



सत्यमेव जयते

::आयुक्त (अपील-II) का कार्यालय,केंद्रीय उत्पाद

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
7वीं मंजिल, केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise
पोलिटैकनिक के पास, Building,
आम्बवाडी, अहमदाबाद : 380015 Near Polytechnic,
Ambavadi,
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(84) 26/Ahd-II/Appeals-II/ 2015-16 / 1704 to 1708
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 036 -16-17

दिनांक (Date): 26.08.2016, जारी करने की तारीख (Date of issue): 06/09/16

श्री उमा शंकर, आयुक्त(अपील-II) द्वारा पारित

Passed by Shri Uma Shanker , Commissioner (Appeals-II)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No. MP/09/Dem/AC/2015/AP Dated: 23-03-2015

issued by: Assistant Commissioner., Central Excise (Div-II), Ahmedabad-II

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Zimmer USA Dhall Screens

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 an 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) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक 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 Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, 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 हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है ।

G. Jil



Cont...2

- (c) 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।

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

- (1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष 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 हो तो 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 सेवाकर 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) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) 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 ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित आधिकारिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर 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.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (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 सेवा कर 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।

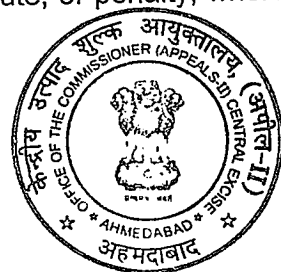
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में 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 subject appeal is filed by M/S. Zimmer USA Dhall Screens (A unit owned by Dhall Enterprises & Engineers Pvt. Ltd.), having their factory at Sijpur Bogha, Near G.D. High school, Naroda Road, Ahmedabad- 382345(herein after referred to as "the Appellant") against OIO No No.MP/09/DEM/AC/2015/AP338/AP Dtd. 23/3/2015(hereinafter referred to as 'the impugned order) Passed By The Assistant Commissioner,CentralExcise, Division-II,Ahmedabad-II,(hereinafter referred to as 'the adjudicating authority') engaged in the manufacture of Excisable goods falling under Chapter 84 of the Central Excise Tariff Act,1985 [hereinafter referred as CETA-1985].

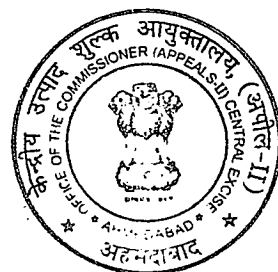
2. Brief facts of the case is, during the Course of audit it was observed that the appellant had procured capital goods from their related unit i.e. Dhall Enterprises & Engineers Pvt. Ltd. and availed Cenvat credit Rs.12,99,271/- on the basis of invoice No. 215 dated 31.10.2009 issued by Dhall Enterprises & Engineers Pvt. Ltd. M/s Dhall Enterprises & Engineers Pvt. Ltd. was required to pass on an amount of Rs. 11,10,063/- only, instead of Rs. 12,99,271/- in terms of provisions of Rule 3(5) of Cenvat Credit Rules, 2004. it appeared that m/s. Dhall Enterprises & Engineers Pvt. Ltd. passed on excess amount **Rs.1,39,208/-**, it appeared that the said amount passed on to the appellant was not a duty specified under the rule 3[1] or 3(6) of CCR 2004. Therefore the Cenvat credit to the excess of said cenvat availed required to be recovered. They have contravened the provisions of Rule 9(6),they have rendered themselves liable for penal action under the provisions of Rule 15(2) ibid. show cause notice was issued and vide above order demand is confirmed with interest and penalty on them under CCR 2004 read with Section 11AC of the Central Excise Act.1944.

