REGISTERED
SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/54/2013-RA /142 Date of Issue: 24.04.2018

ORDER NO. 133 /2018-CX (WZ)/ASRA/MUMBAI DATED 23.04.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of Customs & Central Excise, Rajkot.

Respondent : M/s Excel Crop Care Ltd. District Kutch.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 17/2013(RAJ)CE/AK/COMMR(A)/Ahd dated 31.01.2013 passed by the Commissioner (Appeals-I), Rajkot.

ORDER

This revision application is filed by the Commissioner of Customs & Central Excise, Rajkot (hereinafter referred to as "the applicant") against the Order-in-Appeal No. 17/2013(RAJ) CE/AK/COMMR (A)/Ahd dated 31.01. 2013 passed by the Commissioner (Appeals-I), Central Excise, Rajkot.

2. The issue in brief is that the respondent, M/s Excel Crop Care Ltd., District Kutch, (hereinafter referred to as "respondent") was engaged in the manufacture of excisable goods i.e. Zinc Phosphate / Commando falling under Chapter No. 38 of the Central Excise Tariff Act, 1985 and was registered with Central Excise Department. The respondent was availing the benefit of notification No. 39/2001-CE dated 31.07.2001, as amended.

3. The respondent filed rebate claim of Rs. 9,28,345/- in respect of goods exported by them on 21.10.2007 and 31.10.2007. Their claim was rejected by the lower authority, viz, Assistant Commissioner, Central Excise, Gandhidham (Kutch) vide Order in Original No. 1751/2011-12 dated 16.03.2012 on the grounds that rebate is not permissible for units availing exemption under notification No. 39/2001-CE dated 31.07.2001, after amended of notification No. 19/2004-CE dated 06.09.2004, vide notification No. 37/2007-CE(NT) dated 17.09.2007.

3. Being aggrieved, the respondent preferred an appeal before the Commissioner (Appeals-I), Rajkot, (the Appellate Authority) who vide Order-in-Appeal No.17/2013(RAJ)CE/AK/COMMR(A)/Ahd dated 31.01.2013 allowed the appeal. The Appellate Authority held that,

(i) benefit of notification No. 39/2001-CE was available for a period not exceeding five years and since the party had exhausted / crossed the stipulated turnover of Rs. 4.2 Cr (twice the amount of investment) in their fifth year on 19.06.2007, they were out of notification No. 39/2001-CE.

(ii) the assessee had also intimated the jurisdictional Asstt. Commissioner, vide letter dated 08.10.2007, about their expiry period of exemption available to them under said notification and their intent to export the goods under LUT.

4. Being aggrieved, the Department filed aforementioned Revision Application against the impugned Order in Appeal on following grounds :

4(i) That the appellate authority has erred in interpreting the provisions of Notification No. 39/2001-CE dated 31.07.2001, as amended and erroneously came to a conclusion that the respondent was entitled to rebate of duty paid on goods exported by them.

4(ii) That the condition at Para 3(vi) of Notification No. 39/2001-CE is as follows :

(vi) The exemption shall apply for a period not exceeding five years from the date of commencement of commercial production by the unit.

4(iii) The date of commencement of commercial production of the appellant was 16.05.2003. Therefore, the respondent was entitled for exemption during five years, as -

First Year 16.05.2003 to 15.05.2004

Second Year 16.05.2004 to 15.05.2005

Third Year 16.05.2005 to 15.05.2006

Fourth Year 16.05.2006 to 15.05.2007

Fifth Year 16.05.2007 to 15.05.2008

4(iv) The respondent has availed the benefit of Notification No. 39/2001-CE in the fifth year also, though the clearance of twice the value of investment was reached by June, 2007.

4(v) As per clause (h) of Para 2 of Notification No. 19/2004-CE(NT), inserted vide Notification No.37/2007-CE(NT) dated 17.09.2007, in case of export of goods which are manufactured by a manufacturer availing the Notification No. 39/2001-CE, the rebate shall not be admissible under Notification No. 19/2004-CE(NT), as amended.

