

<b>केन्द्रीय कर आयुक्त (अपील)</b>	
<b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b>	
7 <sup>th</sup> Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015	
आम्बावाडी, अहमदाबाद-380015	
फोन नम्बर : 079-26305065	टेलिफैक्स : 079-26305136

क फाइल संख्या : File No : V2(ST)023/A-II/2017-18 / 1030 to 1035  
 ख अपील आदेश संख्या : Order-In-Appeal No. **AHM-EXCUS-001-APP-115-17-18**  
 दिनांक Date : 18-10-2017 जारी करने की तारीख Date of Issue 2-11-17

**श्री उमा शंकर**, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **AHM-SVTAX-000-ADC-39-2016-17** Dated **20.02.2017** Issued by Assistant Commr STC, Service Tax, Ahmedabad

ध अपीलकर्ता का नाम एवं पता  
**Name & Address of The Appellants**

**M/s. Lee & Muirhead pvt ltd**  
**Ahmedabad**

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, मेघाणी 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 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 प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति हांगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219K 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 63 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 होंगे।

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,

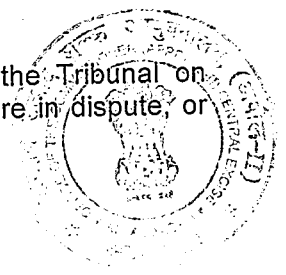
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

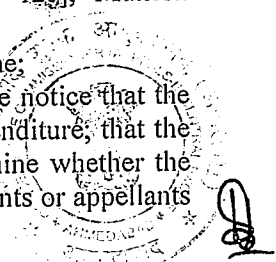
This appeal has been filed by M/s. Lee & Muirhead Private Limited, 306, Akik Complex, Opp. Lions Hall, Nr. Mithakali Six Roads, Ahmedabad-380006 [for short – ‘appellant’] against OIO No. AHM-SVTAX-000-ADC-39-2016-17 dated 20.2.2017 [for short – ‘impugned OIO’] passed by the Additional Commissioner of the erstwhile Service Tax Commissionerate, Ahmedabad [for short – ‘adjudicating authority’]. This OIO has been passed based on the directions given by the earlier Commissioner(Appeals) vide his OIA No. 166/2013(STC)/SKS/Commr(A)/Ahd. dated 2.8.2013.

2. Briefly, the facts are that based on an intelligence, a case was booked against the appellant, *inter alia*, alleging that they were raising two sets of invoices for reimbursement of various expenses incurred by them while providing their services, to their clients. The first invoice(s) was relating to services/agency charges while the second invoice(s) was relating to other charges/expenses incurred. The appellant discharged service tax only on the first invoices claiming that the second invoices were issued for reimbursement of expenses incurred on behalf of their clients. The present dispute is for the period from 1.4.2008 to 30.9.2008 for which a show cause notice dated 24.9.2009 was issued demanding service tax of Rs. 7,01,164/- along with interest. The notice further proposed penalty on the appellant under sections 76, 77 and 78 of the Finance Act, 1994. A notice on the same matter had already been issued for the period covering from 1.10.2003 to 31.3.2008, in the past.

3. The show cause notice dated 24.9.2009 was adjudicated vide OIO No. 22/ADC/2012 dated 30.3.2012 wherein the adjudicating authority confirmed the service tax demand along with interest and also imposed penalty on the appellant under sections 76, 77 and 78 of the Finance Act, 1994. The appellant approached the Commissioner(A) who vide his OIA No. 166/2013(STC)/SKS/Commr(A)/Ahd dated 2.8.2013, remanded the matter back to the adjudicating authority with a direction to decide the matter afresh for considering exclusion of reimbursable expenses after verifying the invoices and after giving reasonable opportunity for hearing. Based on the OIA dated 2.8.2013, the matter was decided once again vide the impugned OIO dated 20.2.2017, wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty under sections 76, 77 and 78 of the Finance Act, 1994.

