

	केंद्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केंद्रीय कर शुल्क भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
	079-26305065	टेलिफैक्स : 079-26305136

रजिस्टर्ड डाक ए.डी. द्वारा

- क फाइल संख्या : File No : V2(38)115, 116 & 117/Ahd-I/2016-17 / ११५५ ३० ९४१
Stay Appl.No. NA/2016-17
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-058 to 060-2017-18
दिनांक 18.08.2017 जारी करने की तारीख Date of Issue २५/९/१७
- श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)
- ग Joint Commissioner केन्द्रीय कर, Ahmedabad-I द्वारा जारी मूल आदेश सं 71/CX-I Ahmd/JC/MK/2016
दिनांक: 22/12/2016 से सृजित
- Arising out of Order-in-Original No. 71/CX-I Ahmd/JC/MK/2016 दिनांक: 22/12/2016 issued by
Joint Commissioner, Ahmedabad-I
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s. Protect Constructions Chemicals Pvt. Ltd.
Shri Nihir Jatinbhai Shah
Shri Manish D. Shah
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।

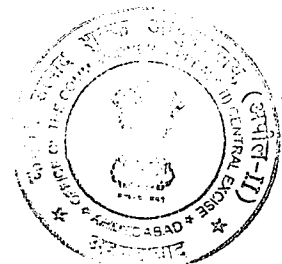
Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

... 2 ...



(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.

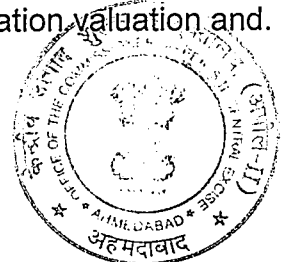
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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.



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 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 .

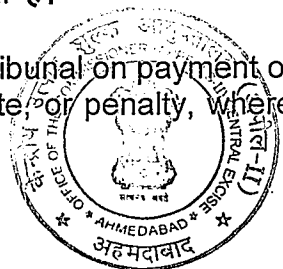
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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

Following three appeals have been filed against the Order-in-Original number 71/CX-I Ahmd/JC/MK/2016 dated 22.12.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Joint Commissioner, C. Ex., HQ, Ahmedabad-I (*hereinafter referred to as 'adjudicating authority'*).

Appeal No & dt. Of filing	Filed By	Duty confirmed	Penalty imposed	Remarks
115/16-17 Dt. 25.02.17	M/s Protect Construction P. Ltd., B/h Narol Court, Ujjwal Coumpound, Ahmedabad	Duty Not decided in OIO as already decided in settlement Commission	48,99,184/- 11AC(1)(C) of CEA 1944 + 1,00,00,000/- Red. Fine u/r 25(1),(a),(b),(d)	Duty Rs. 97,98,367/- confirmed by Settlement Commission order dt. 31.08.2015
116/16-17 Dt. 25.02.17	Shri Nihir Jatinbhai Shah, Director of M/s Protect Con. Pvt. Ltd	Not applicable	2,00,000/- PP u/r 26 of CER-2002	Immunity granted by settlement Commission withdrawn
117/16-17 Dt. 25.02.17	Shri Manish D. Shah, Director of M/s Protect Con. Pvt. Ltd	Not applicable	2,00,000/- PP u/r 26 of CER-2002	as PP not paid by each of them in 30 days

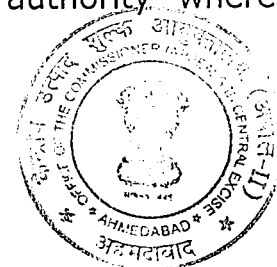
2. The facts of the case, in brief, are that, clearance value in Excise return was less than the sale value in P & L Account and sales tax return in 2010-11. Appellant [C. Ex. Reg. No. AAEC P2662G XM001] had maintained two sets of invoice for one and same consignment. One set with higher value for sales of excisable goods to their buyer and invoice in second set with less value for declaring value to Central Excise. Moreover appellant had not included packing and forwarding charge in assessable value. Further appellant had stock transferred their goods to depot for further sale to ultimate customers but he had not paid differential duty on difference sale value at depot to customers and value taken at the time of stock transfer to depot. SCN dated 24.12.2013 was issued for recovery of duty Rs. 97,98,367/- (latter re-determined /recalculated as Rs. 1,01,27,362/-) on excisable goods value Rs. 20,00,15,305/-.



