



• आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क *
सातवाँ तल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटैकनिक के पास, अम्बाबाडी,
अहमदाबाद - 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(52)47/ Ahd-I/2016-17 *2849*

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-021-2016-17
दिनांक Date : 28.10.2016 जारी करने की तारीख Date of Issue 9 .11.2016

श्री उमा शंकर आयुक्त (अपील-I) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeal-I)

ग Additional Commissioner, केंद्रीय उत्पाद शुल्क, A'bad-I द्वारा जारी मूल आदेश सं
46/Addl.Commr/2008 दिनांक: 24-02-2009 से सृजित

Arising out of Order-in-Original No. 46/Addl.Commr./2008 Dated : 24-02-2009 issued by
Additional Commissioner, Central Excise, Ahmedabad-I

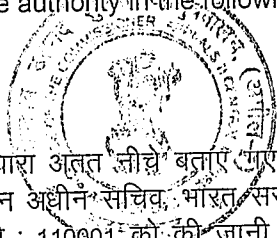
घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s. Jay Ambe Textile, Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे
बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

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

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :



(1) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को
उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग,
चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit
Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street. New
Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first
proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने 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 प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to
another factory or from one warehouse to another during the course of processing of the goods in a
warehouse or in storage whether in a factory or in a warehouse.

(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।

(b) 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।

- (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 हो।

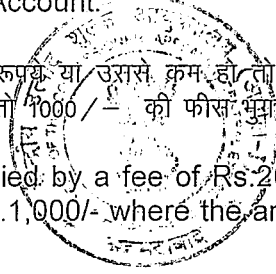
- (d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

- (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, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल 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 इए-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 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(Appéal) 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 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 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

This Order-in-Appeal is being issued in compliance to the direction of the Hon'ble CESTAT issued vide Order No. A/1613/WZB/AHD/2011 dated 29.8.2011, wherein M/s. Jay Ambe Textile, was asked to deposit Rs. 1,64,416/- within a period of four weeks from the date of order and report compliance to the Commissioner(Appeals) on 3.10.2011 consequent to which the Commissioner(A) was to restore the appeal filed by the appellant, which had been rejected vide OIA No. 182/2010(Ahd-I)CE/MM/Commr(A)/Ahd dated 28.6.2010, on the grounds of non compliance of Section 35F of Central Excise Act, 1944.

2. M/s. Jay Ambe Textile, C/o. Kanha Exim, Plot No.128-132 , Near Gulabnagar, Opp. Gujarat Farm, Suez Farm Road, Behrampura, Ahmedabad (for short – “*appellant*”) had filed this appeal on 03.08.2009, along with stay application against OIO No. 46/Addl. Commr./2008 dated 24.2.2009, passed by the Additional Commissioner, Central Excise, Ahmedabad-I (for short - “*adjudicating authority*”).

2.1 The appellants were issued a show cause notice dated 28.08.2000, alleging that since they had failed to discharge their duty liability within the stipulated date as per Annual Production Capacity, determined under Section 3A of the Central Excise Act '1944 [for short – “Act”] for the months of February, 2000 and March, 2000, they were liable to pay the outstanding duty along with interest and penalty. This notice was adjudicated vide OIO No. 96/ADC/2001 (dated 28.2.2001) wherein the demand was confirmed along with interest and penalty. This OIO was set aside vide OIA No. 530/03(Ahd-I)-CE dated 12.9.2003. Department thereafter, filed an appeal before Hon'ble Tribunal, which remanded back the matter to the original adjudicating authority to decide the liability in terms of APC fixed by the Commissioner [which on being challenged before the Tribunal was remanded for re-examination]. Thereafter, the Adjudicating Authority vide the impugned order, confirmed the demand of Rs.1,64,416/- along with interest and imposed penalty of Rs.5,94,120/- on the appellant based on the APC fixed by the Commissioner vide his OIO dated 15/Commissioner/2006 dated 4.10.2006.

