



आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
☎ 07926305065 - टेलिफैक्स 07926305136



DIN : 20221264SW00008234E3

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/STP/777/2022 / 6586-90
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-114/2022-23
दिनांक Date : 28-12-2022 जारी करने की तारीख Date of Issue 29.12.2022
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. MP/1/AC/Div-III/2021-22 दिनांक: 28.09.2021 passed by The Assistant Commissioner, CGST, Division III, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

M/s Shri Hari Infrastructure
Shri Hari Villa, Opp. Swaminarayan Gurukul,
Near Sudama Hotel, Mehmedabad Road,
Hathijan, Ahmedabad - 382445

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 :

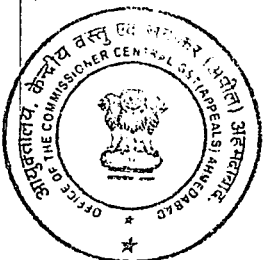
Revision application to Government of India:

(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 हानिकार खाने 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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) 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।

(c) 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 भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. in case of appeals

Other than as mentioned in para-2(i) (a) above.



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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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.

- (73) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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.

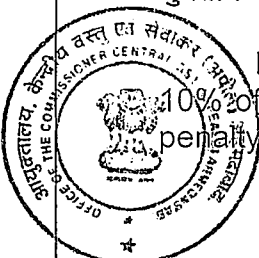
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

- (ccxxix) amount determined under Section 11 D;
- (ccxxx) amount of erroneous Cenvat Credit taken;
- (ccxxxii) amount payable under Rule 6 of the Cenvat Credit Rules.

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."



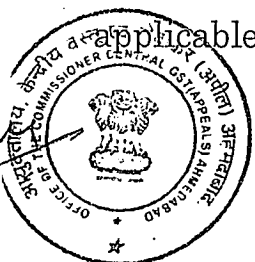
ORDER-IN-APPEAL

The present appeal has been filed by M/s. Shri Hari Infrastructure, Shri Harivilla, Opposite Swaminarayan Gurukul, Mehmedabad Road, Hathijan, Ahmedabad – 382 445 (hereinafter referred to as the “appellant”) against Order in Original No. MP/1/AC/Div-III/2021-22 dated 28.09.2021 [hereinafter referred to as the “*impugned order*”] passed by the Assistant Commissioner, Division – III, CGST, Commissionerate : Ahmedabad South [hereinafter referred to as “*adjudicating authority*”].

2. Briefly stated, the facts of the case is that the appellant were holding Service Tax Registration No. ABWFS1361HSD001 and engaged in providing Construction of Residential Complex service. During the course of Audit of the records of the appellant for the period from April, 2014 to June, 2017 conducted by the Officers of CGST Audit Commissionerate, Ahmedabad, while reconciling the Financial statements of F.Y. 2017-18 (upto June, 2017) with the ST-3 return filed by the appellant, it was observed that the taxable value as per their Books of Accounts was Rs.39,67,682/- while that declared in their returns was Rs.38,67,270/-. It, therefore, appeared that there was a difference in the taxable value amounting to Rs.1,00,412/- on which service tax amounting to Rs.15,062/- was payable by the appellant.

2.1 It was further observed that during F.Y. 2016-17, the appellant had claimed abatement @ 75%, whereas the actual rate of abatement, in terms of Notification No.8/2016-ST dated 01.03.2016, was 70%. Therefore, the appellant was liable to pay service tax amounting to Rs.1,58,486/- on the excess abatement availed amounting to Rs.10,56,571/- during this period.

2.2 It was also found during the audit that the appellant had during F.Y. 2015-16 declared a taxable value amounting to Rs.7,00,000/- in their ST-3 returns for the period from January, 2016 to March, 2016 and paid applicable service tax amounting to Rs.98,918/-. It appeared that the applicable rate of service tax from 15.11.2015 was 14.5% and the total



service tax payable was amounting to Rs.1,01,500/-. Therefore, the appellant appeared to have short paid service tax amounting to Rs.2,582/-.

3. The appellant was, subsequently, issued a Show Cause Notice bearing No. 203/2019-20/CGST Audit Ahmedabad dated 21.11.2019 from F.No. VI/1(b)-178/C-II Audit/AP-10/2018-19 wherein it was proposed to :

- a) Recover service tax totally amounting to Rs.1,76,130/- under the proviso to Section 73 (1) of the Finance Act, 1994.
- b) Recover Interest under Section 75 of the Finance Act, 1994.
- c) Impose penalty under Section 78(1) of the Finance Act, 1994.