3. Being aggrieved by the above said OIO the appellant filed an appeal on the following main grounds;

It is submitted that the assessment of duty on capital machinery done by M/s. Dhall Enterprises & Engineers Pvt. Ltd., whether correct or wrong cannot be reopened at the end of recipient i.e. present appellant. The appellant relies following orders for the aforesaid settled legal position:-

1. SARVESH REFRACTORIES (P) LTD vs CCE. reported at 2007 (218) E.L.T. 488 (S.C.)
2. CCE vs KITCHEN APPLIANCES INDIA LTD reported at 2013 (288) E.L.T. 567
3. BALAKRISHNA INDUSTRIES LTD. vs CCE reported at 2014 (309) E.L.T. 354 .

In the present case, the capital machinery is not cleared at tariff rate, the capital machinery is cleared at written down transaction value which is correct as per proviso to rule 3(5A). M/s. Dhall Enterprises & Engineers Pvt. Ltd was required to pay exact amount of credit which was availed at the time of receipt of machinery, which is quite higher than the amount paid by them at the time of clearance. Hence also, the



1

assessment at the end of supplier is correct and whatever amount paid is clearly admissible as Cenvat to the present appellant. The appellant had also pleaded revenue neutrality and had relied upon following orders of the Tribunal.

- 2013 (290) ELT 538 (Guj.) in the case of Gujarat Glass P Ltd
- 2010 (254) ELT 628 (Guj.) in the case of Indeos ABC Ltd
- 2008 (232) ELT 462 in the case of M / s. Jay Mata Alloys Pvt. Ltd.

Both the units are one and same company as present appellant is 100% proprietary unit of supplier. Hence the demand is revenue neutral and hence also requires to be quashed.

the capital goods were transferred to the appellant by Dhall Enterprises & Engineers Pvt. Ltd.; that they filed their monthly returns, credit on capital goods and payment of duty, apart from the records of credit was also checked by the department at the time of audit ,but no objection was raised regarding transfer price or payment of duty, no suppression of any information to the department; that it is also a well settled position in law that the Cenvat cannot be recovered from recipient of goods even in case of non-payment of duty by supplier.

4. Personal hearing was held on 14.06.2016, which was attended by Shri Nirav Shah advocate of behalf of the Appellant. He reiterated the grounds of appeal filed by them earlier. I have gone through all records placed before me in the form of the impugned order and written submissions of department as well as submissions made during personal hearing. he cited judgements 1. SARVESH REFRACTORIES (P) LTD vs CCE. reported at 2007 (218) E.L.T. 488 (S.C.) 2. CCE vs MDS SWITCHGEAR LTD. reported at 2008 (229) E.L.T. 485 (S.C.) 3. CCE vs KITCHEN APPLIANCES INDIA LTD reported at 2013 (288) E.L.T. 567. I find that the main issue involved is whether Cenvat Credit of the amount passed on by the supplier in excess of the amount (of duty credit) determined to be payable under the provisions of Sub-Rule (6) read with Sub-Rule (5) of Rule 3 of Cenvat Credit Rules, 2004. I find that, The question, as to what amount should be payable, on removal of capital goods after use, as representing duty, of which credit is admissible under Cenvat Credit Rules, 2004, is answered by Rule 3 of Cenvat Credit Rules, 2004. The relevant provisions at relevant time are reproduced below:-

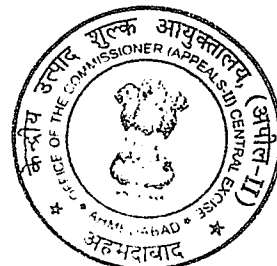
3. CENVAT credit-

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act

.....;

The amount paid under sub-rule (5) and sub-rule (5A) shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under sub-rule (5) and sub-rule (5A).



