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 ::आयुक्त (अपील) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::  
 O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,



द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील फाइल संख्या Appeal / File No.	मूल आदेश नं / OIO No.	दिनांक / Date
	V2/261/RAJ/2016	DC/JAM/ST/01/2016-17	30.09.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

**RAJ-EXCUS-000-APP-077 -2017-18**

आदेश का दिनांक / Date of Order:	27.09.2017	जारी करने की तारीख / Date of issue:	29.09.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /  
 Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथ आयुक्त/अधुक्त/अनुक्त/उप-आयुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गण्डीधम) द्वारा उपरलिखित जारी मूल आदेश से सूचित /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellant & Respondent :-**  
 M/s. Saraswati Engineering., Block 8-A, Moti Nagar., Co-Operative Society., Sikka Patiya, Dist : Jamnagar

इस आदेश(अपील) से व्यभिक्त कोई व्यक्ति विम्बलिखित तरीके से उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील उपर कर सकता है।/  
 Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सेवा शुल्क/केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील/अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत विम्बलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) इलीक्ट्रान सुव्यवस्था से सम्बन्धित सभी मामलों सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील/अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर के पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपील के अलावा एक सभी अपील सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील/अपील न्यायाधिकरण (सिस्टट) की प्रादेशिक शाखा/रीजियन, , दक्षिणीय तल, बहुमाली भवन असावा अहमदाबाद-380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asawa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील/अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) विनियम, 2001 के नियम 6 के अन्तर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इसकी प्रत्येक प्रतिका एक प्रति के साथ, जहां उत्पाद शुल्क की राशि अज्ञात की गयी और लगाया गया अज्ञात, अथवा 5 लाख या उससे कम, 5 लाख रुपया या 50 लाख रुपया तक अथवा 50 लाख रुपया से अधिक है तो कमसे 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपील/अपील न्यायाधिकरण की शाखा के महासंक रजिस्टार के नाम से किसी भी सर्वोदित बैंक के बैंक द्वारा जारी रेगुलर बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील/अपील न्यायाधिकरण की शाखा स्थित है। अन्तर्गत आदेश (स्टे ऑर्डर) के लिए अपील/अपील के साथ 500/- रुपया का निर्धारित शुल्क जमा करना होगा। /

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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपील/अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर अधिनियम, 1994 के नियम 9(1) के तहत निर्धारित फॉर्म S.T.5 में चार प्रतियों में की जा सकती है एवं उसके साथ चार प्रतियों के विच्छेद अपील की गयी है, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि अज्ञात की गयी और लगाया गया अज्ञात, अथवा 5 लाख या उससे कम, 5 लाख रुपया या 50 लाख रुपया तक अथवा 50 लाख रुपया से अधिक है तो कमसे 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपील/अपील न्यायाधिकरण की शाखा के महासंक रजिस्टार के नाम से किसी भी सर्वोदित बैंक के बैंक द्वारा जारी रेगुलर बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील/अपील न्यायाधिकरण की शाखा स्थित है। अन्तर्गत आदेश (स्टे ऑर्डर) के लिए अपील/अपील के साथ 500/- रुपया का निर्धारित शुल्क जमा करना होगा। /

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 accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is upto 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. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



**::ORDER-IN-APPEAL::**

M/s. Sarawati Engineering Block 8-A, Moti Nagar Co-operative Society, Sikka Patiya Tal. & Dist Jamnagar (hereinafter referred to as "the appellant") against Order in Original No. DC/JAM/ST/01/2016-17 dated 30.09.2016 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise, Jamnagar (hereinafter referred to as "the lower adjudicating authority").

2. The facts of the case are that during the course of audit, it was observed that the appellant had provided erection & dismantling of scaffolding under taxable category of Erection, Commissioning and Installation Service, as defined under Section 65(105)(zzd) readwith Section 65(29) of the Finance Act, 1994 (hereinafter referred to as "the Act"), and paid service tax on gross value upto 06.09.2012, however, thereafter the appellant started paying service tax on 25% of taxable value of such service provided to M/s. Leo Coats (India) Pvt. Ltd. under Notification 30/2012-ST classifying the said services as "Manpower Supply", whereas the appellant continued to pay service tax on gross taxable value of such service provided to their other service recipients. On being asked, the appellant informed that with effect from 07.09.2012, they were not considering the said service under Erection, Commissioning and Installation service but as Manpower Service for M/s. Leo Coats (India) Pvt. Ltd. only and therefore they paid service tax on 25% of taxable value under the Notification No. 30/2012-ST. Show Cause Notice No. V.ST/AR-II/JMN/ADC(SS)/203/2014-15 dated 12.01.2015 covering the period from F.Y. 2009-10 to 2013-14 was issued, which was adjudicated vide OIO No. 10/ADC/PV/2015-16 dated 29.05.2015 and the same was upheld vide OIA No. RAJ-EXCUS-000-APP-043-16-17 dated 29.08.2016.

