

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

क फाइल संख्या : File No : V2(ST)0201@0202/A-II/2016-17 11517 व 1522
 ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-001-APP-087&088-17-18**
 दिनांक Date : 25-09-2017 जारी करने की तारीख Date of Issue 10-10-17

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-18-19-16-17** Dated **14.10.2016** Issued by ADC STC, Service Tax, Ahmedabad

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

M/s. Gujarat State Export Corporation 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 मेंटल हास्पिटल कम्पाउण्ड, मेधाणी 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 होगी) 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 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 अर्ज़ी 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,

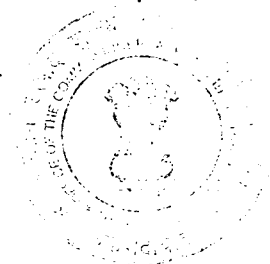
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

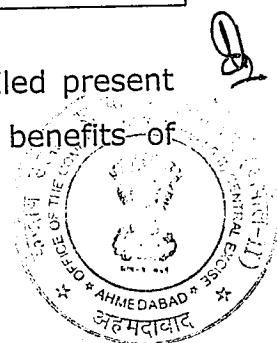
M/s. Gujarat State Export Corporation Ltd (Now GSEC Ltd.), 2nd floor, Gjarat Chamber Building, Near Natraj Theater, ashram Road, Navrangpura, Ahmedabad- 300 009 (*hereinafter referred to as 'appellants'*) have filed the present appeals, against the Order-in-Original number AHM-SVTAX-000-ADC-18-19-2016-17 dated 14.10.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Addl.Commissioner, Service Tax HQ, Ambawadi, Ahmedabad- (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that appellant was providing Exempted and taxable service but were neither paying 6%/8% in terms of Rule 6(3)(i) of CCR 2004, on Exempted service value nor paying proportionate to turnover of Exempted service value under Rule 6(3)(ii) of CCR 2004. For availing proportional payment under Rule 6(3)(ii), prior intimation to Superintendent is required and proportional payment amount is to be calculated as per formulas prescribed in rule 6(3A) of CCR, 2004. On being pointed out by audit (AR 141/2012-13 dated 02.01.2013 RP-1), appellant belately chose option under Rule 6(3)(ii) and made payment of Rs. 9,17,390/- (duty) + interest Rs. 4,90,453/- [total 14,07,843/-] vide challan dated 07.10.2013 for period 2009-10 to 2012-13 and proportionally reversed CENVAT of Rs. 3,22,583/- for period 2013-14.

3. Department was of view that appellant is not eligible for benefits of Rule 6(3)(ii) as no prior intimation is given to Superintendent and such option can not be applied retrospectively, hence appellant is compulsorily required to follow Rule 6(3)(i) & pay 6%/8% of exempted service value. Therefore two SCN dated 16.09.2014 covering period 2009-10 to 2012-13 and SCN dated 24.04.2015 covering period 2013-14 demanding 6%/8% reversal in terms of Rule 6(3)(i) of CER on Value of Exempted service were issued demanding payment of Rs. 39,02,274/- and 1,22,757/- respectively. Vide impugned OIO both the SCN`s were confirmed with interest liability and imposed following penalty

SCN dt.	Section 76	Section 77	Section 78	Rule 15A, CCR
16.9.14	NIL	10,000.00	39,02,274.00	NIL
24.4.15	12,276.00	10,000.00	NIL	5,000.00

4. Being aggrieved with the impugned OIO, appellant have filed present appeal wherein it is requested that they should be allowed benefits of



proportional payment prescribed rule 6(3)(ii) r/w rule 6(3A) and SCN issued are time barred.

5. Personal hearing in the case was granted on 17.08.2017. Shri Hardik P. Modi, Consultant appeared before me and reiterated the grounds of appeal and requested to extend the benefits of rule 6(3AA) of CCR, 2004.

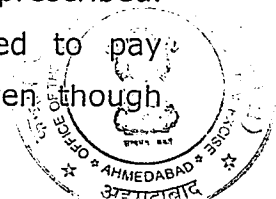
DISUSSION AND FINDINGS

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

6.2 Audit had asked to reverse 6% of exempted service value in terms of rule 6(3)(i). Appellant had suo moto reversed credit/paid duty as per rule 6(3)(ii) r/w rule 6(3A) during the audit. Said benefit of rule 6(3)(ii) r/w rule 6(3A) has been denied in impugned OIO as prior intimation was not filed to JRO. In appeal memo also it is contended that benefits of rule 6(3)(ii) r/w rule 6(3A) should be extended ignoring the prior intimation to JRO not given. During course of hearing it is contended that retrospective benefits of rule 6(3)(i) r/w rule 6(3AA) introduced from 01.4.2016 may be given to them.