4. The appellant feeling aggrieved against the impugned OIO dated 20.2.2017, has once again vide this appeal, approached this office raising the following averments:

- that the adjudicating authority did not follow the directions and has travelled beyond the directions issued by the appellate authority; that the wish to rely on the case of Classic Strips Limited [2016(339) ELT 144], Britannia Industries Limited [2016(338) ELT 120], Mukesh Appliances Private Limited [2016(343) ELT 246];
- that non following the instructions of higher forum is a breach of judicial discipline;
- that the OIO has travelled beyond the notice since there was no allegation in the notice that the appellants had not provided any authorization letter of its client to pay the expenditure; that the notice dated 24.9.2009, which is a periodical notice was issued only to determine whether the actual recoveries were on account of expenditure incurred on behalf of the appellants or appellants own expenditure;



- that since the appellant acted as a pure agent reimbursements are not liable for service tax; that they had satisfied all the conditions under Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006;
- that the adjudicating authority did not consider the appellants case was covered under circular dated 21.12.2009 and therefore also the said value of actual reimbursement cannot be included in the taxable value;
- that they wish to rely on the case of Ranadey Micro Nutrients [CCE (1996) 10 SCC 387(SC)] and Paper Products Limited [1999 (7) SCC 84]
- that Rule 5(2) of the Valuation Rules has already been held to be ultra vires by the Delhi High Court in the case of Intercontinental Consultants and Technocrats Private Limited [2012-TIOL-966-HC-DEL-ST];
- that the entire case is revenue neutral since if they paid service tax they were eligible for CENVAT credit;
- that section 78 cannot be invoked since the notice was periodical and the facts were known to the department; that the appellant acted under a bonafide belief;
- that when the issue involved is that of interpretation of law of scope of taxing entry, penalty under section 78 cannot be invoked.

5. Personal hearing in the case was held on 13.9.2017 wherein Ms. Puloma Dalal, CA, appeared on behalf of the appellant and reiterated the grounds of appeal. Ms. Dalal, CA submitted additional written submissions dated 12.9.2017. She further stated that the valuation rule was not invoked in the notice; that all the bills were inclusive of the service tax and that they had also submitted the CA's certificate to this effect. She also submitted copy of citation in the case of Ashita International Limited [2015(38) STR 246]. In the additional submissions, the following contentions, were raised:

- that the issue in the present dispute was whether service tax is payable on reimbursements received by the appellants besides services provided as a CHA;
- that the adjudicating authority in his OIO in para 10.3.1 has recorded that the appellants have recovered only the actual expenses inclusive of service tax and no extra amount has been raised or recovered;
- the services of other vendors obtained by the appellant for their clients is not includible in view of Section 67 of the Finance Act, 1994;
- that these services have already suffered tax as evidenced from various sample bills/invoices attached as well as entire ledger extracted and placed on record by the appellants;
- that Rule 5(1) and 5(2) of the Valuation Rules, is of no consequence as the said rule is already held to be ultra vires in the case of Intercontinental Consultants and Technologies Private Limited;
- that they have already placed on record the authorization that they always had the group concern M/s. Lemuir Secure Logistics from whom they incurred various reimbursable expenses; that hence reimbursable expenses recovery does not attract service tax and would not form part of the value of taxable services.

6. I have gone through the facts of the case, the appellant's grounds of appeal, their additional submissions and the grounds raised during the course of personal hearing. The question to be decided is whether the appellant is liable for service tax on the second set of invoices, which as per the appellant were issued only for reimbursement of expenses, they had incurred during the disputed period from 1.4.2008 to 30.9.2008.

7. Before moving forward with the case, I would like to put on record certain facts, viz:

- the first notice covering the period from 1.10.2003 to 31.3.2008 was confirmed by the original adjudicating authority which on appeal before the then Commissioner(A), was decided vide OIA

dated 29.11.2010, wherein the demand for the period from 1.10.2003 to 17.4.2006, it was held that no service tax was payable by the appellants on reimbursable amount prior to 18.4.2006 relying on the circular of TRU of 1997. In respect of the period from 18.4.2006 to 31.3.2008, the Commissioner(A) held that with the introduction of Service Tax (Determination of Valuation) Rules, 2006, the appellant has not been able to satisfy the conditions laid down under Rule 5(2) and therefore, the exemption of reimbursed expenses from the total gross income of the appellant cannot be allowed.

