

II ORDER IN APPEAL IS

The present appeal has been filed by M/s. Amrta Cementa Ltd., Ambajnarjan, Taluka: Kodinar, Dist.: Junagadh, Gujarat (hereinafter referred to as 'Appellant') against Order in Original number 43403IN/COMPR/041/PLTU/WCO/2016 dated 11.05.2017 (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Large Tax Payer Unit, Mumbai (hereinafter referred to as 'the lower adjudicating authority').

3. The brief facts of the case are that appellant, having registered office at Elegant Business Park, MIDC, Cross Road 'B', Off. Anthonikunj, Road, Andheri (E), Mumbai - 400 055 was registered as a Large Taxpayers Unit having Membership No. 111/NUM/22/2. It was holding Central Excise Registration No. AACG0569PXN003 for manufacture of 'Cement' (CFC), (PPC) & Clinker falling under Sub-heading nos. 25232910, 25232910 & 25231000 respectively of the first schedule of the Central Excise Act, 1944. During the course of audit, it was noticed that the appellant had availed and utilized Central credit on services such as 'Repairing of Motor Vehicle - Dumper & Tipper' & 'Supplying of Motor Vehicle - Buss, Tipper & Bullock' and these services were alleged to be not input services by appellant as per the definition of input service in terms of rule 2(d) of Central Credit Rules, 2004 (hereinafter referred to as 'CCR') as it existed during the financial year 2011-12. It was also alleged that it had no nexus with the manufacturing or sales of the excisable goods manufactured by appellant as definition of 'input service' excluded the services specified in sub-clause (d) general insurance business, (e) contract cab, (f) repair, reconditioning, restoration or decoration of any motor vehicle and (zzc) supply of tangible goods including machinery, equipment and appliances for use, or clause (13) of Section 65 of the Finance Act, 1994 (hereinafter referred to as 'the Act'), in so far as they related to motor vehicles. The services of repair and maintenance of the Dumper & Tipper appeared to fall under sub-clause (zct) and that of supplying of buss, tipper and bullock under sub-clause (zzc) of clause (13) of Section 65 of the Act. Further the exception in sub-clause (E) & (C) of rule 2(i) provided that if the motor vehicles/dumpers or tractors were used for the provision of taxable services for which the credit on motor vehicle was available as capital goods then such services would be treated as 'input service' provided motor vehicle/dumpers or tractors were registered in the name of service provider for providing taxable services as specified in various sub-clauses for

13/05/2017

various services. In this case, the utility of the motor vehicles i.e. hyacs, Coper & loaders / rumpers and tractors was for movement of raw materials within factory premises and did not fall under any of the categories mentioned in sub-clauses and hence not covered under sub-clause (b) or (c) of Rule 2(a) of the Rules and hence cannot be said to be capital goods. As the subject motor vehicles do not fall under the definition of capital goods, the services of supply of tangible goods and repair and maintenance as specified in sub-clause (a)(i)(a) and (a)(i)(b) of clause 1(1)(c) of Section 65 of the Act, do not be termed as 'input service' in light of the exclusion clause (1)(c) of Rule 2(f) of the Rules.

2.1 The definition of 'capital goods' was amended vide Notification No. 28/2012 (F.No.) dated 20.06.2012 w.e.f. 01.07.2012 wherein rumpers and tractors were included as capital goods if the same were used for providing output services and the condition of specified services as stipulated earlier were dispensed with. Therefore, the taxable services rendered by the motor vehicles for which the credit is available as capital goods are defined as 'input service' w.e.f. 01.07.2012 as per the exception to the exclusion clause (f) of Rule 2(f) of the Rules and hence, the Central credit on the repair and maintenance services of the loaders and tractors and supplying of motor vehicles would be inadmissible during the period from April, 2011 to June, 2012. Appellant had availed Central credit on services of supply of motor vehicles viz. hyacs, tractors and bulker and had declared these services under category of 'Business Auxiliary Services'. However, scrutiny of bill/invoice issued by the service provider revealed that the service providers had charged a monthly fixed amount for supply of vehicle and had not declared under their invoices the category of service as 'Business Auxiliary Service'. Even agreements between the appellant and service providers for hiring of motor vehicles clarified these under the category of 'Supply of tangible goods'. It was alleged that the appellant had deliberately shown the same under category of 'Business Auxiliary Service' with intention to avail Central credit of service tax on the basis of bills of service providers under which they had provided motor vehicles in the, which was not admissible as input service. Thus, the credit taken on services of supplying of motor vehicles, hyacs, tractors & bulkers provided during the period from 01.04.2011 to 30.06.2012 alleged to be incorrect.