4. The SCN was adjudicated vide the impugned order wherein the demand of service tax amounting to Rs.1,76,130/- was confirmed along with interest. Penalty equivalent to the service tax confirmed was imposed under Section 78(1) of the Finance Act, 1994.

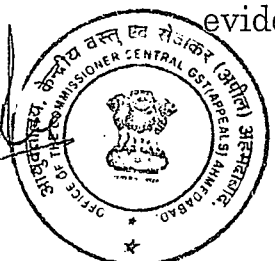
5. Being aggrieved with the impugned order, the appellant have filed the present appeal on the following grounds :

- i. The confirmation of demand of service tax amounting to Rs.15,062/- is not legal and correct on the grounds that during F.Y. 2017-18, they had collected VAT and service tax over and above the booking amount from the customers towards residential dwellings, which amounts to Rs.9,92,142/-. Out of this deduction was allowed to the extent of Rs.6,57,436/- while Rs.3,34,706/- was added to their taxable value. The amount of Rs.3,34,706/- is towards VAT liability, but the audit had considered this as advance collection from their customers.
- ii. They had correctly disclosed the net taxable value and also paid correct service tax. These facts have not been considered by the adjudicating authority while confirming the demand.
- iii. VAT/Sales Tax and service tax are payable on construction services. It is settled law that service tax and sales tax are mutually exclusive. Rule 2A(1)(i)(a) of the Service Tax Valuation Rules and Rule 3 (1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 makes it clear that VAT and service tax is not to be

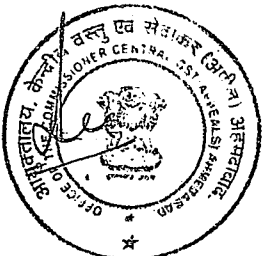


included for the purpose of service tax. Reliance is also placed upon CBIC Circular No.139/8/2011-TRU dated 10.05.2011.

- iv. Therefore, they are not liable to pay service tax on Rs.3,34,706/- (Rs.1,00,412/- after abatement).
- v. Regarding confirmation of demand amounting to Rs.1,56,486/-, it is submitted that the provisions dealing with abatement for construction of a complex, building, civil structure of a part thereof had undergone changes very frequently. The abatement available was 75% in terms of Notification No.26/2012-ST. However, the provisions were changed w.e.f 01.04.2016 vide Notification No.8/2016-ST and the abatement was reduced to 70%. Due to oversight, they lost sight of this. However, the fact remains that they had recorded all the details in their books of accounts. There is no mis-declaration, mis-statement with intent to evade payment of tax on their part. Therefore, the demand is not sustainable on limitation as per Section 73 of the Finance Act, 1994.
- vi. Regarding confirmation of demand of service tax amounting to Rs.2,582/-, it is submitted that they were under the impression that service tax @ 14% was applicable for the entire period of F.Y. 2015-16 and had paid service tax accordingly and shown it in the returns filed by them. Their returns were also scrutinized/assessed by the jurisdictional Range Office and they had not noticed non payment of Swacchh Bharat Cess (SBC).
- vii. There is no mis-declaration, mis-statement on their part and the non payment of SBC @ 0.5% was due to bonafide confusion and interpretation of abolishing of Education Cess and Secondary and Higher Education Cess and imposition of SBC.
- viii. The short payment is not detected as a result of any concealment of income or deliberate mis-declaration, mis-statement or suppression of fact with intent to evade payment of tax. Therefore, demand is not sustainable on limitation as per Section 73 of the Finance Act, 1994.
- ix. The SCN was issued on 21.11.2019 demanding service tax for F.Y. 2015-16 and F.Y. 2017-18. For justification of extended period, the provisions are quoted mechanically and unsubstantiated with any evidence.