- in respect of the present dispute, the adjudicating authority vide his OIO dated 30.3.2012, confirmed the demand. On an appeal being filed before the then Commissioner(A) the matter was decided vide OIA dated 2.8.2013, wherein the matter was remanded to the adjudicating authority to decide it afresh, after recording the following findings were recorded:
  - that on perusing the sample invoices submitted along with the appeal, one can unambiguously ascertain that not only vendors invoice have been paid at actual but also that all the third party services obtained were those of warehousing;
  - that the actual expenses on obtaining these services are recovered [including the service tax paid thereon] & no service tax can be demanded again on the services which have already suffered service tax;
  - that on one invoice viz 7289/8.8.2008 on which service tax is demanded, the appellant has also attached receipts which show payment of service tax; that along with the invoices & receipts, the appellant has also provided copy of statement of account and therefore, the findings of the adjudicating authority that ledger for pure agent was not maintained and the appellant has not satisfied the conditions of Rule 5(2) of the Valuation Rules, is not correct.
- that the direction in the OIA dated 2.8.2013 was as follows:

*"12. ....The appellant in his defense stated that they are having the details in respect of every invoice issued by them along with the vendors invoice, but since the invoices were huge in numbers the same were not produced but only sample invoices were produced, but the JAC has not given the direction to conduct inspection of documents. In view of the above and in the interest of justice, I find it appropriate to give an opportunity to the appellant in this regard and I direct the adjudicating authority to consider the instant claim afresh for considering exclusion of reimbursable expenses after verifying the invoices and after giving reasonable opportunity for hearing."*

- department feeling aggrieved, filed an appeal before the Hon'ble Tribunal but subsequently withdrew the same in view of Board's Circular dated 17.8.2011 as amended on 17.12.2015.[Order No. A/10458-10480/2016 dtd 27.5.2016].

8. Hence, it is amply evident that the remand was with a specific direction. Now on going through the impugned OIO dated 20.2.2017, issued consequent to the aforementioned remand by the Commissioner(A), the adjudicating authority records that the appellant had submitted only 16 invoices out of the 173 invoices list submitted by them for the period from 1.4.2008 to 30.9.2008, though as per the direction, the appellant was supposed to produce each and every invoice. The adjudicating authority further states that on going through the 16 invoices which form a part on which service tax is demanded, the corresponding receipt show service tax paid on the said invoices; that the appellant has recovered only the actual expenses inclusive of service tax and no extra amount has been raised [para 10.3.1 of the impugned OIO]. The findings in respect of the 16 invoices are in tune with the observations recorded by the then Commissioner(A) in para 9 of his OIA dated 2.8.2013. Surprisingly, without supplying the documents needed for the verification, the appellant is again before me raising the averment that the adjudicating authority did not follow the directions issued by the appellate authority. For forming an opinion on the task entrusted to the adjudicating authority, it was imperative that all the invoices, receipts, supporting documents, etc., be provided to the adjudicating authority. Since the documents in its entirety were not provided, it was not possible for the adjudicating authority to decide this issue.

9. But after having said so, I find that the adjudicating authority, after holding that the appellant had only recovered the actual expenses inclusive of service tax and no extra amount has been raised or recovered, went on to examine the findings of the Commissioner(A), recorded in para 10 of the OIA dated 2.8.2013, wherein the Commissioner(A) had held as follows :

*"Hence here I am not agreed with the adjudicating authority that the appellant has not provided any documentary evidence which shows that ledger for pure agent has been separately maintained, and the assessee has not satisfied the conditions of sub rule (2) of rule 5."*

In para 10.3.3, the adjudicating authority held that the appellant had not produced any evidence that they had entered into contractual agreement or contract job number wise as mentioned in the invoices with the recipient of service to act as his pure agent in order to incur expenditure or costs in the course of providing taxable service as per the condition (a) to explanation 1 to Rule 5(2) of the Valuation Rules. Though, I agree with the contention raised by the appellant that the adjudicating authority, in his denovo adjudication exceeded his brief, it would appear imprudent, if I were not to examine the claim of the adjudicating authority. albeit made exceeding his jurisdiction, more so since this was never the task entrusted to him when the remand was made vide OIA dated 2.8.2013.


