



सत्यमेव जयते

आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,

केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

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क फाइल संख्या : File No : **V2(ST)118 /North/Appeals/2018-19**

9076709081

ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-002-APP-143-18-19**

दिनांक Date : **01-Jan-19** जारी करने की तारीख Date of Issue **21/1/2019.**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)

ग Arising out of Order-in-Original No **CGST/A'bad-North/Div-VII/S.Tax-DC-008-18-19** Dated **05-Jul-18** Issued by **Deputy Commissioner** , Central GST , Div-VII , Ahmedabad North.

Received by Shushroat (Customs) 21/1/19

घ अपीलकर्ता का नाम एवं पता
Name & Address of The Appellants

9427418974

M/s J.M Infrastructure

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

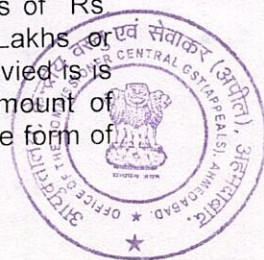
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूप 5 लाख या उससे कम है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompany ed by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of



crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियों (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर

आयुक्त, सहायक / उप आयुक्त अथवा **अधीक्षक** केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 6.50/- पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇒ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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.

⇒ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) इस संदर्भ 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।

4(1) 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.

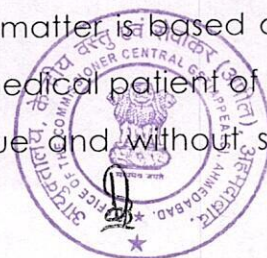


ORDER - IN - APPEAL

M/s. J.M Infracture, Ranip, Ahmedabad (henceforth, "appellants") filed the present appeal against the Order-in-Original No.CGST/A'bad-North/Div-VII/S.Tax-DC-008-18-19 05.07.2018 (henceforth, "impugned order") passed by the Deputy Commissioner, GST Division-VII, Ahmedabad-North(henceforth, "adjudicating authority").

2. Brief facts of the case are that based on the intelligence that 60% of the total value collected from members in cash against booking/sale of residential cum commercial units in the scheme named 'Nishan Royal' & 'Nishan Status' were not included in accountants maintained for service tax purpose/ST-3 returns by M/s JM Infracture, 'Nishan Status', Survey No.105/3 TP No.66,FP No. 26,GST Crossing, New Ranip, Ahmedabad('M/s JM' for brevity) & M/s. Raj Builders,Shop No.5&6'Nishan Status', GST Crossing, New Ranip,Ahmedabad('M/s Raj' for brevity), both service tax registrant, evaded service tax on said cash receipt and paid service tax only on remaining 40% value received through cheques, the office situated at Flat No.B-503 'Nishan Royal' Survey No.149,Opp-Anmol Bungalow, GST Road, New Ranip, Ahmedabad were searched 19.01.2015 by officers of Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad (here-in-after referred to as 'DGCEI') and various official & private documents were seized under panchnama. Investigation revealed that M/s JM evaded service tax Rs.25,57,665/- during the period from Oct 2010 to March 2015 on advance booking received in cash. Show cause notice dated 14.02.2017 issued in this regard was decided under impugned order confirming said service tax short paid along with interest, penalty against the appellant.

3. Being aggrieved with the impugned order, the appellant preferred this appeal contesting *inter alia*, that various submissions made by them were overlooked by he adjudicating authority; that the adjudicating authority merely accepted the allegations of the show cause notice without considering submissions made by them. They cited case law M/s Cryil Lasardo v/s Juliana Maria Lasardo 2004(7)SCC,Asstt. Commr v/s Shukla Brothers 2010(254)ELT6(SC)=2011(22)STR 105; that the case of the department without investigatin into crux of the matter is based only on the statement of Shri Jemin Patel who is chronic medical patient of clinical depression; that the show cause notice is vague and without specific