4(vi) Once the respondent unit has availed the benefit of Notification No.39/2001-CE in the fifth year, the unit would be considered as availing the benefit of Notification No. 39/2001-CE for the entire period of fifth year. There is nothing in Notification No. 39/2001-CE to indicate that the unit would be considered as availing Notification No. 39/2001-CE in the fifth year only till the clearance value reaches twice the value of investment.

4(vii) The emphasis given in the impugned order to words 'not exceeding five years' in Para 3(vi) of Notification No. 39/2001-CE, appears to be misplaced in as much as the said condition do not provide that the unit can claim not to have availed said Notification No. 39/2001-CE for later part of the year after enjoying the benefit of said Notification in the earlier part of the year.

4(viii) Obviously, the condition at Para 3(vi) do not provide that a unit has to compulsorily avail the said notification for five years. A unit can opt not to avail benefit of said notification in the fifth year, or for that matter any earlier years. But once the benefit has been availed in each year, it can not be said that the unit is not availing said notification after reaching stipulated clearance value.

4(ix) That the clause (h) of Para 2 of Notification No. 19/2004-CE(NT) inserted vide Notification No. 37/2007-CE(NT) dated

17.09.2007, restricts the admissibility of rebate to export of goods manufactured by a manufacturer availing Notification No. 39/2001-CE. This Notification also do not provide for allowing rebate to manufacturer availing Notification No. 39/2001-CE after clearance value reaches twice the value of investment.

4(x) If the contention of the respondent, as upheld by the Commissioner (Appeals), that they have not claimed the benefit of rebate under Rule 18 and Notification No. 39/2001-CE simultaneously is accepted as correct, the manufacturer availing notification No. 39/2001-CE [or other Notification as mentioned in clause (h) of Para 2 of Notification No. 19/2001-CE(NT)] would be entitled to claim rebate in each year after reaching the clearance value of twice the value of investment. However, plain reading of clause (h) of Para 2 of Notification No. 19/2004-CE (NT) reveals that no such benefit is envisaged in Notification No. 19/2004-CE(NT), as amended.

4(xi) In the case of Sunder Steels Ltd. [2005 (181) ELT 154 (SC)], Hon'ble Apex Court has held that the Notification has to be interpreted on its wording; and that no words, not used in the Notification, can be added.

4(xii) As observed by a Constitution Bench of Supreme Court in Hansraj Gordhandas v. H.H. Dave [1978 (2) E.L.T. (3 350) (SC) = 1969 (2) S.C.R. 253)], a Notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification, i.e., by the plain terms of the exemption.

5. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. Respondent vide letter dated 05-08-2013 has filed following written submissions :-:

- the instant issue is related to export of duty paid finished goods & rebate claimed thereon as per Notification No.19/2004-CE (NT) under Rule 18 of Central Excise Rules. The department claims that the claimant is not liable to claim rebate because of, availing exemption benefit as per Notification No. 39/2001-CE dated 31.07.2001.

- in fact, the tenure of such benefit was expired on June 2007, as per condition of the said notification 39/2001-CE dated 31.07.2001.

- the respodent not availing the benifit of Notification 39/2001-CE and they paid duty on the consignment cleared for export and accordingly filed the rebate claim as crossing the limit of Rs. 4,20,65,210/- as per para no (v) (b) of the said notification.

- impugned goods were exported by the claimant during October 2007. It is clear & evident that, during this point of time the claimant is not entitled for any exemption, as already explained above, as per the condition in Notification No.39/2001-CE dated 31.07.2001

- abiding with the law of the land the exporter has to pay duty on exported goods & claim rebate under Rule 18 of Central excise Rules 2002 was the only option open to them.

- the contention of the department that the claimant have exhausted their benefit on 19.06.2007 is not correct & not supported by any documents.

- on the other hand the claimant has informed the fact of completion of exemption period as per Notification No. 39/2001-CE dated 31.07.2001 to the jurisdictional assistant commissioner vide their letter dated 08.10.2007.