9.1 The appellant, as is well known, is a Custom House Agent (CHA) and has been discharging service tax under the category of *Custom House Agency*. During the disputed period, CHAs were governed under the Custom House Agents Licensing Regulations, 2004 (CHALR). Regulation 2(c), defines CHA as a person licensed under these regulations to act as agent for the transaction of any business relating to the entry or departure or conveyance or the import of export of goods at any Customs Station. Regulation 13, of the CHALR, defines the obligation of Customs House Agents, wherein under sub-regulation (a), it is imperative for a CHA to obtain an authorization from each of the companies, firms individuals by whom he is for the time being employed as CHA & produce it whenever required by the DC/AC of Customs. In view of the foregoing, since there is no doubt that the appellant was working under the said regulation for the period under dispute, the findings of the adjudicating authority that since the appellant had not produced any evidence that they had entered into contractual agreement with the recipient of service to act as his pure agent, is not legally tenable. Of course, there would have been authorization/agreement to act as an agent, without which the CHA could not have discharged his function as a Custom House Agent. Even otherwise, as I have already held the adjudicating authority was not supposed to examine the finding of the Commissioner(A) in his OIA dated 2.8.2013 and should have restricted himself to the specific task of reconsidering the claim afresh for considering exclusion of reimbursable expenses after verifying the invoices and after giving reasonable opportunity for hearing to the appellant.

9.2 The appellant has argued that that Rule 5(2) of the Valuation Rules has already been held to be ultra vires by the Delhi High Court in the case of Intercontinental Consultants

and Technocrats Private Limited [2012-TIOL-966-HC-DEL-ST]. However, I find that the department has already filed an appeal against the said order in the Hon'ble Supreme Court vide Petition for Special Leave to Appeal (Civil) No. 32257 of 2013 [reported at 2014 (35) S.T.R. J99 (SC)]. The Hon'ble Supreme Court of India in the case of West Coast Paper Mills [2004(164) ELT 375], has already held that when an appeal is filed and admitted in Supreme Court against an order, the correctness of the said order is in jeopardy.

10. Now, since the documents needed for the verification, has not been provided by the appellant to the adjudicating authority, I am left with no choice but to remand it back once again, with a specific direction that the adjudicating authority will reconsider the claim afresh for considering exclusion of reimbursable expenses after verifying the invoices and after giving reasonable opportunity for hearing to the appellant. Needless to state, the issue related to whether the appellant was acting as a pure agent, stands settled already in view of the OIA dated 2.8.2013, which has attained finality. The appellant is further directed to provide all the documents, etc. to the adjudicating authority within two months from the receipt of this order-in- appeal. The adjudicating authority is also directed to dispose of the matter within a month of receipt of said documents from the appellant. The sole purpose of remanding it once again is to ensure that there is no miscarriage of justice.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।  
11. The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : 18.10.2017

Attested



(Vinod Lukose)  
Superintendent,  
Central Tax(Appeals),  
Ahmedabad.

By RPAD.

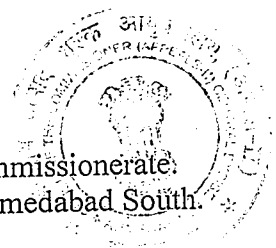
To,

M/s. Lee & Muirhead Private Limited,  
306, Akik Complex,  
Opp. Lions Hall,  
Nr. Mithakali Six Roads,  
Ahmedabad-380006

M/s. Lee & Muirhead Private Limited,  
Oricon House,  
12, K Dubash Marg,  
Mumbai 400 023.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VI, Ahmedabad South.



V2(ST)/23/A-II/17-18

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4. The Additional Commissioner, System, Central Tax, Ahmedabad South  
Commissionerate.

5. Guard File.

6. P.A.