[Handwritten signature]

5. In the instant case, the amount as representing duty, of which credit is admissible under Cenvat Credit Rules 2004, comes to Rs.11,60,063/- Any amount in excess of this amount is not a duty of which credit can be allowed under Cenvat Credit Rules, 2004. I find that the appellant had cleared second hand capital goods without undertaking any manufacturing activity. Such clearance was made on reversal of Cenvat credit in excess of the amount to be determined under proviso to Sub-Rule (5) of Rule 3 of Cenvat Credit Rules, 2004. Since there was no manufacturing activity, no question of collection of excise duty would arise. While clearing the capital goods after use, the assessee had to follow the procedure laid down in the rule 3(5) ibid. Such rules required that on clearance of the said capital goods after use, the assessee should have paid an amount of Rs. 11,60,063/- only, To the extent the assessee reversed the Cenvat credit in its account on clearance of the said capital goods without any manufacturing activity equal to above said amount of Rs. 11,60.063/- is permissible. But collection of higher amount in the guise of excise duty would not make the receiver eligible for the availment of excess amount of credit.

6. I find that, rule 3(5) of the Rules does not permit collection of higher excise duty from the purchaser or deposit thereof with the Department in form of Cenvat credit, Secondly, since no manufacturing activity was undertaken on the capital goods cleared by the assessee, the goods removed on as such basis were not thereafter exigible to excise duty. Rule 3 of Cenvat Credit Rules, 2004 permits credit of duty paid on manufactured goods or CVD paid on imported goods, as per Sub-Rule (1) and permits credit of the amount paid under sub-rule (5) as if it was a duty, as per Sub-Rule (6) of Rule 3 of Cenvat Credit Rules, 2004. Nowhere in these provisions, is allowed the credit of an amount which is not duty.

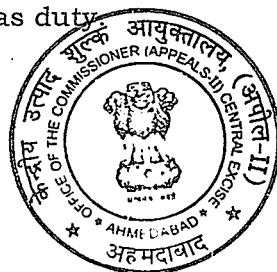
7. I find that, the word duty is defined in Rule 2(e) of Central Excise Rules, 2002, as under:-

"RULE 2. Definitions.— In these rules, unless the context otherwise requires, –
(e) "duty" means the duty payable under section 3 of the Act;"

The question whether an amount collected in excess of an amount determined under Rule 3(5) is duty of excise, is decided by the High Court of Gujarat, in the case of M/s Inductotherm (I) Pvt.:Ltd. Vide their judgment dated 28.06.2012 Hon'ble High Court held as under :-

'Cenvat Credit can be utilized for payment of duties. None of the clauses (a) to (e) thereof would cover a situation where the amount has been collected from the purchaser under the title of excise duty which can never be categorized as such since no manufacturing activity was carried out by the respondent. Utilization of Cenvat credit for such purpose, therefore, was wholly impermissible....'

In view of above, any excess deposit cannot be termed as duty.



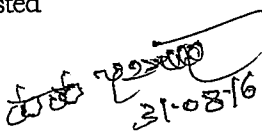
8. Further, I find that, that the appellant is registered with Central Excise department since long and they are supposed to be aware of the Rules & Procedures In spite of that they had taken credit of excess amount collected in contravention of rule 3(5) of Cenvat Credit Rules, 2004. As per Rule 9(6) of Cenvat Credit Rules burden of proof regarding the admissibility of the CENVAT credit lies upon the assessee taking Cenvat credit. Breach of any of the Rules of the Central Excise Act / Rules etc. the appellant has rendered themselves liable for penal action. In view of foregoing discussion, I find that the appellant has availed credit of excess amount in the guise of Excise duty and utilized the said amount. Accordingly; I hold that the impugned order is just and legal.

9. In view of the foregoing discussion and findings, I uphold the impugned order and disallow the appeal. The appeal stands disposed of as above.



[Uma Shanker]
Commissioner (Appeals-II)
Central Excise, Ahmedabad

Attested



[K.K. Parmar]
Superintendent (Appeals-II)
Central excise, Ahmedabad.

By Regd. Post A. D

M/s. Zimmer USA Dhall Screens,

(A unit owned by Dhall Enterprises & Engineers Pvt. Ltd.),

Sijpur Bogha, Near G.D. High school,

Naroda Road,

Ahmedabad- 382345 .

Copy to :

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II.
3. The Asstt. Commissioner, Central Excise, Divi-II, Ahmedabad-II
4. The Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.
5. Guard file.
5. PA file.