In view of the above, the respondent M/s Excel Corp Care Ltd. requested to allow their legitimate claim of rebate and set aside the OIO No. 1751/2011-12 dated 16.03.2012.

6. A personal hearing in the case was held on 17.01.2018. None was present for the applicant. Shri R.K. Sharma, Advocate, Smt. Soma Sharma, Advocate and Shri Mangesh Jha, Assistant, appeared on behalf of the respondent. The respondent pleaded that the Commissioner (Appeal) has passed a detailed order on the basis of explained reasoning. In view of the same it was pleaded that instant revision application be dismissed and Order in Appeal be allowed.

7. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

8. On perusal of records, Government observes that the respondent filed rebate claim of Rs. 9,28,345/- (Rupees Nine Lakhs Twenty Eight Thousand Three Hundred and Forty Five) in respect of goods exported by them on 21.10.2007 and 31.10.2007. Their claim was rejected by the lower authority on the grounds that rebate is not permissible for units availing exemption under notification No. 39/2001-CE dated 31.07.2001, after amended of notification No. 19/2004-CE dated 06.09.2004, vide notification No. 37/2007-CE(NT) dated 17.09.2007. On respondent filing appeal, the Appellate Authority allowed the appeal holding that

(i) benefit of notification No. 39/2001-CE was available for a period not exceeding five years and since the party had exhausted / crossed the stipulated turnover of Rs. 4.2 Cr (twice the amount of investment) in their fifth year on 19.06.2007, they were out of notification No. 39/2001-CE;

(ii) the assessee had also intimated the jurisdictional Asst Commissioner, vide letter dated 08.10.2007, about their expiry period of exemption available to them under said notification and their intent to export the goods under LUT.

Now, applicant department has filed this revision application on the grounds stated in para 4 above.

9. Department has mainly contested the said order-in-appeal on the ground that condition 2(h) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 prohibits grant of rebate in case export of goods which are manufactured by manufacturer availing the Notification No. 39/2001-C.E., dated 31-7-2001. The respondent in their written cross objections have reiterated the findings in the said order-in-appeal and pleaded that rebate claims were rightly allowed to them.

10. In order to understand the issue, the provisions of relevant para (Para No. 3) of Notification No. 39/2001-C.E. dated 31.07.2001 may be perused which are extracted as under :-

Para 3 provides conditions; subject to which, such exemption would be available. Para 3 of the Notification Notification No. 39/2001-C.E. dated 31.07.2001 reads as under :-

"*3. The exemption contained in this notification shall be subject to the following conditions, namely :-*

(i) It shall apply only to new industrial units, that is to say, units which are set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of December 2005.

(ii) In order to avail of this exemption, the manufacturer shall produce a certificate from the Committee consisting of the Chief Commissioner of Central Excise, Ahmedabad and the Principal Secretary to the Government of Gujarat, Department of Industry to the jurisdictional Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, that the unit in respect of which exemption is claimed is a new unit and has been set up during the time period specified in condition (i) above.

(iii) Before effecting clearances under this notification, the manufacturer shall also furnish a declaration regarding the original value of investment in plant and machinery installed in the factory as on the date of commencement of commercial production to the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be.

(iv) The manufacturer shall also produce a certificate from the said Committee confirming the original value of investment and such a certificate shall be produced within a period of one month from the date of commencement of commercial production or such extended period as the Assistant Commissioner or Deputy Commissioner may allow.

(v) In case on the basis of such certification or otherwise, the original value of investment in plant and machinery,

(a) is found to be less than Rs. 20 Crore but was declared to be Rs. 20 crore or more, the manufacturer shall be liable to pay back the entire amount of duty exemption availed under the Notification at the rate of 24% per annum as if no exemptions were available, or

(b) is found to be less than the declared value and was declared to be below Rs. 20 Crore, the manufacturer shall be liable to pay duty on the goods cleared, if any, in excess of twice the actual value of original investment in each of the years during which exemption has been claimed under this notification thereof.

with interest @ 24% per annum, as if no exemptions were available to those clearances under this notification.