3. Aggrieved, the appellant filed this appeal along with stay application, on the grounds that:

- the impugned order is premature as it has been passed before the Commissioner re-fixed APC in terms of direction given by Hon'ble Tribunal vide order dated 26.6.2001;
- the issue regarding inclusion of drying cylinder as a chamber of proportionate basis or otherwise was under dispute before the Hon'ble Tribunal at the relevant time and therefore, they had requested the Adjudicating authority, to adjourn the matter; that the order passed without considering the request for adjournment, is ex-parte;

- imposition of penalty of Rs.1,64,416/- for non-payment of duty in the month of Feb, 2000 and March, 2000, is unreasonable, as duty was not paid due to interpretation; that they strongly believe that drying cylinder should not be added for computation of additional production capacity, as the same has been installed in the Stenter;
- imposition of penalty is not justified as there is no any mens rea or willful misstatement; that the delay was due to financial crunch.

4. The appeal was decided by the then Commissioner(A) vide his OIA dated 28.6.2010, *supra*, wherein he rejected the appeal on the grounds of non compliance of Section 35F of the Act, as the appellant had failed to pre-deposit Rs. 5,70,000/- ordered vide Stay Order No.13(Ahd-I)/2010-11 dated 4.5.2010. As is mentioned in para 1, the appellant, deposited the amount of Rs. 1,64,416/- vide TR-6 Challan dated 27.09.2011 and hence, the appeal was restored as per the directions of the Tribunal vide order No. A/1613/WZB/AHD/2011 dated 7.9.2011.

5. The appeal was however, kept in call book since department had filed an appeal before the Apex Court on an identical issue against the decision of Hon'ble High Court of Gujarat [in SCA No.1984 of 2002] in the case of M/s. Krishna Processors [2012(280)ELT 186 (Guj.)]. As the Hon'ble Supreme Court, has decided the issue, the appeal stands retrieved from the call book and is now being taken up for decision in compliance to Tribunal's order dated 29.8.2011.

6. Personal hearing in the matter was held on 18.10.2016, wherein Shri B.R.Parmar, Consultant, appeared on behalf of the appellant and reiterated the grounds of appeal and submitted a written submission dated 18.10.2016, stating that the matter regarding inclusion of Open Drying Cylinder for the purpose of fixation of Annual Production Capacity and duty liability for the year 1999-2000, has been challenged before the Hon'ble High Court of Gujarat vide Tax Appeal No. 1637/2010 [2013(292)ELTA143(Guj)], and therefore, the duty demand under impugned OIO was erroneous. He further relied on the following judgements (i) M/s. Krishna Processors [2012(280)ELT 186 (Guj.)] and Shree Bhagwati Steel Rolling Mills [2015(326)ELT209(S.C.)].

7. I have gone through the facts of the case, the appellant's grounds of appeal, and submissions made at the time of personal hearing. Simultaneously, two issues being contested by the appellant are (i) fixing of Annual Production Capacity and (ii) demand of duty along with interest and imposition of penalty under Rule 96ZQ. Since the present appeal is against OIO No. 46/Addl.Commr./2008 dated 24.2.2009, it is limited to confirmation of duty, interest and imposition of penalty. The issue pertaining to fixation of APC is not a part of the present dispute. In-fact, the appellant himself has stated that the same is pending before the Gujarat High Court.

9

8. The question to be decided in this appeal is:

- [a] whether the appellant is liable for duty allegedly short paid;
- [b] whether the appellant is liable for interest under rule 96ZQ5(i) and;
- [c] whether the appellant is liable for penalty under Rule 96ZQ5(ii) of the Central Excise Rules, 1944.