6.3 Appellant request of allowing them benefit of rule 6(3)(i) r/w rule 6(3AA) can not be extended when they have contended before adjudicating authority and in appeal memo before me also that they should be allowed benefits of rule 6(3)(ii) r/w rule 6(3A). It is only during course of hearing they has argued for benefits of 6(3)(i) r/w rule 6(3AA). Appellant is not allowed to change the stand taken, other then contested in OIO. Rule 6(3AA) is introduced from 01.04.2016; therefore benefits can not be extended retrospectively. Now I shall proceed to examine whether benefits of rule 6(3)(ii) r/w rule 6(3A) can be allowed or not.

7.1 There is no dispute that the appellant is required to make payment as per rule 6 of CCR, 2004, as he is providing taxable as well s Exempted/Non-taxable service simultaneously and taking credit on all common input Services. On being pointed out, Appellant has made voluntary payment as per rule 6(3)(ii). I find that appellant is denied by department, the benefits u/r rule 6(3A) r/w 6(3)(ii) and they are compulsorily forced to follow rule 6(3)(i) wherein payment 6%/8% of Exempted service value is prescribed. Question to be decided is whether appellant can be allowed to pay proportional duty calculated as per rule 6(3A) r/w 6(3)(ii) even though



appellant has not given prior intimation to concerned Superintendent as required u/r rule 6(3A) r/w 6(3)(ii).

7.2 Rule 6(1) of CCR , clearly states that CENVAT credit shall not be allowed on input service used in manufacture of exempted goods or provision of exempted services except in the circumstances mentioned in sub-rule(2). Rule 6(2), *ibid*, puts an obligation on a manufacturer who avails CENVAT credit in respect of inputs and input services, used in both dutiable and exempted final products, to maintain separate records. Rule 6(3), *ibid*, a non-obstante clause, gives a facility to a manufacturer, opting not to maintain separate accounts to either

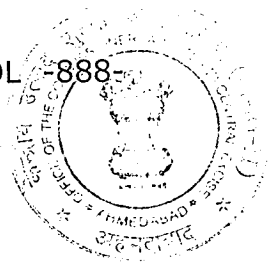
[a] pay an amount of 6% of the value of exempted goods; [RULE 6(3)(i)]
or

[b] pay an amount as determined under rule 3A; ;[RULE 6(3)(ii)] or

[c] maintain separate accounts and take CENVAT credit as per conditions therein and thereafter, pay an amount as per sub rule 3A of CCR .

8. I find that as per rule prior intimation u/r 6(3A) contains details like (a) Name , address and registration No. of service provider, (b) date from which option is availed, (c) description of exempted and taxable services and (d) CENVAT credit lying on date of availing exemption. I find all this particulars are available with the department and there is no revenue implication either directly or in-directly even if not submitted. Merely because no prior intimation is given substantial benefits/rights should not be denied and appellant should not be forced to pay 6%/8% of exempted service value under 6(3)(i). Adjudicating authority has not concluded in OIO that department was not having any information as required under said intimation and for want of that department was not in position to calculate payment u/r 6(3)(ii), therefore substantial benefit can not be denied. My view is supported by following judgments-

- I. Wipro Limited Vs. Union of India [2013] 32 Taxmann.com 113 (Delhi High Court)
- II. Kothari Infotech Ltd V/S Commissioner of Central Excise, Surat - [2013] 38 taxmann.com 298 (Ahmadabad - CESTAT)
- III. Mannubhai & Co. Vs. Commissioner of Service Tax (2011)(21)STR(65)- CESTAT (Ahmadabad)
- IV. M/S Mangalore Fertilizers & Chemicals Vs Deputy Commissioner 1991 (55) ELT 437
- V. CST Delhi vs. Convergys India Private Limited 2009 -TIOL -888- CESTAT -DEL-2009 (16) STR 198 (TRI. - DEL)



VI. CST Delhi vs. Keane Worldzen India Pvt. Ltd. 2008 – TIOL -496 –
CESTAT –DEL: 2008 (10) STR 471 (Tri. – Del)

9.1 Further I am of the view that there is no condition provided in the rule that if a particular option out of three are not opted, then only option of payment of 6%/8% provided u/r 6(3)(i) shall be compulsorily made applicable. Therefore revenue should not insist the appellant to avail particular option. The main object of rule 6 is to ensure that the assesses should not avail the CENVAT credit in respect of input or input services which are used in relation to manufacture of exempted goods or for exempted service. My view is supported by CESTAT judgment in case of Mercedes Benz India Pvt. Ltd. [2015 (40) STR 381 (Tri.- Mumbai)].