(vi) The exemption shall apply for a period not exceeding [five] years from the date of commencement of commercial production by the unit."

11. Now, coming to the instant case, Government observes that Condition No. (vi) of Para 3 of the Notification No. 39/2001-C.E. dated 31.07.2001 lays down the outer time limit by stating that the exemption shall apply for a period not exceeding five years from the date of commencement of commercial production. In other words the Notification No. 39/2001-C.E, dated 31-7-2001, provides for the exemption from payment of excise duty for five years from the date of commencement of commercial production, to the newly set up industrial units with specific minimum investments as an incentive to set up new industries in Kutch region. A plain reading of the Condition No. (vi) of Para 3 Notification No. 39/2001-C.E. dated 31.07.2001 indicates that the benefit thereunder was available for the period of 5 years or less but not more than 5 years.

12. Government further observes that the respondent in the instant case commenced commercial production on 16.05.2003. Applying the condition No. 3 (vi) of the notification no. 39/2001-CE, as amended the respondent was eligible to avail the benefit of the said Notification before 15.05.2008. However, the respondent in the fifth and last year crossed the stipulated turnover of Rs. 4.20 Crores on 19.06.2007 and therefore they were not entitled to avail exemption under Notification No. 39/2001-CE dated 31.07.2001, after 19.06.2007.

13. Government observes that the lower adjudicating authority while rejecting the rebate claim, held that the respondent were working under the ambit of Notification No. 39/2001-CE dated 31.07.2001 as the stipulated period of five years thereunder were to complete only on 15.05.2008 and not before, and therefore, as per amended condition (h) of the Notification No. 19/2004-C.E.(N.T), dated 06.09.2004 the respondent were not eligible for

rebate on exported goods upto 15.05.2008. The respondent on the other hand contended that as per the provisions of the said notification, the benefit was not available for the period ending five years and since in their case during the fifth year they exhausted ceiling of the clearances equal to twice the amount of the value of investment in plant and machinery they were entitled to rebate on the goods exported on payment of duty after crossing such limits.

14. Government also observes that Notification 37/2007-C.E. (N.T.) dated 17-9-2007 was issued for amending the Notification 19/2004-C.E. (N.T.) dated 6-9-2004 to insert the condition (h) which reads as under :

> *"(h) that in case of export of goods which are manufactured by a manufacturer availing the notifications of the Government of India in the Ministry of Finance (Department of Revenue) No. 32/99-C.E., dated 8th July, 1999 [GSR 508(E), dated 8th July, 1999] or No. 33/99-C.E., dated 8th July, 1999 [GSR 509(E) dated the 8th July, 1999] or No. 39/2001-C.E., dated the 31st July, 2001 [GSR 565(E), dated the 31st July, 2001] or notification the Government of India in the erstwhile Ministry of Finance and Company Affairs (Department of Revenue) No. 56/2002-C.E., dated 14th November, 2002 [GSR 764(E), dated 14th November, 2002] or No. 57/2002-C.E., dated the 14th November, 2002 [GSR 765(E), dated the 14th November, 2002] or notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 56/2003-C.E., dated the 25th June 2003 [GSR 513(E), dated the 25th June, 2003] or 71/2003-C.E., dated the 9th September 2003 [GSR 717(E), dated the 9th September 2003] or No. 20/2007-C.E., dated the 25th April, 2007 [GSR 307(E), dated the 25th April, 2007], the rebate shall not be admissible under this notification."*

The plain reading of said provisions reveals that in case of export of goods which are manufactured by a manufacturer availing Notification No. 39/2001-C.E., dated 31-7-2001, the rebate of duty paid on exported goods shall not be admissible under Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004.

Government also observes that before issuance of Notification No. 37/2007-C.E. (N.T.) dated 14-9-2007 amending the Notification 19/2004-C.E. (N.T.) dated 6-9-2004, the Board had also issued the following Circular:

Circular No 842/19/2006-CX
8th December 2006

F.No. 04/06/2006-CX.I
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

Subject: Application of contents of Circular No. 682/73/2002-CX dated 19.12.2002 to exemption notification No. 39/2001-CE dated 31.7.2001- regarding.

