing. They reiterated submissions made in appeal memorandum.

4.1 The appellant in their additional submission dated 23.02.2023, produced during the course of personal hearing, inter alia reiterated submissions made in appeal memorandum.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of service tax against the appellant along with interest and penalty, in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period FY 2016-17.

6. It is observed that the adjudicating authority had confirmed the demand of service tax observing that a single copy of invoice, submitted by the appellant, alone can not represent whole invoices and the appellant failed to submit the further proper and adequate documents. The relevant Para of the impugned order are as under:

"16. In the name of sample copies of invoices asked for, the said assessee skeletal one invoice copy submitted thus a single copy alone can not represent whole invoices of the said unit. Moreover, even after repeated requests to produce the support to their claim providing outdoor catering service i.e. more samples of invoices, bank statements, income ledger, etc. but they failed to produce the same till date thus I am not in a position to conclude that the subject service classification i.e. outdoor catering service. Therefore any benefit, exemption or abatement, etc. available, cannot be extended to them in the absence of proper and adequate supporting documents.



17. Regarding claim for deduction of tax i.e. VAT paid by them in the taxable value but till date they have not produced payment of VAT any challan or VAT returns at the material time thus the said assessee not be deserved for such deduction too.

18. Moreover, they also claimed benefit of Service Tax notification 01/2006-ST dated 01.03.2006 but when they ab initio fail to adduce supporting documents to prove "outdoor catering service" rendering by them in the particular period thus the question of granting exemption does not arise. However, the said Noticee sougning for benefit of notification 1/2006-ST dated 01.03.2006 is rescinded vide Notification No. 34/2012-ST dated 20/06/2012. Since, the subject benefit of notification claimed by the Noticee is stood rescinded, the effect thereof was that the means ceased to exist, and thereafter, further period benefit not be extended.

19. The show cause notice has been issued on the basis of the details received from Income Tax Department. The said Noticee is registered with department having Service Tax Registration No. ADVPT7829CSD001 and engaged in the business activity of other service. As per Section 65B(44) of the Finance Act, 1994 service "means any activity carried out by a person for another for consideration, and includes a declared services. The nature of activities carried out by the Noticee as Service Provider appears to be covered under the definition of service and appears to be not covered under the Negative List of services specified under Section 66D of the Finance Act, 1994. This service is also not covered under the exempted services as provided in the Notfn. No.25/2012-S.T.

20. The said Noticee has not submitted the required details, hence there was no other alternative left, but to arrive at the service value on the basis of the details received from the Income Tax department. The total income works out to Rs. 21,68,511/- and service tax works out to Rs. 3,25,276/-."

7. It is also observed that the appellant have in the appeal memorandum, contended that they were engaged in giving goods on hire during FY 2016-17 that amounted to transfer of right to use goods, which is deemed sale and it attracts levy of VAT and not service tax. However, it is noticed that during the reply to the show cause notice dated 17.06.2020, the appellant had, inter alia, stated that they have engaged in providing catering services and also claim abatement benefit under Notification No. 01/2006-ST dated 01.03.2006. It is also observed that the appellant have shown the income in the head Catering Income in their Profit & Loss Account for the FY 2016-17.



7.2 On verification of the Invoice No. 120 dated 02.02.2016 submitted by the appellant along with reply to the show cause notice dated 17.06.2020 before the adjudicating authority and Invoices No. 5 dated 21.04.2016, No. 9 dated 03.08.2016 and No. 12 dated 05.01.2017 submitted by them along with appeal memorandum, it is observed that the appellant are engaged in providing Mandap Keeper Service and Outdoor Catering Services in the name of "Sarbhara". It is also observed that all the invoices as discussed above were issued for providing Mandap Keeper Service.

7.3 However, I find that without submitting all the invoices issued by them along with the supporting documents, the contention of the appellant that they have engaged in giving various goods viz. tables, chairs, fans, etc. on hire basis for their use at the location of the customers, cannot be accepted.

8. I also find that in the SCN in question, the demand has been raised for the period FY 2016-17 based on the Income Tax Returns filed by the appellant. It is also not specified as to under which category of service, the non-levy of service tax is alleged against the appellant. The adjudicating authority has confirmed the demand of service tax in the impugned order without verifying all the records / invoices issued by the appellant. Thus, without any further inquiry or investigation; without called for further documents from the appellant; and without even specifying the category of service in respect of which demand of service tax is confirmed, the impugned order issued by the adjudicating authority is not proper and legal.

9. I also find that the contention of the appellant at the appeal stage, that they were engaged in giving goods on hire during FY 2016-17 that amounted to transfer of right to use goods which is deemed sale and it attracts levy of VAT and not service tax, was not put forth by them during their submission before the adjudicating authority. Therefore, I am of the considered view that the appellant cannot seek to establish their eligibility for exemption at the appellate stage without first claiming before the adjudicating authority. They should have submitted all the relevant records and documents before the adjudicating authority, who is best placed to verify the authenticity of the documents as well as their eligibility for exemption. Even at the appellate stage, the appellant have not submitted all the invoice for verification.

10. Considering the facts of the case as discussed hereinabove and in the interest of justice, I am of the considered view that the case is required to be remanded back to the adjudicating authority to consider the claim of the appellant for exemption from service tax on the basis of all the invoices issued by the appellant and all other supporting documents. The appellant are also required to submit all the required documents before the adjudicating

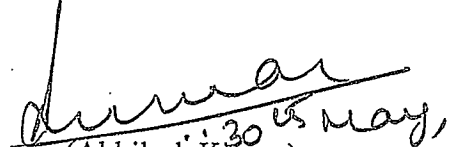


authority within 15 days of the receipt of this order. The adjudicating authority shall, after considering the records and documents submitted by the appellant, decide the case afresh by following the principles of natural justice.

11. Accordingly, I remand the matter back to the adjudicating authority to reconsider the issue afresh in light of the above discussion and pass a speaking order after following the principles of natural justice.


12. अपील कर्ता 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.


(Akhilesh Kumar)
Commissioner (Appeals) 30 May, 2023.

Attested

Date : 30.05.2023


(R. C. Maniyar)
Superintendent(Appeals),
CGST, Ahmedabad



By RPAD / SPEED POST

To,

M/s. Bhavesh Jaswantlal Thakkar,
Sarbhara, 62, Ambika Sak Market,
Near Jalaram Mandir, Gungadi Road,
Patan – 384265

Appellant

The Assistant Commissioner,
CGST, Division Palanpur,

Respondent

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Gandhinagar
- 3) The Assistant Commissioner, CGST, Division Palanpur.
- 4) The Assistant Commissioner (HQ System), CGST, Gandhinagar
(for uploading the OIA)

- ✓ 5) Guard File
- 6) PA file