allegations; that onus of proof lies on the department which is not discharged in present case; that demand arising out of 'Rojmail' is not sustainable; that allegation that rojmail and data/document recovered from secret office of the appellant is incorrect as said office belongs to M/s raj builders where no files of appellant were kept; that mere recovery of books from office which does not belongs to the appellant cannot be the basis of demand; that vital information is not provided in panchanama dated 19.01.2015, hence bad in law also rojmail seized in absence of partner Shri Jemin Patel which shows vexatious nature of search; that the panchanama has not complied with the guidelines and judicial decision laid down by various courts which are required for credibility of panchnama, it suffer from basic requirements of detail information for search proceedings as it has not given description of record, -they cited case law Kuber Tobacco Product Ltd v/s CCE 2013 (290) ELT 545 (Tri- Del); that they cited case law CCEv/s Dirba Pipe Pvt 2016 -TIOL-2661-CESTAT-CHD,CC Nagpur v/s Mohmad Lalik Hussain Shaikh 2014 (300) ELT 209(bom), Intelligence Officer,DRI v/s Arshad Saleem Khan 2004(173) ELT 460(Kar) to state that panchanama is vital document which needs to be drawn in compliance of statutory provisions in presence of witness/panchas which is absence in present case;

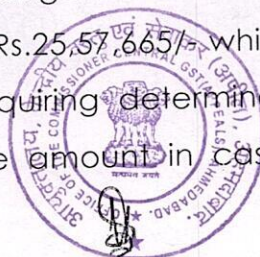
They further pleaded that except the sheet recovered from secret office, no corroborative evidence were produced to show that the appellant have received the unaccounted cash; that the investigation failed to show if unaccounted cash was received by the appellant and was utilised in their business or for personal need, they relied on case law Samta Khinda v/s Asstt Commr of IT 2016-TIOL-2267-ITAT-Del, CCE v/s Magnum Steel Ltd 2016-TIOL—3322-CESTAT-Del, Ruby Chlorate Ltd v/s Commr of C.Ex. Trichy 2006 (204) ELT 607 (Tri-Chennai), Charminar Bottling co p Ltd v/s CCE 2005 (192)ELT 1052 etc; that the department has only relied on statement of the partner which were taken under coercion and no investigation were carried out to prove receipt of unaccounted cash by the appellant-they cited case law Rajpur Forging pvt ltd v/s CCE 2016(335)ELT 295(T) to state that placing reliance on the statement is not sufficient for the department to prove receipt of unaccounted cash. They also cited case law Commissioner of Central Excise v/s Saakeen Alloys Pvt ltd 2014 (308) Elt 655(Guj) & CCE Raipur v/s Heliwal Polypack Pvt ltd 2016(340)ELT 204(Tri.Del); that in the present case reliance is placed on Rojmel book and loose paper seized from a third party premises and



statement recorded based on such document without any further corroborative document and therefore the allegation of clandestine clearance is not sustainable; in absence of investigation at buyers end, receipt of un accounted cash cannot be confirmed; that time sought for cross examination of Shri Jaimin Patel who was abroad, was also not allowed; that they were entitled for reduction of Rs.2,80,448/- on account of BU permission; that even otherwise service tax is not payable on sale of units under the category of construction service as there is no mechanism to ascertain value of service component. To state that no service tax can be levied under any category of service when mechanism to levy tax is absent in the Act or Rules made therein under - they cited case law Suresh Kumar Banshal v/s UOI 2016 (43) STR 3(Del) and Commissioner C. Ex. Kerala v/s Larsen & Toubro and others; that levy of service tax on sale of immovable property is sub-judice; that demand of service tax Rs. 90,817/- under reverse charge mechanism has already been discharged by the appellant which is not considered; that computation of liability is incorrect; that Since periodical returns were filled the department was aware of the fact and hence no suppression of fact involved; that penalty under section 77 and 78 of Finance Act 1994 does not arise as the issue is a question of interpretation of law and there was no intention to evade tax; that there was bonafide belief that the impugned activity were not taxable and hence in term of Section 80 Finance Act 1994, penalties cannot be imposed under section 77 and 78.

4. In the personal hearing held on 26.10.2018 Shri Madhu Jain, advocate reiterated the grounds of appeal and stated that cross examination was allowed but could not happen because of medical reason. She submits that premise from where diary was recovered does not belong to the appellant.