Kind attention is invited to Circular 682/73/2002, dated 19.12.2002, issued by the TRU in respect of notifications No. 56/2002 and 57/2002, both dated 14.11.2002, applicable for units availing area based exemption in J & K. In para 3 of the said Circular, following clarification was issued:

> *" 3. In this context, it may be pointed out that the "Refund" envisaged in the notifications is not on account of any excess payment of excise duty by the manufacturers, but is basically designed to give effect to the exemption. In other words, the mechanism has been adopted to operationalize the exemption envisaged in these two notifications. In view of this aspect of the matter, the provisions of Section 11B of the Central Excise Act, 1944 would not apply in the case of these notifications."*

2. Representations have been received in the Ministry, seeking clarification as to whether the clarification given by the TRU in the above mentioned Circular will also be applicable for refund granted to units located in Kutch area availing benefit of notification No. 39/2001 dated 31.7.2001.

3. The matter has been examined by the Board. It is noticed that when same scheme of refund is founded for other areas, the clarification issued with reference of J & K should hold good, and there should not

have been any doubt. Therefore, it is clarified that clarification issued vide para-3 of Circular No. 682/73/2002, dated 19.12.2002, will also be applicable for units availing exemption under notification No. 39/2001-CE dated 31.7.2001 (Kutch) , 71/2003-CE dated 9.9.2003 and 56/2003 dated 25.6.2003 (Sikkim),32/99-CE and 33/99-CE both dated 8.7.1999 (North East).

Government observes that the said Notification 37/2007-C.E. was issued for giving the authority to the clarification dated 8-12-2006 wherein it was clarified that the term 'duty paid' used in Rule 18 is not included that portion of duty which is subsequently refunded to manufacturer by way of exemption under Notification 39/2001-C.E. Therefore the basic intention of the Board while issuing the Notification 37/2007-C.E. (N.T.) was to debar the rebate of duty on those goods on which refund was available under Notification 39/2001-C.E. Therefore, when the goods are eligible for the refund of duty paid under the exemption Notification No. 39/2001-C.E. then the rebate shall not be allowed on that portion of duty paid on the goods so exported.

15. In the instant case the respondent had crossed the stipulated turnover of Rs. 4.2 Crores on 19.06.2007 hence, thereafter, for any further export clearances they could not have availed the benefit under Notification 39/2001-C.E. and hence precisely they were out of the said notification as soon as they had crossed the stipulated turnover in June 2007, being the fifth and last year of the said Notification. Government also notes that the respondent had also intimated the jurisdictional Assistant/Deputy Commissioner, vide letter dated 08.10.2007, about their expiry period of exemption available to them under said notification and their intent to export the goods under Letter of Undertaking (LUT). However, their application for acceptance of LUT was pending approval with the department and therefore, the respondent were left with no other option but to clear the goods for export on payment of duty.

16. Government also observes that prior to amendment of Notification No. 19/2004-C.E. (N.T.), vide Notification No. 37/2007-C.E. (N.T.), dated 17-9-2007, there was not such restriction on grant of rebate to unit availing area based exemption Notification. As already explained at para 14 above, the basic intention of the Board while issuing the Notification 37/2007-C.E. (N.T.) was to debar the rebate of duty on those goods on which refund was available under Notification 39/2001-C.E. Therefore, when the goods are eligible for the refund of duty paid under the exemption Notification No. 39/2001-C.E. then the rebate shall not be allowed on that portion of duty paid on the goods so exported. Hence, what was sought to be disallowed vide Notification No. 37/2007-C.E. (N.T.), dated 17-9-2007 was simultaneous availment of benefits under Notification No. 39/2001-C.E. as well as Notification 19/2004-C.E. (N.T.),as amended. Further, it is also not the case of the department that the respondent were claiming both the benefits [of Notification No. 39/2001-C.E. as well as Notification 19/2004-C.E. (N.T.)] simultaneously. In fact, in the instant case Government notes that the respondent had clearly informed the jurisdictional Deputy Commissioner, Division Bhuj vide letter dated 08.10.2007, about their expiry period of exemption available to them under notification 39/2001-C.E. and their intent to export the goods under Letter of Undertaking (LUT). Since the LUT was not accepted, the respondent cleared the goods for export on payment of duty, the rebate of which they claimed under Rule 18 of the Central Excise Rules, 2002 read with Notification No. 19/2004-CE (NT) dated 06.09.2004.

