



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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आजादी का
अमृत महोत्सव

By SPEED POST

DIN:- 20240264SW0000888C0E

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| (क) | फ़ाइल संख्या / File No. | GAPPL/COM/STP/4386/2023 / 2334 |
| (ख) | अपील आदेश संख्या और दिनांक / Order-In -Appeal and date | AHM-EXCUS-002-APP-224/23-24 and 09.02.2024 |
| (ग) | पारित किया गया / Passed By | श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals) |
| (घ) | जारी करने की दिनांक / Date of Issue | 13.02.2024 |
| (ङ) | Arising out of Order-In-Original No. GST-06/D-VI/O&A/792/Pankaj/AM/2022-23 dated 23.3.2023 passed by The Assistant Commissioner, CGST Division-VI, Ahmedabad North | |
| (च) | अपीलकर्ता का नाम और पता / Name and Address of the Appellant | Pankaj K. Vasudeva Proprietor of M/s. Air Com F-102, Westend Park, B/h Gurudwara S.G. Highway, Ahmedabad - 380054 |

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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:

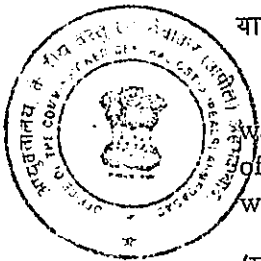
(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली: 110001 को की जानी चाहिए :-

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 :-

(क) 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।

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

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।



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।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(घ) 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।

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.

(2) 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 सवृत 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.

(3) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 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.

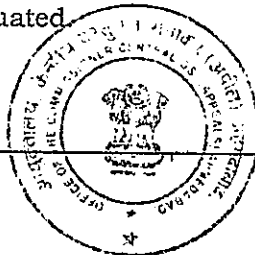
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-वी/35-इ के अंतर्गत:-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(2) उक्तलिखित परिच्छेद 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।

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 above para.

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 Appellant 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 मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू 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) एके प्रति अपील 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)।

- (1) खंड (Section) 11D के तहत निर्धारित राशि;
- (2) लिया गलत सेनवैट क्रेडिट की राशि;
- (3) 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।

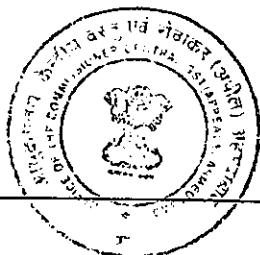
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

(6) (i) 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. Pankaj K. Vasudeva, Proprietor of M/s Air Com, F-102, Westend park, B/h Gurudwara, S.G. Highway, Ahmedabad-380054 (hereinafter referred to as "the appellant") against Order-in-Original No. GST-06/D-VI/O&A/792/Pankaj/AM/2022-23 dated 23.03.2022 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST, Division VI, Ahmedabad North (hereinafter referred to as "the adjudicating authority").

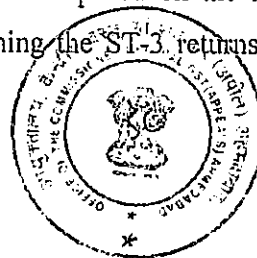
2. Briefly stated, the facts of the case are that the appellant is engaged in the business activity of service provider holding PAN No. ABTPV0571F. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the FY 2015-16, it was noticed that the figures are shown as "Sale of Service under sales/gross receipt from services" in their ITR filed with the Income Tax department as under:

| Year | Total sale of service as per ITR | Service tax Rate | Service tax not paid |
|---------|----------------------------------|------------------|----------------------|
| 2015-16 | 38,32,551/- | 14.5% | 5,33,306/- |

Accordingly, it appeared that the appellant has earned the substantial income from providing services but neither get registered with the service tax department and not paid the service tax. The appellant were called upon to submit copies of Balance Sheet, Profit & Loss Account, Income Tax Return, Form 26AS, for the said period. However, the appellant had not responded to the letter issued by the department.

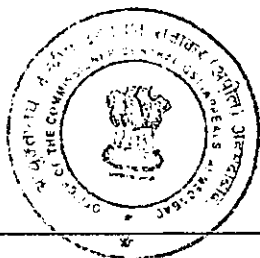
2.1 Subsequently, the appellant were issued a Show Cause Notice No. GST-06/04-1097/O&A/Pankaj dated 24.03.2021 demanding Service Tax amounting to Rs 5,33,306/- for the period FY 2015-16, under provisions of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of service tax for F.Y. 2016-17 to be ascertained in future. Further the SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; and imposition of penalties under Section 76, Section 77 and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 11,85,514/- was confirmed under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period F.Y. 2015-16 & 2016-17. Further, (i) Penalty of Rs. 11,85,514/- was imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1)(a) of the Finance Act, 1994; and (iii) Penalty of Rs. 30,000/- was imposed on the appellant under Section 70(1) of the Finance Act, 1994 for not furnishing the ST-3 returns for concerned period.



3. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the following grounds:

- The appellant, Shri Pankaj K. Vasudeva, having PAN no ABTPV0571F was running a proprietary firm in the name of M/s Air Com engaged in trading of mobiles and mobile accessories. The adjudicating authority, ignoring the fact that the appellant is a trader and not a service provider as well as without properly evaluating the submission of the appellant, confirmed the demand vide impugned OIO. The appellant denied all the allegations made by the department and submitted that the impugned OIO is issued without warranting the facts and contentions of the appellant and the same should be dropped in the interest of justice.
- The appellant submitted that the department has disbelieved their contentions regarding the title "Price drop discount / price drop incentive / Price protection discount" is nothing but trade discount received during the course of purchase of mobiles. The income shown under this nomenclature is not at all a service. The learned Adjudicating authority has failed to appreciate the evidence in the form of sample of scheme discount pamphlets / messages / emails produced by them. The appellant is a trader, and they receive a certain discount from their supplier which is nothing but reduction of purchase cost, the demand has been raised by the department on the amount which is clearly a part of trading activity and no service tax can be demanded on the same as the element of service is absent.
- Further, they submitted that the appellant is engaged in trading of Mobile instruments. The price of a mobile is high when it is launched in the market however as the period passes on, the price of the mobile reduces. Many time the cost of procurement is higher than the selling price of the mobile. Since mobile is a fast-changing technology the prices drop rapidly and frequently. To counterbalance the loss caused due to the price drop, the supplier passes on certain additional discount / incentive / price drop / scheme discount to the appellant. By mistake the appellant at the time of filing of the Income Tax return, has shown under the value of services provided, however, it should have been shown as reduction from the purchase cost, as it is nothing, but additional discount received from the company or the supplier. They submitted that on the purchase discount, no Service Tax can be leviable as the said amount pertains to discount given by the supplier on trading business which in fact is profit (reduction of cost) for the appellant.
- The appellant further submitted that the activity of the appellant is nothing but trading of goods under cover of invoice. The appellant is regular in filing VAT Returns as well as VAT Audit is also undertaken. Whereby also the adjustment on account of



credit note for purchase is shown. They made reference of the master circular no 96/7/2007-S.T. dated 23.08.2007 wherein it is clarified that when VAT/Sales tax is paid, then the activity is not subject to service.

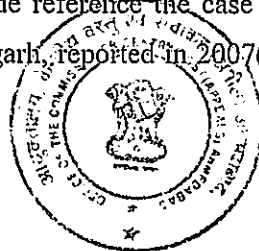
Further they also relied on the decision in the case of (2023) 5 Centax 246(Tri.Del)[06.02.2023] Veer Parbhu Marketing Ltd. Versus Commr of Central Excise, Jodhpur wherein it was held that the incentives can't be taxed even post negative list they are in the nature of discount or they are on account of meeting target.

- They further submitted that the appellant and its suppliers carry a business relationship strictly on a principal to principal basis. The appellant is not agent or representative of any of its supplier. The adjudicating authority in para 16 of the impugned OIO wrongly held that the appellant is a commission agent and provides business auxiliary services.

The appellant placed reliance on the decision of Honorable Tribunal in the case of BSNL v/s CCE, Mangalore reported in 2011 (24) STR 0236 (T-Bang) wherein the issue involved was regarding the service tax liability on the amount of trade discount/commission given by the appellant(BSNL) to the PCO Operators and the Tribunal followed its own order in the case of Bharti Infotel Limited reported in 2006 (1) STR 0107 (T) wherein the demand was dropped raised on the above basis.

The appellants also relied on the decision of Honorable Tribunal in the case of Kerala Publicity Bureau reported in 2008 (9) STR 101 (Tri-Bang) wherein the issue was that service tax was being collected by the department on the incentives collected by the appellant therein by considering it as extra commission, the Honorable Tribunal relied on decision of Division Bench of Tribunal in the case of Euro RSCG Advertising Limited and Marketing Consultants and Agencies Limited reported in 2007 (7) STR 277 (T) wherein it was held that this incentive is target incentive which has no connection with the levy of service tax. These decisions have been followed by various Tribunals including Ahmedabad Bench in the case of P. Gautham & Company reported in 2011 (24) STR 447 (Tri-Ahmd). The ratio of these decisions is directly applicable to the instant case as the appellant is not providing any service to its suppliers. Further their relations with each other are on principal-to-principal basis and any amount received in the form of trade discount is not in any way connected with any service rendered.