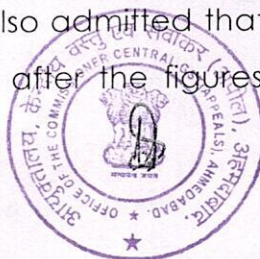
5. I have carefully gone through the appeal wherein on the intelligence that 60% of the total value collected from members in cash against booking/sale of residential cum commercial were not included in taxable value and service tax were paid only on 40% value received through cheques, the premise of the appellant were searched by officers of Directorate General of Central Excise Intelligence. Investigation revealed that the appellant evaded service tax Rs.25,57,665/- which was confirmed under impugned order. The issue requiring determination is whether the appellant have received advance amount in cash from



various members of the scheme 'Nishan Royal' and evaded service tax on it. I find that the entire case is based on the 'Rojmel' book recovered by the officers of DGCEI and entries made therein using code word while mentioning the amount. Investigation revealed that the figures recorded in the 'Rojmel' pertains to advance amount received by the appellant in cash from prospective buyers of residential/commercial units in the scheme 'Nishan Royal'. It also revealed that the figures were recorded in codeword and actual amount of cash received can be arrived by adding '00' after the figure shown in 'Rojmel'. For example cash receipt of rupees three lakh is recorded as 3000/-.

6. The main plea of the appellant is that case of the department without investigation into crux of the matter is based only on the statement of Shri Jemin Patel, partner of the appellant firm. I find that Shri Jemin Patel under his statement dated 19.01.2015 recorded under Section 14 of the Central Excise Act, 1944 has admitted that (i) 'Rojmel' book has been written as per his direction by the accountant Shri Vishal Patel. (ii) receipt of cash from members and showing of the same in 'code word' (iii) both the books Red cover Rojmel book- "Nishan Status" & "Receipt Book-Nishan Status" showing details of cash transaction pertains to their scheme "Nishan Status" is written by Shri Vishal Patel, who left the job two years ago (iv) amount written in 'code' and the same may be read by adding '00' after the figures shown in 'Rojmel' (v) all amount received towards sale of residential flats/shops (vi) not discharged service tax in respect of said cash receipt shown in two books viz. A/6 & A/7 of annexure 'A' to said panchnama, (vii) Neither accounted for cash receipt in their books of account nor paid service tax on it (viii) admitted mistake and assured to deposit service tax (ix) Said cash received prior to 'Building Use' permission (x) Said amount received towards cost of building & construction and hence entitled for abatement @75%. (xi) utilised said cash towards purchase of land to landlords, etc.

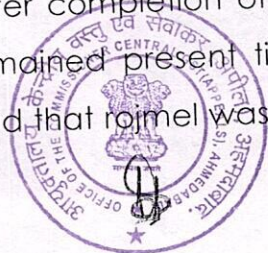
7. I observe that Shri Jemin Patel is a partner of the appellant firm who is responsible for day to day business and looking after entire affairs of the firm. In the instant case as a partners of the firm he categorically admitted receipt of cash from prospective members and showing of the same in 'code word' in the 'Rojmel' book which is written as per his direction by the accountant Shri Vishal Patel. He also admitted that amount written in 'code' may be read by adding '00' after the figures. He admitted that



they have not discharged service tax in respect of said cash receipt shown in two books viz. A/6 & A/7 of annexure 'A' to said panchnama and agreed to deposit service tax involved therein. Further, as an additional evidence he also admitted using of said cash towards purchase of land from landlords. These all evidences being instrumental in detecting the modus operandi adopted by the appellant and cannot be overlooked. I also find that said statement of Shri Jemin Patel has not been retracted later on. In view of said confession on all issues related to the case and non retraction of statement, the same deserves weitage and cannot be neglected. My views on the issue are supported by CESTAT, Principal Bench, New Delhi reported in case of Shri Laxminarayan Real Ispat Pvt Ltd v/s Commissioner of Central Excise & Service Tax ,Raipur 2017 (357) E.L.T. 0713 (Tri. - Del.), relevant portion of which are reproduced below:

7. Since the Director has categorically admitted non-accountal of raw material and clandestine removal of the finished goods and the statements has not been retracted before the Central Excise Officers, I am of the view that Central Excise duty along with interest and penalty confirmed against the appellant by the authorities below is proper and justified.