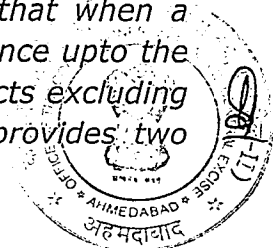
9.2 The appellant further contended that the demand cannot be more than the CENVAT Credit, availed. I observe that in view of amended provisions of Rule 6 (3) of CCR, the Joint Secretary (TRU) has issued a letter no. 334/8/2016-TRU dated 29.2.2016 which states that:

(h) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.

(i) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.

(ii) sub-rule (2) of rule 6 is being amended to provide that a manufacturer who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.

(iii) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products excluding exempted goods or when a provider of output services provides two



classes of services, namely exempted services and output services excluding exempted services, then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services, subject to a maximum of the total credit taken or (b) pay an amount as determined under sub-rule (3A).

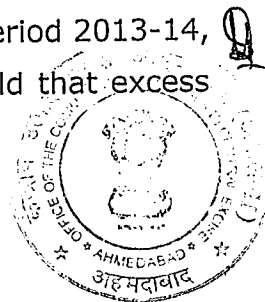
(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.

9.3 However, this amendment reflects the interpretation and intent of the Government. In-fact Joint Secretary himself states that the rules are being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit. . Even otherwise to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal. Though the above referred amendment has made in a clarification nature and not specified any retrospective effect, the intent of the Government is very clear.

9.4. In view above, I hold that the activity carried out by the appellant is falling within the meaning of 'exempted service' as defined under Rule 2(e) of CCR. It is not under dispute that the appellant had availed Cenvat credit on input/input services which were used in relation to both dutiable and exempted activity. Therefore, it was imperative on the appellant, to either, not take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2), *ibid*. However, as is already mentioned, the appellant took CENVAT credit in respect of input service used in trading activity and also failed to maintain separate accounts. Therefore, the provisions of Rule 6 (3) of CCR clearly attracts in appellant's case.

9.5 The appellant have pleaded that they have been denied the benefits of the rule 6(3AA) of CCR, 2004. I am of considered view that benefits of rule 6(3AA) can not be extended retrospectively said rule 6(3AA) was introduced w.e.f. 01.04.2016.

10. Appellant has paid, in terms of rule 6(3A), cash of 9,17,390/- for period 2009-10 to 2012-13 and cenvat of Rs. 3,22,583/- for period 2013-14, attributed to the exempted services provided. Therefore, I hold that excess



amount confirmed over and above in excess of 9,17,390/- is not required to be paid. Having granted benefits of rule 6(3)(ii), needless to say that, less amount [3,22,583/- minus 1,22,757/-] confirmed in OIO for FY 2013-14 is required to be paid. I further hold that appropriate interest u/s 75 on amount Rs. 9,17,390/- and 3,22,583/- is also required to be paid, if so far not paid.

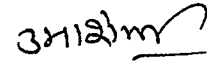
11. Had the audit not conducted such a non payment or non-reversal as prescribed in rule 6 of CCR, 2004 would not have come to knowledge. Appellant have never disclosed to department that that they are availing credits for input services used for providing exempted service. I hold that demand has been correctly raised invoking extended period for SCN dt. 16.09.2014. SCN dt. 24.04.2015 is issued within 18 months of filing of ST-3 return hence it is not time barred.

12. Consequent to change in amount of duty, I am inclined to impose the amount of penalty under Section 78 in SCN dated 16.09.2014 equivalent to credit reversed/paid in terms of rule 6(3A) r/w rule 6(3)(ii) with benefits of 25 % as stated in para 11(A)(v) of impugned OIO. Further I am inclined to impose penalty of Rs. 32,258/- under Section 76 in SCN dated 24.04.2015 with benefits of 25 % as stated in para 11(B)(v) of impugned OIO. I uphold the OIO as far it relates to imposing of penalty u/s 77 and Rule 15A of CCR, 2004 for both the SCN.

13. In view of above, benefits of rule 6(3AA) can not be extended to appellant retrospectively, however I extend the benefits of rule 6(3A) as requested in appeal memo. Appeal filed by the appellants is partially allowed with above modification.

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

14. 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,

M/s. Gujarat State Export Corporation Ltd (Now GSEC Ltd.),
2nd floor, Gjarat Chamber Building,
Near Natraj Theater, ashram Road,
Navrangpura, Ahmedabad- 300 009

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, Service Tax Div-II, Ahmedabad(old jurisdiction).
- 5) The Asst. Commissioner(System), GST South, Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



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