2.1 The appellant vide letter dated 29.07.2015 submitted details regarding said service valued at Rs. 43,56,113/- provided to M/s. Leo Coats (India) Pvt. Ltd. for the subsequent year 2014-15 and informed that they had paid service tax of Rs. 1,34,604/- (@25%) considering the service as manpower supply service.

2.2 SCN No. V.ST/JMN-02/Demand/16-17 dated 19.04.2016 (hereinafter referred to as "the impugned SCN") was issued for subsequent period for year 2014-15 proposing recovery of service tax of Rs. 4,03,812/- under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and imposition of penalties under Section 76, 77 and 78 of the Act. The lower adjudicating authority, vide impugned order, confirmed demand of service tax under Section 73(1) of the Act and interest under Section 75 of the Act and also imposed penalty under Section 76 and Section 77 of the Act and dropped penalty under Section 78 of the Act.

3. Being aggrieved by the impugned order, the appellant filed present appeal, *inter alia*, on the grounds that the lower adjudicating authority has erred in classifying their activity as 'Erection, Commissioning and Installation Service' instead of 'Manpower Supply Service'; that the appellant had to provide workers to M/s. Leo Coats (India) Pvt. Ltd. as per contract to carry out erection and dismantling work; that the consideration of service provided shall be based on number of workers supplied and number of days worked by labour; that the due tax (remaining 75%) has already been paid by the service recipient under reverse charge mechanism during the year 2014-15 and there was no revenue loss to the government; that judicial precedent as decided in the matter of Navyug Alloys P. Ltd reported as 2009 (13) STR 421 (Tri.Ahd) was not followed in the impugned order; that the appellant has provided manpower supply service and paid service tax on 25% of taxable value and filed ST-3 returns, there is no suppression of facts and no evasion of service tax, therefore no penalty under Section 76 of the Act should be imposed; that the appellant is not liable to penalty under Section 77 of the Act as they properly classified the service under taxable category of manpower supply service.

4. Personal hearing in the matter was attended by Shri Himanshu P. Agravat, Advocate who reiterated the grounds of appeal and submitted that they charged two rates (i) for skilled manpower @ Rs. 750/- per day per person (ii) and for unskilled manpower another rate @ Rs. 650/- per day per person and the total bill is on the above basis; that 75% has been paid by recipient of service and 25% by them; that period involved is 2014-15 only in negative list regime when classification of service is not material; that full 100% service tax has already been deposited to the Government account; that nothing is still payable

to the Government; hence the impugned order should be set aside and appeal allowed.

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**Findings:**

5. I have carefully gone through the facts of the instant case, the impugned order, appeal memorandum and the submissions made by the appellant during the course of personal hearing.

6. The issue to be decided in the present appeal is whether the services provided by the appellant is 'Erection, Commissioning and Installation Service' or 'Manpower Supply Service'.

6.1 I find that the appellant's main contentions is that the lower adjudicating authority has erred in classifying their activity as 'Erection, Commissioning and Installation Service' instead of 'Manpower Supply Service'; that the type of services should be considered after appreciating all facts and circumstances of the case and actual control and supervision over manpower supplied by them. I am of the view that to arrive at the correct conclusion, material facts are required to be looked into. Agreement entered between two parties which decide terms of business i.e. type of service in the instant case and unit rate to determine the value. I observe that the lower adjudicating authority has relied upon the contract No. LEO/SRT/0101 dated 01.09.2012 entered between the appellant and service recipient i.e. M/s. Leo Coats (India) Pvt. Ltd. which explicitly reveals that "(i) the appellant was the contractor who has to work as per the instruction and priorities given by the M/s. Leo Coats (India) Pvt. Ltd.; (ii) the recipient did not guarantee of the complete scope of work; (iii) site supervisor and site-incharge was the scope of the appellant; (iv) job was to be carried out under the supervision of the appellant; (v) job description refers Scaffolding Erection & Dismantling and (vi) rate was per CUM". For proper understanding, a scanned image of Contract Order No. LEO/SRT/0101 dated 01.09.2012 is reproduced below:

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CONTRACT ORDER

WO No: LEO-001/001  
 Date: 18/08/2016  
 Location of Job: RIL Jamnagar Site  
 Job Description: Scaffolding for Chem & Dist. plant

Sl. No.	Item Code	Service Description	Unit	Rate
1	211114	Scaffolding for Chem & Dist. plant	Sq. Ft.	120
2	211115	Painting of Scaffolding	Sq. Ft.	100
3	211116	Removal of Scaffolding	Sq. Ft.	100

Special Conditions of Contract:

1. The contractor shall be responsible for obtaining all necessary permits and licenses for the execution of the work.
2. The contractor shall be responsible for the safety of the work and shall take all necessary precautions to prevent accidents and injuries.
3. The contractor shall be responsible for the quality of the work and shall ensure that the work is completed in accordance with the specifications and standards.
4. The contractor shall be responsible for the disposal of all waste and debris generated during the execution of the work.

1) Mode of Measurement:

- 1) Measurement shall be in accordance with the specifications and standards.

2) Service Tax:

- 1) Service tax shall be levied at the rate of 7.5% on the net amount payable to the contractor.

3) Retention of work:

- 1) Retention of work shall be 5% of the net amount payable to the contractor.

4) Payment Terms:

- 1) Payment shall be made within 45 days of the completion of the work.

For LEO Coats (India) Pvt. Ltd.  
 Authorized Signatory: \_\_\_\_\_  
 Date: 18/08/2016

6.2 The contract agreement referred above, no where suggests that the appellant has to charge per man-hour or per man power for supply of services to the recipient. Rate agreed upon between the appellant and M/s. Leo Coats (India) Pvt. Ltd. was per CUM (for better understating it should read as "cubic meter") which also not indicative of any manpower supply. Job description specifically refers "Scaffolding Erection & Dismantling" and "Additional Platform". In addition to that, I also observed from the said Contract Order No. LEO/SRT/0101 dated 01.09.2012 that there is Special Conditions D and E, which read as under:

"D) Mobilization time:

- 1) Contractor shall mobilize required resources at job site immediately

E) Payment Terms:

- 1) Payment shall be paid within 45 days from the date of receipt of certified measurement of bill"

6.3 It can be seen that Condition D) does not suggest providing manpower at the Job Site and Condition E) refers payment on the basis of measurement of work and non on the basis of manpower supplied.

6.4 I find that the appellant argue that they provided service to M/s. Leo Coats (India) Pvt. Ltd. and provided workers to carry erection and dismantling work as per the agreement, but not produced any agreement during the course of adjudication proceeding and not even in appeal memorandum or at the time of personal hearing. The lower adjudicating authority has relied upon the contract No. LEO/SRT/0101 dated 01.09.2012 entered between the appellant and M/s. Leo Coats (India) Pvt. Ltd. and for which the appellant neither contested nor produced any other or new agreement. Therefore, earlier contract dated 01.09.2012 was taken as base to decide the service actually provided by the appellant.

6.5 It is a fact that the appellant had provided erection & dismantling of scaffolding to their all service recipients treating the identical service as Erection, Commissioning and Installation Service, and paid Service Tax on total

gross value upto 06.09.2012. Thereafter, the appellant started paying service tax on 25% of taxable value of such service provided to M/s. Leo Coats (India) Pvt. Ltd. under Notification 30/2012-ST classifying the said services as "Manpower Supply", whereas they still paid service tax on total gross value of such service provided to their other service recipients treating the same service as Erection, Commissioning and Installation Service!!

6.6 The above discussed facts lead to conclusion that the service provided by the appellant was not "Manpower Supply Service" and the grounds of appeal does not hold ground. The appellant's view suffers from legal infirmity and there is no merit in this appeal. I hold that the service provided by the appellant is 'Erection, Commissioning and Installation Service' and not Manpower Supply Service.