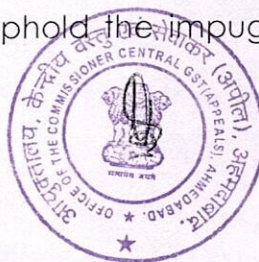
8. It is contested that without investigation in to crux of the matter, the case is based only on the statement. Except the sheet recovered from secret office, no corroborative evidence were produced to show that the appellant have received the unaccounted cash. However, it would be noteworthy to observe that Shri Jemin Patel, partner of the appellant firm also admitted that the cash received from prospective buyers has been used towards expenditure related to purchase of land from landlords. This shows that investigation was conducted on further disposal of cash after its receipt by the appellant. It is pleaded that the demand arising out of 'Rojmail' is not sustainable; that allegation that rojmail and data/document recovered from secret office of the appellant is incorrect as said office belongs to M/s raj builders where no files of appellant were kept; that mere recovery of books from office which does not belongs to the appellant cannot be the basis of demand. However, in view of the fact that said 'rojmel' was recovered under panchnama dated 19.01.2015 in presence of Shri Jemin Patel, said plea cannot be considered. It is also on record that after completion of social work Shri Jemin Patel joined the search and remained present till completion of panchnama. Therefore, it cannot be said that rojmel was recovered in his absence.



9. It is contested by the appellant that oral evidence in the form of statement of partner is not valid evidence. However, I find so far as the statement has not been retracted by anyone, its relevancy cannot be ignored. If the statements were recorded under pressure, the same would have been retracted. Further, the plea of the appellant that statement was recorded under pressure does not deserve merit as none of the statement was retracted by anyone. They also pleaded that placing reliance on the statement is not sufficient for the department to prove receipt of unaccounted cash for which they cited case law Commissioner of Central Excise v/s Saakeen Alloys Pvt Ltd 2014 (308) Elt 655(Guj). However I observe that statement in said case was retracted soon after being recorded which is not the case here and hence ratio of the same cannot be made applicable. It is also contested that cross examination requested was not allowed by the adjudicating authority. However I find that in the instant case the partners of the appellant firm categorically admitted receipt & non accounting of cash and also non payment of service tax, they voluntarily paid Rs.11,00,000/-towards said tax liability. Further the adjudicating authority already allowed cross examination opportunity two times i.e. on 5.06.2018 & 13.06.2018. Said plea is therefore not acceptable. Thus after careful analysis of available evidence and the facts of the case, I find that the appellant could not make out a convincing case to interfere with the order of the lower Authority.

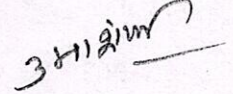
10. With reference to imposition of penalty on the appellant firm, I find that the appellant was guiltfully and fraudulently involved in evasion of tax by on cash received from members of the scheme 'Nishan Royal' and the error committed is not bonafide one and hence imposition of penalty under section 77 and 78 of the Finance Act 1994 under the impugned order need not require any interference.

11. In view of aforesaid discussion, I uphold the impugned order and reject the appeal.



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

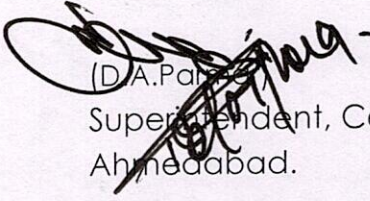
The appeal filed by the appellant stands disposed of in above terms.


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested


(D.A. Patil)
Superintendent, Central Tax (Appeals)
Ahmedabad.



By R.P.A.D.

To,

M/s JM Infrascture, 'Nishan Status', Survey No.105/3
TP Scheme No.66,FP No. 26,Near Anand Party Plot,
GST Crossing, New Ranip,Ahmedabad-382481.

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax,Ahmedabad-North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad-North.
4. The Deputy Commissioner, Central Tax, Division-VII, Ahmedabad-North.
5. Deputy Director,DGGSTI, AZU,Ahmedabad.
6. Guard File.
7. P.A.



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