- The appellants submitted that they have suppressed nothing from the department therefore the extended period can't be invoked in their case and the penalty under Section 78 cannot be imposed upon them. They made reference the case law of (i) Continental Foundation jt. Venture Vs. CCE, Chandigarh, reported in 2007(216) ELT



177(SC), (ii) M/s jaiprakash Industries Ltd. reported in 2002(146) ELT 481(SC) ,(iii) M/s Pahwa Chemicals Private Ltd Vs Commissioner-2005(189) E.L.T. 257(S.C.), M/s Hindustan Steel Ltd vs State of Orrisa-1978(2) E.L.T. J159(SC) and M/s Padmini Products v. Collector of C.Ex. 1989(043) ELT 0195(SC).

- The appellant requested to set aside the impugned OIO and allow their appeal.

4. Personal hearing in the matter was held on dated 12.01.2024. Gunjan Shah,C.A. appeared on behalf of the appellant. He stated that his client sells mobiles and the purchase discount given by the company is not liable to service tax. He also furnished the original certificates from the suppliers.

5. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of service tax against the appellant along with interest and penalty. in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period F.Y. 2015-16 & 2016-17.

6. I find that in the SCN in question, the demand has been raised for the period F.Y. 2015-16 & 2016-17 based on the Income Tax Returns filed by the appellant. The appellant failed to file their reply against the letters issued by the department. Therefore the impugned SCN was issued considering the value shown against "Sales of Services" value provided by the Income Tax Department. Further the appellant filed their submission at the time of PH but adjudicating authority didn't considered the same and confirmed the demand.

7 Now, as the written & verbal submission by the appellant has been made before me. As per submission filed by the appellant, the appellant was engaged in sale and purchase of the mobiles and mobile accessories and received the purchase discount from its suppliers of Rs. 38,32,551/- during the F.Y. 2015-16 and Rs. 43,48,052/- during the F.Y. 2016-17. Such discount were received in the form of credit notes when the prices were gone down in compare to prices at the time of purchase from its suppliers. This lowered the cost price of the appellant and enable him to sale the item at discounted/less price to the ultimate customer. The same is also evident from the supplier wise ledgers furnished by the appellant.

In general, the price of a mobile is high when it is launched in the market. However as the time passes on, the price of the mobile reduces. Many time the cost of procurement is higher than the selling price of the mobile. Since mobile technology is changing fast ,the prices drop rapidly and frequently for older versions. To counterbalance the loss caused due to the price drop, the supplier passes on certain additional discount / incentive / price drop / scheme



discount to the appellant/seller. As per their submission, by mistake, the appellant at the time of filing of the Income Tax return, has shown this receipt under the value of services provided, however, it was a reduction in the purchase cost and the same may be considered as a profit from trading.


8. In view of the above discussion, I am of the considered view the income generated from reduction in the purchase cost can not be liable to service tax. Therefore the appellant is not required to pay any service tax on such income. Since the demand of Service Tax is not sustainable on merits, there does not arise any question of charging interest or imposing penalties in the case.

9. In view of above, I hold that the impugned order passed by the adjudicating authority confirming demand of Service Tax, in respect of income received by the appellant during the F.Y. 2015-16 & 2016-17, is not legal and proper and deserve to be set aside.

10. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

11. अपील कर्ता 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.

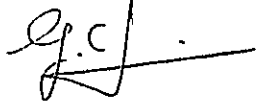
Attested


(Manish Kumar)
Superintendent(Appeals),
CGST, Ahmedabad.

By RPAD / SPEED POST

To,
M/s. Pankaj K. Vasudeva,
Proprietor of M/s Air Com,
F-102, Westend park, B/h Gurudwara,
S.G. Highway, Ahmedabad-380054

The Assistant Commissioner,
CGST, Division-VI,
Ahmedabad North



(ज्ञानचंद जैन)

आयुक्त (अपील्स)

Date : 09.02.24



Appellant

Respondent

Copy to :

- 1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
- 2) The Commissioner, CGST, Ahmedabad North
- 3) The Assistant Commissioner, CGST, Division VI, Ahmedabad North
- ~~4) The Assistant Commissioner (HQ System), CGST, Ahmedabad North~~
(for uploading the OIA)
- 5) Guard File
- 6) PA file