3. The above observations led to issuance of Show Cause Notice S.No. LT/290/W/2012-12 dated 26.07.2012 (44379012) issued dated 26.05.2011 (419) proposed

to disallow and recover wrongly availed Cessat credit of Rs. 17,93,676/- on 'Repair of motor vehicle - dumper & tipper' and on 'supplying of motor vehicles - hywa, dippers & bulkers' during the period from 01.04.2011 to 30.06.2012 under Rule 14 of the Rules read with Section 11A(1)(14) of the Central Excise Act, 1944 (hereinafter referred to as the Act) alongwith interest under Section 11AB/11AA of the Act. It was also proposed to impose penalty under Rule 13(2) of the Rules read with Section 11A(2) of the Act. The said Show Cause Notice was adjudicated by the lower adjudicating authority with the impugned order wherein Cessat Credit of Rs. 17,93,676/- was disallowed under Rule 14 of the Rules read with Section 11A(1)(14) of the Act alongwith interest under Rule 14 of the Rules read with Section 11AB/11AA of the Act. The lower adjudicating authority imposed penalty @ 10% of Cessat credit under Rule 13(2) of the Rules read with Section 11A(2)(c) of the Act.

4. Being aggrieved with the impugned order, the appellant preferred this appeal, inter-alia, on the following grounds:

1. The services under consideration i.e. 'repair & maintenance of Dumper & Tipper' and 'supplying of hywa, dippers & bulkers' were input services which were contained in relation to manufacture of final dutiable goods; that the allegation that services under consideration has no nexus with manufacturing activity has been dropped in the impugned order;
2. The dumpers & dippers used by them are not motor vehicle and therefore, exclusion clause (B) of the Input service definition is not applicable in the present case and hence credit is correctly admissible to them; that they rely on definition of motor vehicle as mentioned in Section 55(70) of the Act read with Section 2(28) of Motor Vehicle Act, 1988 and they rely on judgment in case of *Gascony India Ltd* reported as 1997 (92) ELT 14 (SC);
3. It is admitted fact that credit in respect of impugned services was available for the period prior to April, 2011 and for the period after June, 2012; that the intention of the government has always been to allow credit on the impugned services; that it is incorrect to suggest that disallowed services are not input service for specific period alone i.e. April, 2011 to June, 2012; that exclusion portion given in the definition of the input service was inserted in the definition of Input

services as defined under Rule 2(a) of the Rules vide Notification No. 3/2011-C.E. (VT) dated 31.03.2011 and prior to 31.03.2011, exclusion clause was not there in the definition of input services; that therefore, prior to 31.03.2011, they were eligible to take credit on all the input services received by them in respect of dumpers/tippers used by them; that since 30.06.2012, definition of term capital goods as given under Rule 2(a) of the Rules was amended vide Notification No. 28/2012-C.E. (VT) dated 20.06.2012 as per which dumpers & tippers used within the factory premises were treated as capital goods and as such credit of input services received in respect of dumpers/tippers is admissible to them for the period after 01.07.2012; that alterations/ amendments made in the Rules were clarificatory in nature and they rely on judgment of WFLR reported as 2005 (181) ELT 139 (SC), Srijana Metal Products Ltd - 2011 (273) EIT 117 (T), Heave Elements (India) Pvt. Ltd. - 2012 (319) ELT 240 (Trib.).