3. Appellant filed application before the Settlement Commission. Appellant had paid Rs. 59,99,509/- . Settlement commission ordered as below-

- a. Balance amount of duty Rs. 37,98,858/- [97,98,367/- minus 59,99,509/-] should be paid within 30 days of receipt of order.
- b. Eligibility of Cenvat credit to be decided by central Excise officer in terms of para 8.8
- c. Department to calculate Interest after receipt of balance amount and intimate within 7 days of receipt of final payment.
- d. Seized goods are not liable for confiscation. Hence question of imposition of fine does not arise. The Bond and BG, if any, may be released once balance amount is paid.
- e. Penalty of Rs. 4,00,000/- is imposed on applicant under provisions cited in SCN. Bench granted them immunity from penalty in excess of this amount. The penalty should be paid within 30 days of receipt of settlement Commission`s order.
- f. Penalty of Rs. 50,000/- is imposed on co-applicant Shri Nihir Jatinbhai Shah, under provisions cited in SCN. Bench granted them immunity from penalty in excess of this amount. The penalty should be paid within 30 days of receipt of settlement Commission`s order.
- g. Penalty of Rs. 20,000/- is imposed on co-applicant Shri Manish Dineshchandra Shah, under provisions cited in SCN. Bench granted them immunity from penalty in excess of this amount. The penalty should be paid within 30 days of receipt of settlement Commission`s order.
- h. Prosecution: Subject to the payment of remaining duty, interest and penalties, the Bench granted immunity from prosecution to the applicant and co-applicant under CEA-1944.
- i. The above immunities are granted under sub-section (10 of Section 32K of the Act to the applicant. Attention of the applicant/co-applicant is also invited to the provisions of sub-section (20 and (3) of section ibidi.

4. Immunity granted to appellant and co-applicant were deemed to be withdrawn in terms of section 32K(2) as payment duty, penalty, personal penalty and fine was not made as stated in Settlement Commission order. The case was therefore adjudicated by adjudicating authority wherein following was imposed-



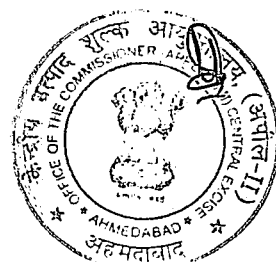
- a. Confiscated excisable goods valuing Rs. 19,70,05,073 cleared during 2008-09b to 30.09.2014 u/r 25(1)(a), 25(1)(b) and 25(1)(d) of CER-2002 and imposed redemption fine of Rs. 1,00,00,000/- in lieu of confiscation.
- b. Imposed penalty of Rs. 48,99,184/- (being 50% of duty) as per proviso to section 11AC(1)(C) of CEA 1944.
- c. Imposed penalty of Rs. 2,00,000/- upon Shri Nihir Jatinbhai Shah, Director of M/s Protect Construction Chemicals P. Ltd., Ahmedabad u/r 26 of CER, 2002.
- d. Imposed penalty of Rs. 2,00,000/- upon Shri Manish D. Shah, Director of M/s Protect Construction Chemicals P. Ltd., Ahmedabad u/r 26 of CER, 2002

5. Being arrived with the impugned OIO, the appellant and above two co-appellant filed appeal before Commissioner Appeal wherein it is stated that-

- I. Appellant have no intention to do any fraud otherwise they would have not shown in VAT and Income Tax return and also in Balance Sheet.
- II. Extended period of five years is not applicable as there was no intension to evade duty.
- III. Merely buying large packet of product and then selling it in small packet of less quantity does not amount to manufacture u/s 2(f) of CEA-1944.
- IV. OIO has not categorically dealt with admissibility or non-admissibility of Cenvat credit of Rs. 8,24,687/-.
- V. Settlement Commission order becomes null and void if the order is not complied with by the parties within 30 days of passing of order.
- VI. Co-applicant has acted in bona fide manner in all the transaction and only relied on the advice of their consultant and hence, the personal penalty imposed should be quashed and set aside.

6. Personal hearing in the all three appeals was granted on 18.08.2017. Shri Sanket Gupta, Advocate appeared before me on behalf of above three appellant and reiterated the grounds of appeal of all three appeals. Shri Sanket Gupta, Advocate, further stated that Directors are acting in bonafied manner hence no penalty can be imposed.

DISUSSION AND FINDINGS



7. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the all three appellants at the time of personal hearing.

8. Contention that settlement Commission order becomes null and void is not, made by appellant party is made without any judicial authority. Settlement commission order is judicial order. Section 32P of CEA 1944, deems that the Settlement Commission proceeding is the judicial proceedings within the meaning of Section 193 and 228 of IPC. Any judicial order becomes null and void if and only it is ordered to be so by higher judiciary. As per the Section 32M of the Act, the order of Settlement Commissions is final and conclusive, therefore, I conclude that, the duty confirmed and ordered to be recovered can not be re-adjudicated by adjudicating authority as far as duty is concerned. It is not open to decide taxability at the time of adjudication when settlement Commission order is issued regarding taxability and demand liability is fixed. I am in complete agreement in this regards with the conclusion drawn by adjudicating authority at para 42 of impugned OIO. Many arguments put forth by appellant to defend the taxability of re-packing u/s 2(f) of CEA-1944 and arguments regarding not applicability of extended period of five years for recovery etc. are of no use to them.