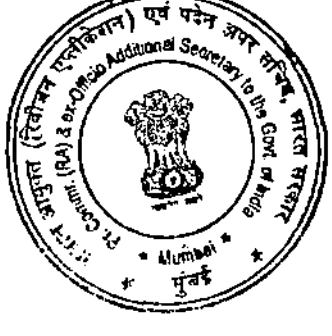
17. Government also notes that the department in their grounds of appeal have contended that the condition at Para 3(vi) do not provide that a unit has to compulsorily avail the said notification for five years, however, once a unit opts to avail benefit in each year, it can not be said that the unit is not availing said notification after reaching stipulated clearance value. It is further contended by the department that the clause (h) of Para 2 of Notification No. 19/2004-CE(NT), inserted vide Notification No. 37/2007-

CE(NT) dated 17.09.2007, restricts the admissibility of rebate to export of goods manufactured by a manufacturer availing Notification No. 39/2001-CE. This Notification also do not provide for allowing rebate to manufacturer availing Notification No. 39/2001-CE after clearance value reaches twice the value of investment.

18. Government observes that plain reading of both the aforesaid notifications does not state what has been interpreted by the department. In fact, Government is of a considered view, that the export clearances effected by the respondent on 21.10.2007 and 31.10.2007 cannot be treated as made under the Notification No. 39/2001-CE dated 31.07.2001 and therefore amended Notification No. 37/2007-CE (NT) dated 17.09.2007 cannot be arbitrarily made applicable to their case.

19. Government observes that it is a settled law that a notification has to be construed strictly. The Hon'ble Supreme Court in the case of CCE v. Modi Rubber - 2001 (131) E.L.T. 515 (S.C.) has held that an exemption notification cannot be unduly stretched to produce unintended results in derogation of plain language employed therein.

20. Since the export of duty paid goods is not in dispute, the rebate claim cannot be denied. As such, Government holds that in the instant case the rebate claim is admissible to the applicant under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004. Government, keeping in view the discussion made in the foregoing paras, finds the impugned Order-in-Appeal as legal and proper and therefore upholds the same. Government remands back the case to original authority for sanctioning of the claimed rebates, after due verifications of documents. The original authority is directed to sanction the rebate claims if the same are otherwise in order. The original adjudicating authority shall pass the order within eight weeks from the receipt of this order.



21. The revision application is dismissed being devoid of any merit and impugned Order in Appeal is upheld as legal and proper.

22. So ordered.

23.4.18

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 133/2018-CX (WZ)/ASRA/Mumbai DATED 23·4·2018.

True Copy Attested

To,
Commissioner of Goods and Service Tax,
Kutch (Gandhidham). Sector 8,
Opposite Ram Leela Maidan, Gandhidham -370201.

23/4/18
एस. आर. हिरुलकर
S. R. HIRULKAR
CA-C)

Copy to:

1. Commissioner (Appeals), GST & Central Excise, 2nd Floor, GST Bhavan, Race Course Ring Road, Rajkot, 360 001.

2. M/s Excel Crop Care Limited,
Bhuj-Mundra Road, Gajod, Bhuj, Kachchh

3. The Deputy/Assistant Commissioner, CGST, Bhuj Division, Plot No.3,4,5 Kutch Palace, Near Gada Patia Bus Stop, Bhujodi, P.O.Madhapar S.O Post Office – Bhuj, KACHCHH, Gujarat 370020.

4. Sr. P.S. to AS (RA), Mumbai.

5. Guard File.

6. Spare Copy.