4. Dumpers are classifiable as inputs and there is no restriction on usage of input services received in respect of inputs and hence credit of input services is correctly admissible to them. Also, the goods used in or in relation to the manufacture of final product whether directly or indirectly is also enough to cover the dumpers used for transportation of limestone from mining area to limestone crusher and they rely on following decisions:

- (a) Indian Copper Corpn. Ltd. - A.R. 1960 SC 891 (16 S.C. 269 (SC))
- (b) Hindalloy Zinc Ltd. - 2002 (142) EIT 240
- (c) J. K. Cotton Spg. & Weav. Mills Co. Ltd. - 1997 ELT 34 (SC)

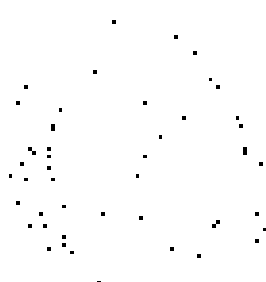
5. The entire demand is time barred as extended period of limitation is not makeable in the facts of the case as the differential duty demand for the period from April, 2011 to June, 2012 and State Cause Notice was issued on 05.05.2011; that there was no suppression of facts with intent to evade payment of duty and hence demand is time barred; that they are regularly filing monthly returns alongwith General credit details with the departmental authorities from time to time; that they are listed company and required to maintain all statutory records and transcription in respect of the credit taken by them on imported services which was available on records; that the audit objection in the present case was issued on 26.0.2013 and State Cause Notice was

issued on 06.05.2016; that the department was aware of the fact that they had availed benefit of assigned services since 2013, however, department has issued Show Cause Notice after period of more than three years; that they cannot be penalized for delay in issuance of Show Cause Notice and hence invocation of extended period of limitation under the provisions of Section 114(f) of the Act is incorrect; that they place reliance on following judgments:

1. Lanco Industries Ltd - 2011 (265 ELT 118 (T)
2. Rajasthan Textile Mills - 2006 (203) ELT 839 (T)
3. Chrompton Greaves Ltd - 2006 (201) ELT 602 (T)
4. Nallu Concretes Pvt. Ltd - 1997 (96) ELT 191 (T)
5. Prudite Engineering Co. - 1992 (75) ELT 257 (Guj)
6. Tamil Nadu Housing Board - 1994 (74) ELT 9 (SC)
7. Garbheria Foundation - 2007 (216) ELT 177 (SC)
8. Padmini Products - 1989 (43) ELT 190 (SC)
9. Chemplex Drugs - 1985 (40) ELT 276 (SC)
10. Laxmi Prakash Industries Limited - 2002 (144) ELT 481 (SC)
11. Anand Nishikawa Co. Ltd. - 2005 (124) ELT 140 (SC)
12. Husparm Pharmaceuticals Company - 1995 (78) ELT 401 (SC)
13. Tata Iron and Steel Co. Ltd. - 1988 (35) ELT 605 (SC)

In this case the issue involved is of interpretation of law and hence it cannot be alleged that appellant had deliberately suppressed information that too with an intent to evade payment of service tax and rely on case laws reported as 2007 (3) ELT 308 (T) and Sanjivani (75) - 2005 (78) ELT 487 (T).

6. No penalty is imposed on them in absence of element of suppression, mis-statement with intent to evade payment of duty and hence there is no reason to impose penalty for suppression, mis-statement with intent to evade payment of duty and they rely on Hindustan Steel Ltd reported as 1969 (2) SC 627, Koliner Pharmaceuticals Ltd reported as 1985 (20) ELT, but in case of interpretation of provisions of law, penalty is not imposed and they rely on following judgments:
 - (1) Swarcos Chemicals (P) Ltd. - 2006 (204) ELT 492 (T)
 - (2) Bansa Petrochemicals Ltd - 2006 (197) ELT 97 (T)
 - (3) Telco Ltd. - 2006 (196) ELT 308 (T)
 - (4) Syntex Steels Ltd. - 2006 (195) ELT 204 (T)



(5) Sikar Ex Servicemen Welfare Coop. Society - 14 - 2006 (4) STR 213

(11)

(6) Hindustan Steel Ltd. - 1978 (2) ELT (1) 159; 501

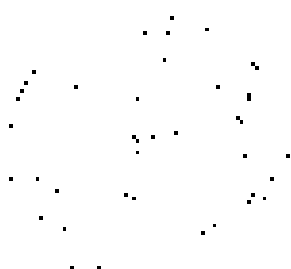
7. Interest is not recoverable as original demand is not sustainable.