9 As the entire issue revolves primarily around Rule 96ZQ, first I would like to deal with [b] and [c] supra. The relevant extracts of sub-rule 5 of rule 96ZQ are reproduced below, for ease of reference:

(5) If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to :-

- (i) pay the outstanding amount of duty along with interest at the rate of twenty-four percent per annum calculated for the outstanding period on the outstanding amount; and*
- (ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.*

10. The issue of vires of rule 96ZQ of the Central Excise Rules, 1944 & section 3A of the Central Excise Act, 1944, was raised before the Gujarat High Court in SCA No. 1984/2002 in the case of M/s. Krishna Processors, [2012(280) ELT 186(Guj.)]. The Hon'ble High Court of Gujarat vide its order dated 16.3.2012, held the penal provisions contained in Rule 96ZQ(5) (ii) of the Central Excise Rules, 1944 to be ultra vires Articles 14, 19 (1) (g) and 265 of the Constitution of India. Department feeling aggrieved, filed an appeal before the Supreme Court [SCA No.13619/2015] against the aforementioned order of the Hon'ble High Court of Gujarat. The Hon'ble Supreme Court vide its order dated 24.11.2015 [2015(326)E.L.T.209(SC)], in the case of M/s. Shree Bhagwati Steel Rolling Mills and Others, inter alia, held that;

- as per the Constitution Bench decision in the case of VVS Sugars v/s State of AP, since Section 3A which provides for a separate scheme for availing facilities under a compound levy scheme does not itself provide for the levying of interest, Rules 96ZO, 96ZP and 96ZQ cannot do so;*
- struck down rules 96ZO, 96ZP and 96ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of articles 14 & 19(1)(g) of the Constitution and are ultra vires the Central Excise Act, 1944.*
- on the question of whether omission of the compounded levy scheme in 2001 wipes out the liability of the assessee for the period during which the scheme was in operation, it was held that the issue has already been decided in Fibre Board's case, wherein it was held that 'omission' is akin to 'deletion'; that this is form of 'repeal', and that therefore previous proceedings would be protected by Rule 6 of the General Clauses Act because repeal does not amount to obliteration from the beginning and that 'omission' is only in futuro.*

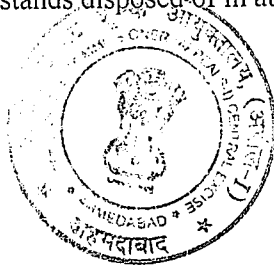
11. Vide the aforementioned order dated 24.11.2015, the Supreme Court has struck down rule 96ZQ of the Central Excise Rules, 1944, in so far as it [a] imposes mandatory penalty equivalent to the amount of duty; and [b] provides for levy of interest. In view of the foregoing, since both 96ZQ (5)(i) & (ii) of the Central Excise, Rules, 1944, have been struck down by the Hon'ble Supreme Court, following the said order, the imposition of penalty and the demand of interest made vide OIO dated 24.2.2009, are set aside.

12. Now I would like to decide the issue mentioned at [a] supra. I find that the duty of Rs.1,64,416/- being short paid for the months of February and March, 2000, demanded under sub-rule(i) of Rule 96ZQ of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944, based on Annual Production Capacity fixed by the Commissioner vide Order No. 15/Commr/2006 dated 4.10.2006. The contention of the appellant about non-inclusion of length of cylinders while computing APC was rejected by the Hon'ble Tribunal vide order dated 27.2.2009 [2010(252)ELT 14] . The Tribunal had also directed the Adjudicating Authority to compute the duty as per APC fixed by the Commissioner. Accordingly, the adjudicating authority has computed the duty based on the APC fixed by the Commissioner, Hence, the demand of Rs. 1,64,416/-, confirmed in the OIO in respect of duty short paid, is upheld.

13. In view of the above, the demand of interest and imposition of penalty against the appellant vide the impugned OIO dated 24.02.2009, is set aside and the confirmation of the demand of Rs. 1,64,416/- short paid for the months of February & March, 2000, is upheld.

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

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



U. Shankar

(उमा शंकर)

आयुक्त (अपील्स - I)

Date : 28.10.2016

Attested

Vinod Lukose

(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

BY R.P.A.D.

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Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad-I.
3. The Deputy/Assistant Commissioner, Central Excise, Division-IV, Ahmedabad—I.
4. The Assistant Commissioner, System, Ahmedabad-I.
5. Guard File.
6. P.A. File.