- x. The ST-3 returns were filed on due dates and proper records were maintained by them and their returns were assessed by the Range Officers and no discrepancy was noticed or communicated to them. Therefore, it cannot be said that any information was concealed or any mis-declaration was made by them. Therefore, confirmation of demand by invoking extended period is not sustainable.
- xi. Reliance is placed upon the decision in the case of Accurate Chemicals Industries – 2014 (310) ELT 441 (All.); Dynamic Industries Ltd. – 2014 (307) ELT 15 (Guj.); ITC Ltd.- 2013 (291) ELT 377 (T.-Kol.); BCH Electric Ltd.- 2013 (31) STR 68 (T.Del.); Surya Life Sciences Ltd.- 2019 (368) ELT 148 (Tri.-Ahmd); Ultra Tech Cement P. Ltd. – 2014 (302) ELT 334 (Guj.) and Pioneer Scientific Glass Works – 2006 (197) ELT 308 (SC).
- xii. Charge of suppression without any evidence of wilful mis-statement or mis-declaration is not sustainable. Reliance is placed upon the judgment in the case of Sun Pharmaceuticals Industries – 2015 (317) ELT 144 (Tri.-Ahmd); Flextronics Technologies (I) P. Ltd. – 2014 (314) ELT 664 (Tri.-Bang.) and Flextronic Technologies (India) Pvt. Ltd. – 2015 (323) ELT 273 (Kar.).
- xiii. As the demand itself is not sustainable, the question of interest does not arise,
- xiv. For imposition of penalty under Section 78(1) of the Finance Act, 1994 it is mandatory on the part of the department to prove the charges of fraud, collusion, mis-declaration and suppression of fact with intent to evade payment of tax. However, the department has failed to prove the charges with any evidence. The question involved is of interpretation of the provisions of law. Therefore, the imposition of penalty is illegal, incorrect and without jurisdiction.
6. Personal Hearing in the case was held on 16.12.2022. Shri Shivkumar Gupta, Chartered Accountant, appeared on behalf of appellant for the hearing. He reiterated the submissions made in appeal memorandum.



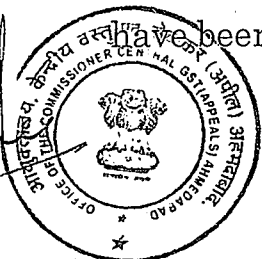
7. I have gone through the facts of the case, submissions made in the Appeal Memorandum as well as submissions made at the time of personal hearing and the material available on records. The issue before me for decision is as whether the impugned order confirming the demand of service tax totally amounting to Rs.1,76,130/-, in the facts and circumstances of the case, is legal and proper or otherwise. The demand pertains to F.Y. 2015-16 to F.Y. 2017-18 (upto June, 2017).

8. The appellant have in their appeal memorandum contested the confirmation of demand of service tax on merits as well as on the grounds of limitation. However, none of the submissions made by the appellant in their appeal memorandum have been made before the adjudicating authority. It is observed that the case was adjudicated ex-parte by the adjudicating authority. It has been mentioned at Para 3 of the impugned order that the appellant was granted personal hearing on four different dates but the same was not attended by the appellant. It has also been mentioned that the appellant have not filed any defense reply to the SCN.

8.1 The appellant have in their appeal memorandum submitted that they had opted for the SVLDR Scheme, 2019 to settle the dispute. However, it was informed to them vide letter dated 27.01.2020 that they are not entitled to SVLDRS, 2019 as the SCN was issued on 21.11.2019 and only disputes upto 30.06.2019 are eligible under the said scheme. The appellant have submitted that under the above circumstances, they could not file a proper defense reply. They have further submitted that due to medical reasons of the Managing Partner and also due to restrictions imposed due to COVID-19, they could not submit their explanation or participate in the adjudication proceedings.

8.2 I find that the appellant were granted personal hearings during July, 2020, December, 2020, March, 2021 and June, 2021. The dates of personal hearing is during the period when the entire country was in the grip of the COVID-19 pandemic. Considering this, the adjudicating authority ought to

have been more considerate in granting the opportunity of personal hearing



to the appellant. It is further observed that the impugned order has not given any finding on the merits of the issues raised in the impugned SCN except for reiterating the allegations of the SCN as findings in the impugned order.

9. Since the impugned order has been passed without the appellant filing their written submissions and without hearing the appellant, I am of the considered view that in the interest of natural justice, the appellant is required to be given another opportunity to present their case before the adjudicating authority. Therefore, I remand the case back to the adjudicating authority for afresh adjudication. The appellant are directed to file their written submissions before the adjudicating authority within 15 days of the receipt of this order. The adjudicating authority shall decide the case after granting opportunity of personal hearing to the appellant. Consequently, I set aside the impugned order and allow the appeal filed by the appellant by way of remand.

10. In view of the facts discussed herein above, I set aside the impugned order and allow the appeal filed by the appellant by way of remand.

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

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

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

M/s. Shri Hari Infrastructure,
Shri Harivilla,
Opposite Swaminarayan Gurukul,
Mehmedabad Road,

Akhilesh Kumar
28 December, 2022
(Akhilesh Kumar)
Commissioner (Appeals)
Date: 28.12.2022.



Appellant

Hathijan, Ahmedabad – 382 445

The Assistant Commissioner,
CGST, Division- III,
Commissionerate : Ahmedabad South.

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South.
(for uploading the OIA)
4. Guard File.
5. P.A. File.