4.1 Personal hearing in this matter was held which was attended by Shri Pradheep Sawant, Sr. Manager and Shri G. L. Mantriya, Manager. They reiterated the grounds of appeal and submitted that dumpers, Tipcars etc. are required to be treated as capital goods as held in the case of Northern Coalfields Ltd. - 2017 (4) STR 217 (Trib. Del.) by the Tribunal (CIS&A), Delhi and not vehicles as held by the impugned order; that Cenvat credit is available and admissible to them in view of above facts and legal position as detailed by them in their written submission dated 12.05.2018.

4.2 In further written submission filed at the time of personal hearing the appellant contended that dumpers and tippers used by them are not motor vehicles and therefore, exclusion clause (B) of the input service definition is not applicable in present case and hence credit is admissible to them; that they rely on definition of 'motor vehicle, capital goods, motor vehicle given at rule 2(i) of the Rules, Section 65(72) of the Act as well as Section 2(20) of Motor Vehicle Act, 1988; that they rely on judgment in case of Gundryan Int'l. Ltd., reported as 1997 (92) ELT 14 (SC); that the lower adjudicating authority has not considered the aforesaid submissions made by them.

4.2.1 They further submitted that dumpers are classifiable as trucks and there is no restriction on usage of such vehicles referred to in respect of 'trucks' and hence credit of input services is admissible to them; that any goods used in or in relation to the manufacture of final product whether directly or indirectly would be covered by the definition of 'input'; that dumpers/tippers hired by them were used for transportation of limestone from the mining area to limestone crusher within the mining area, and thus dumpers are to be treated as used in or in relation to the manufacture of final product; that they rely on following judgments:

- (a) Indian Copper Corpn. Ltd. - AIR 1965 SC 991 at 16 SC 1 259 (SC)
- (b) Hindustan Steel Ltd. - 2002 (342) ELT 269
- (c) L. & Co. Iron Sp. & Wvg. Mch. Co. Ltd. - 1997 ELT 24 (SC)
- (d) Northern Coalfields Ltd., reported as 2017 (3) STR 217 (Trib. Del.)



4.2.2 The report & maintenance of pumps and tubes and suppression of leaks, pipes and bulkers have nexus with manufacturing activity and thus these services are input services that extended period of limitation is not ineluctable as Show Cause Notice has been issued on 07.03.2013 covering period from November, 2012 to January, 2013 under Section 113A(i) that as per Section 11A of the Act, Show Cause Notice is required to be issued within 1 year from the relevant date and hence Show Cause Notice is barred by limitation; that Show Cause Notice alleges suppression and not alleged that there is 'willful' suppression and the lower adjudicating authority failed to give clear findings in this regard; that they rely on decision in case of *Castrol Ag Chemical* reported as 1993 (75) ELT 721; *Granular Drugs and Liniments* - 1989 2 SCC 127.

4.2.3 The penalty under Rule 15(2) of the Rules is not impossible as the ingredients of Rule 15(2) and Section 113C are essentially the same; that since there is no suppression, omission or failure to disclose information on their part, no penalty can be imposed upon them; that they rely on judgment in case of *Practising Professors* - 1976 (88) ELT 12 (5 Cl.); that whenever demand of duty is set aside, consequently the imposition of the penalty has to be set aside and they rely on following judgments:

1. *H.M.M. Ltd.* - 1995 (76) ELT 497 (SC);
2. *Unalata Beverages Ltd.* - 2004 (172) ELT 451 (All);
3. *H. Gan. Instrument* - 1998 (114) ELT 8 (All);
4. *Prince Industries Valves Mfg. Co.* - 2009 (236) ELT 323 (T)

4.2.4 That penalty under Section 113C of the Act is impossible only when there is fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of the Act or the Rules made there under which is charge in the present case and thus Section 113C of the Act has no application in this case; that they rely on judgments in case of *Coastal Papers Ltd.* - 2002 (92) ELT 1080 (T); *Indian Oil Corporation Limited* - 2005 (181) ELT 996 (T); *Coastal Zarda Deyar* - 2005 (188) ELT 257 (SC); that they have not violated any of the provisions of the Act or Rules and thus no penalty is impossible on their as the presence of 'fraud-collusion' is absent in this case; that they rely on following judgments in support of their claim:

1. *Tamilnadu Housing Board* - 1991 (74) ELT 9 (SC)
2. *Harjistan Steel Ltd.* - 1978 (9) ELT 109 (Cl)

3. Shikha Fotedar - 1983 (53) STC 289 (SC)
4. Cement Marketing Com. of India - 1986 (6) ELI 29 (SC)
5. D. Navinchandra - 1987 (25) ELT 495 (SC)

4.2.2 that since the question of duty demand itself does not survive, the question of charging interest also does not survive.

FINDINGS:

5. I have carefully gone through the facts of the case, the impugned order and writter as well as oral submissions made by the Appellant. The issues to be decided are as to whether:

- (i) Cenvat credit of Service Tax on 'Repair of Motor Vehicle - Dumper & Tipper' and 'Support/Hiring of Motor Vehicles - Heavy, Tippers & Bulkers' availed and utilized by the appellant during the period from 31.04.2011 to 30.06.2012 is allowable to them or not;
- (ii) Appellant is liable to pay interest on such availed and utilized Cenvat credit or not;
- (iii) Appellant is liable to be imposed penalty as done in the impugned order or not.

6. I find that appellant has availed and utilized Cenvat credit on services of 'Repair of Motor Vehicle - Dumper & Tipper' classifiable under Section 65 (10a) part of the Act and 'Support/Hiring of Motor Vehicles - Heavy, Tippers & Bulkers' classifiable under Section 65 (10a) (xxvii) of the Act as input service during the period from 31.04.2011 to 30.06.2012. The definition of input service under Rule 2(i) prevailing at material time is required to be looked into, which was as under:

Rule 2(i) 'input service' means any service,

(a) used by a provider of taxable service for providing an output service;

(b) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal;

and includes services used in relation to manufacturing, reception or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control.

coaching and training, computer networking, credit rating, share registry, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes services

- (A)
- (B) specified in sub-clauses (d), (e), (f) and (g) of clause (10) of Section 65 of the Finance Act, in so far as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods; or

As the definition of capital goods as envisaged under Rule 2(a) of the Rules prevailing at the material time was as under:

(a) 'capital goods' means

(A) The following goods namely:-

- (B) Motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clause (f), (g), (h), (i), (j), (k), (l) and (m) of clause (10) of Section 65 of the Finance Act;
- (C) Dumpers or tipper, falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) registered in the name of provider of output service for providing taxable services as specified in sub-clauses (j) and (k) of clause (10) of section 65 of the said Finance Act
- (D) --

(Handwritten signature)

6.2. Central credit on 'Repair of Motor Vehicle - Dumper & Tipper' & 'Supply/financing of motor vehicles - Heavy, Tipper & Bulkers' was proposed to be denied. Therefore, I proposed to decide the issue service-wise. Let us discuss the admissibility of 'Repair of Motor Vehicle - Dumper & Tipper' as defined under Section 65 (10) (g) of the Act. The said service was proposed to be denied on the ground that since the said vehicles were not registered in the name of appellant but were registered in name of service providers and hence appellant is not eligible for Central credit in terms of sub-clause (3) C (C) of Rule 2(a) of the Rules read with Rule 2(i) (ii) (B) of the Rules. It is on record that the services defined under Section 65 (10) (g) of the Act were specifically excluded from the scope of 'input service', except when credit is available as capital goods as defined under 2(i) (ii) (B) of the Rules. It is on record that the dumpers and tippers were in the name of service provider and not in the name of appellant and therefore, Central credit on these vehicles were not available to the appellant as capital goods and hence, Central credit on 'Repair of Motor Vehicle - Dumper & Tipper' was not admissible to the appellant as it was excluded from

the scope of input service.