7. As regards, revenue neutrality of the demand, it can not be allowed under any law but more under Service Tax Law that the tax liability of one person can be discharged by any other in the name of revenue neutrality. Revenue neutrality comes into play where on one hand the assessee pays the due tax and at other hand credit is eligible to him, which can be treated as mere book entry. Under the CENVAT regime, which applies to service tax also, the provider of taxable services has to discharge service tax liability and if such services are used as input services by other service providers or manufacturers of the goods down the line, they can avail input service credit on the service tax paid. There is no exemption for input service or input service provider under the law. The entire scheme of invoice based Central Value Added Tax, which is in force in this case, envisages payment of tax at each stage of taxable event and avilment of credit of tax so paid at the subsequent stage. Th tax regime in force, has to be given meaningful effect, and it is mandatory that the service tax liability is to be discharged the way it has been provided under law. My view draws support from the clarification issued by the CBEC, vide Circular No.138/07/2011-S.T. dated 06-05-2011 and No.147/16/2011-S.T. dated 21-10-2011 whereby it has been clarified that classification of the service would have to be independently done as per the rules and the taxability. Thus, even if the payment of tax or duty, as the case may be, is revenue neutral at subsequent stage, the liability of Service Tax by a service provider has to be discharged at that particular stage unless it is specifically exempted. Thus, this plea of the appellant can not be accepted. The case laws quoted by the appellant are in

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respect of reverse charge mechanism whereas in the present case the liability is totally on the appellant being the service provider and not covered under the reverse charge mechanism. I therefore hold that the argument regarding revenue neutrality is just to escape the payment of Service Tax by the appellant.

8. The appellant has assailed impugned order for imposition of penalty under Section 76 of the Act on the ground that penalty under Section 76 of the Act cannot be imposed as there is no suppression of facts and no evasion of service tax. I find that the impugned SCN is periodical in nature and the department had knowledge of the facts. I find that the lower adjudicating authority has properly and correctly confirmed the demand under Section 73(1) treating it for normal case rather than invoking suppression of facts and conforming demand under proviso to Section 73(1) of the Act. In such case penalty under Section 76 of the Act is imposable and not under Section 78 of the Act.

8.1 I further find that Section 76 of the Act has been amended w.e.f. 14.05.2015. CBEC issued Circular F. No. 334/5/2015-TRU dated 28.02.2015 stating that Section 76 or Section 78 of the Act, as amended w.e.f. 14.05.2015, shall be apply to cases where no notice is served, or notice is served but not yet adjudicated, as the case may be, as per new Section 78B of the Act. In the instant case, there is no suppression of facts etc. by the appellant for the period under consideration and hence penalty is imposable under Section 76 of the Act, which w.e.f. 14.05.2015 is as under:

**"SECTION 76. Penalty for failure to pay service tax. — (1)**  
*Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax :*

*Handwritten signature*

Provided that where service tax and interest is paid within a period of thirty days of—

- (i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period."

(Emphasis supplied)


8.2 In view of above, the appellant is liable to penalty under amended Section 76 of the Act read with Section 78B of the Act @10% of the amount of service tax of Rs. 4,03,812/-, which has been imposed by the lower adjudicating authority. However, the lower adjudicating authority was required to give option to the appellant in his Order – in - Original discussing proviso (ii) to Section 76 of the Act, that if the appellant pays service tax along with interest and also reduced penalty within 30 days from the receipt of the adjudication order then penalty would get reduced to 25% of the penalty imposed in the order. Having not been done so by the lower adjudicating authority, payment of full interest liability as well as reduced penalty of 25% of the penalty imposed can be availed by the appellant now within 30 days of receipt of this order, as per ratio of the judgement of the Hon'ble Supreme Court in the case of R. A. Shaikh Paper Mills P. Ltd. reported at 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular F. No. 208/07/2008 – CX – 6 dated 22.05.2008.

8.3 As regard imposition of penalty under Section 77 of the Act, the appellant pleaded that they have not contravened any provisions of the Act and hence they are not liable to penalty under Section 77 of the Act. I find that it is a fact that the appellant has wrongly classified the service being provided by them to M/s. Leo Coats (India) Pvt. Ltd. and hence failed to correctly assess their service tax liability which resulted in short payment of service tax and contravention of provisions of the Act. Thus, I find that penalty of Rs. 10,000/- imposed under Section 77 of the Act by the lower adjudicating authority in the impugned order is correct, legal and proper.

9. In view of above facts, discussion and findings, I find no reason to interfere with the findings of the adjudicating authority and hence, I uphold the impugned order and reject the appeal.

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

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

  
(कुमार संतोष) 23/9/2022  
आयुक्त (अपील्स)

By R.P.A.D.

To,  
M/s. Saraswati Engineering  
Block 8-A, Moti Nagar CO-op  
Society,  
Sikka Patiya  
Tal. & Dist, Jamnagar.

मे सरस्वती इंजिनीरिंग  
ब्लॉक 8-ए ,  
मोटी नगर को ओप सोसाइटी  
सिक्का पटिया  
तालुका एवं जिल्ला : जामनगर .

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise Commissionerate, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise, Division, Jamnagar.
- 4) Guard File.