9. Now I shall dwell on immunity granted against recovery penalty and fine in excess of specified in Settlement Commission order. As per section 32K(2) of the Act, the immunity granted to a person shall stand withdrawn if such person fails to pay sum specified in the order of Settlement Commissions passed u/s 32F(5) within time specified or fails to comply with any other conditions subject to which immunity was granted.

10. Sub Section (2) of Section 32K of CEA-1944 is reproduced as below-

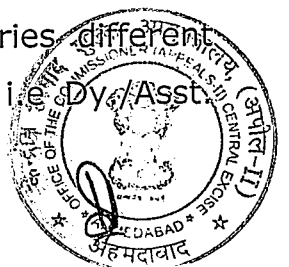
"(2) An immunity granted to a person under sub-section (1) shall stand withdrawn if such person fails to pay any sum specified in the order of the settlement passed under [sub-section (5) of section 32F within the time specified in such order] or fails to comply with any other condition subject to which the immunity was granted and thereupon the provisions of this Act shall apply as if such immunity had not been granted"



11. Since the immunity granted by settlement Commission becomes null and void as its order is not complied case is correctly adjudicated for imposing penalty, redemption fine and Personal penalty. Regarding Penalty imposed under Section 11AC by adjudicating authority, I find that appellant had maintained two set for invoices with intention to show less value in excise return. Appellant argument that they have no intention to hide the clearance and that be so, then they would not have correctly shown clearance value in VAT return, IT returns and books of Account is not convincing and such flimsy argument is just to save their face. They have never declared to department they are maintain the two sets of invoices for on and the same clearance with same sr. No. in both the sets and same description of material. Second set of invoices with lower value is maintained just to show it to excise department as when asked for verification by central Excise officers at the time of assessment of ER-1/3. I up hold the penalty imposed under Section 11AC(1)(C) of CEA 1944 and Rs. 1,00,00,000/- Redemption Fine imposed u/r 25(1),(a),(b),(d) on M/s Protect Construction Chemicals P. Ltd.

12. All this undervaluation and activity of maintenance of two sets of invoices happened under instruction and guidance from the directors Shri Nihir Jatinbhai Patel and Sh. Manish Dineshbhai Shah which evident from various confession statements recorded u/s 14 of CEA 1944 and the panchnama drawn in the case. Looking to the huge amount of duty evasion and keeping in view the active role played by above two directors in the matter, I hold that personal penalty of Rs. 2,00,000/- on each, is correctly imposed u/r 26 of CER-2002.

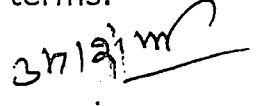
13. Regarding the payment of duty of Rs. 8,24,687/- through Cenvat Credit, it is evident from para 43 of impugned OIO that Settlement Commission has left eligibility of cenvat credit to the proper officer. Appellant has not produced documents before me in this regards. It is correctly concluded at para 43 that taking cenvat credit and payment through cenvat credit is altogether different aspect and carries different obligation. Appellant should approach the jurisdiction Officer i Dy. Asst. Commissioner, the proper officer, in this regards.



14. In view of foregoing discussion all the three appeals are rejected and impugned OIO is up-held

15. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

15. The appeals filed by the appellant stand disposed off in above terms.


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED


(R.R. PATEL)

SUPERINTENDENT (APPEAL),

CENTRAL TAX, AHMEDABAD

To,

1. M/s Protect Construction Pvt. Ltd., shed No. 1, Ujjwal living compound, B/h Old Narol Court, Narol, Ahmedabad
2. Shri Nihir Jatinbhai Shah, Director of M/s Protect Construction Pvt. Ltd.
3. Shri Manish D. Shah, Director of M/s Protect Construction Pvt. Ltd.

Copy to:

- 1) The Chief Commissioner, Central Tax, Ahmedabad.
- 2) The Commissioner Central Tax, GST South, Ahmedabad-
- 3) The Additional Commissioner, Central Tax , GST South, Ahmedabad
- 4) The Asst. Commissioner, C.Ex. Div-I, Ahmedabad-I(old jurisdiction).
- 5) The Asst. Commissioner (System), GST South, Hq, Ahmedabad.
- ✓ 6) Guard File.
- 7) P.A. File.



1-11-54

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