6.3 I find that Cenvat credit on 'Supply/Hiring of motor vehicles - Hvyw., Tippers & Bulkers' was availed by appellant under business auxiliary service though they had engaged the vehicles on hire basis from the service providers. The impugned order rested Cenvat credit on the ground that the said vehicles were not registered in the name of Appellant but were registered in the name of service providers. It is a fact that Section 65 (103) (zzzz) of the Act has specifically excluded this service from scope of 'input service' as defined under 210 (ii) (B) of the rules. It is on record that Motor Vehicles - Hvyw., Tippers & Bulkers were registered in the name of service providers and not in the name of appellant. I, therefore, find that the appellant was not eligible for Cenvat credit on 'Supply/Hiring of motor vehicles - Hvyw., Tippers & Bulkers' as it was excluded from the scope of input service during the material period.

6.4 Appellant has relied upon judgment in case of Northern Coalfields Ltd reported as 2017 (5) GSTL 217 (Tri. Del.) wherein tyre re-treading services, maintenance of vehicles services. I find that in this case the dumpers are owned by Northern Coalfields Ltd and thus Cenvat credit on maintenance/fabricating aids, tyre re-treading services and maintenance of vehicles services were allowed by Hon'ble CESTAT, Delhi, whereas in the case on hand, the dumpers are not owned by appellant but are owned by the service providers and therefore, the judgment cited by appellant is not applicable as as the facts of both the cases are different & together.

7. Appellant contended that the demand is time barred and the extended period of limitation is not applicable in this case as there is no suppression of facts on their part and there is no intent to evade payment of duty; that they have been regularly filing monthly returns alongwith all Cenvat credit details required to be filed; that they maintained all statutory records and all information in respect of the credit taken by them had been provided by them to the department; that audit objections were raised on 26.03.2013 and even then the Show Cause Notice was issued on 25.05.2016. The Show Cause Notice has not given any detail that the appellant did not furnish called for information. It is also a fact that the appellant filed all monthly returns providing information, which was legally required to be provided by them. In such case, I hold that suppression of facts can't be inferred on the


appellant. I find from the records that Audit Memo was issued by the Department on 16.04.2013 which auditing relates to the appellant and hence, the Show Cause Notice has been based on information available with the Department and given by the appellant. I also find that audit report dated 26.03.2013 was issued by the Department to the appellant, which was replied by the Appellant on 30.04.2013. However, the Department issued Show Cause Notice on 04.05.2013 covering extended period without presence of ingredients like fraud or willful misstatement or suppression of facts etc. with intent to evade payment of duty. Had the Show Cause Notice been issued even in May, 2013, the entire period of 01.04.2011 to 31.03.2012 would have been covered under normal period of two years. However, it was not done and the Department took 3 years to issue demand notice in May, 2016, I find that there is no material fact available in this case to hold that there is fraud or willful misstatement or suppression of facts or contravention of the provisions of the Act and/or the Rules with intent to evade payment of Service Tax on part of the Appellant.


5. In view of the facts available in this case, I hold that the contention of appellant that demand is time barred is correct and extended period can't be invoked against them as ingredients for extended for issuing Show Cause Notice for extended period are absent in this case. I, therefore, have no option but to allow the appeal holding demand as time barred. Since demand is held time barred, payment of interest and imposition of penalty on the appellant do not arise.

6. In view of above, I set aside the impugned order and allow the appeal.

६.३ ओरिजनली द्वारा दखल की गई अपील का निपटारा करीबन तर्जिक से किया जा रहा है।

६.४ The appeal filed by the Appellant is disposed off as above.

हस्ताक्षर

 १६/०५/२०१६
 ऑफिसर (आपीलेंगारा)


 (सुभाष रतनभा)
 आसुक्त (आपीलेंगारा)

By RPAD

In

1. M/s. Ambuja Cements Ltd. (Unit: Ambujanagar) Taluka: Kutch, Distt: Jamnagar, Gujarat	जयजी एम्बुजा सीमेंट्स लिमिटेड युनिट: अम्बुजानगर, तालुका: कच्छ, जिल्हा: जामनागर, गुजरात
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Copy for information and necessary action for

- 1) The Chief Commissioner, GST H Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
- 2) The Commissioner, GST B Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 3) The Assistant Commissioner, GST C Central Excise Division, Junagadh.
- 4) The Superintendent, GST G Central Excise, Rajkot/Kodinar.
- 5) Guard File

