F.No. 195/1640/12-RA

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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

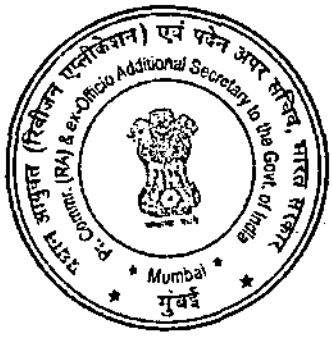
F NO. 195/1640/12-RA/168 Date of Issue: 01.05.2018.

ORDER NO. 134/2018-CX (WZ) /ASRA/MUMBAI DATED 27.04.2018 OF THE 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 CENTRAL EXCISE ACT,1944.

Applicant : M/s. Aarti Drugs Limited.

Respondent: Commissioner, Central Excise, Raigad.

Subject : Revision Applications filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. US/645/RGD/2012 dated 04.10.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.



:ORDER:

This revision application has been filed by M/s M/s. Aarti Drugs Limited. MIDC, Tarapur, Mumbai (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/645/RGD/2012 dated 04.10.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai.

2. The case in brief is that the department had filed an appeal against order-in-original No. 1402/11-12/DC (Rebate)/Raigad dated 09.12.2011 passed by Deputy Commissioner, Central Excise(Rebate), Raigad on the ground that the rebate claims to the tune of Rs.11,29,416/- had been wrongly sanctioned as the applicant had not followed the procedure of self sealing as required vide para 3(a)(xi) of Notification No.19/2004-CE(NT)P dated 06.9/004. Reliance was placed on the decision of Hon'ble Tribunal in the case of M/s Kirloskar Brothers Ltd reported in 1997 (94)E.L.T. 176(Trib.).

3. Vide impugned Order-in-Appeal No. US/645/RGD/2012 dated 04.10.2012, the Commissioner (Appeals) set aside the order-in-original No. 1402/11-12/DC (Rebate)/Raigad dated 09.12.2011 passed by Deputy Commissioner, Central Excise(Rebate), Raigad and allowed the appeal filed by the department.

4. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application under Section 35EE of Central Excise Act, 1944 before the Government mainly on the following grounds:

4.1 They Applicant reiterate all the grounds raised in their Memorandum of cross objection dated 30th may, 2012 before Commissioner (Appeals) and further submit that the Commissioner Central Excise (Appeal) erred in considering the self sealing certificate is a mandatory provision and not a procedural requirement. Para 2 of the Notification No. 19/2004 CE (NT) dated

06/09/2404 relates to mandatory requirements and Para 3 relates to procedural requirements. The requirement of self sealing certificate is listed at Para 3(a)(xi) of the Notification No.19/2004 CE (NT) dated 06/09/2004 and cannot be construed as mandatory requirement.

4.2 as per Para 3(a) (xi) of the Not. No. 19/2004 CE (NT) dated 06.09.2004, self sealing certificate is a procedural requirement and procedural infraction of Notfn. No. 19/2004 CE (NT) dated 06/09/2004 cannot be made ground for denying the substantial benefit of export incentives to the Applicant. They wish to place reliance on the judgment of Government of India in RE; Leighton contractors (I) P.Ltd [2011(267)ELT422(G001 wherein it was held that procedural infraction of Notification, Circular etc. is to be condoned if export really takes place, substantive benefit cannot be denied for procedural lapses. Similar ratio has been applied in the following judgments as well : 1. In RE:- OM Sons Cookware P.Ltd 2011(268) ELT 111(G01) 2. In RE:-Sanket Industries Ltd. 2011(268) ELT125 (G01) 3. In RE:- Shrenik Pharma Ltd. 2012(281) ELT 477(G01) 4. In RE:- Ace Hygiene Products Pvt. Ltd. 2012(276) ELT131(G01).

4.3 the export under self sealing procedure was followed by them for the first time in February 2011 and there was a procedural lapse while adopting the new procedure from clearance of export goods under Central Excise Supervision to clearance under self sealing. The lapse occurred only in respect of goods cleared during the month of February and March 2011 in respect of four ARE 1's.

4.4 As regards the contention of Commissioner (Appeals) that goods were not opened by customs for examination and since the self sealing certificate is not given, the identity of the export goods was not established they respectfully submit that goods exported are basic drugs. Same were exported on the basis of order placed by

the customers. The goods covered under above ARE-1 were duly presented to Customs Authorities and were exported through proper and legal route. Necessary documents required at the time of export of goods were prepared and presented to appropriate authorities including customs authorities and the goods were exported with due clearance/endorsement by concerned authorities including customs authorities. The rebate sanctioning authority while sanctioning rebate claim observed in order in original that the physical export of goods covered by the ARE -1 has been certified by Custom Officer in Part B of original & duplicate copies and also supported by Bill Of Lading.

4.5 The payments in respect of goods exported under above ARE-I have been received by the Applicant. These factors put together clearly prove that the goods which were ordered by overseas buyers were removed from the factory under above AR E 1's and were actually exported. Further Applicant are having in-house testing facility and samples were tested from each consignment. The drug controller have awarded GMP Certificate and test reports have been accepted for granting export incentives as per Boards Circular No. 57/97CUS dated 31/10/1997. In view of the above facts it is submitted that they have exported the same goods as mentioned on the ARE-1's, identity of the same is established with reference to test reports and orders placed by the customer. In view of the above facts substantial benefit cannot be denied to them.

4.6 In this regard they wish to place reliance on the judgments of Govt. of India mentioned above. Further Dept has relied upon the case law in the case of M/s. Kirloskar Brother Ltd. V/s. Collector of Central Excise, Pune, reported in 1997(94)ELT176(Tribunal New Delhi) wherein it was held that refund claim cannot be sanctioned if required condition has not been complied with. They respectfully submit that the ratio of case law relied upon by the Deptt. cannot be applied in the instant case as it pertains to Refund claim.

Rebate Claims granting benefit as export incentives cannot be equated with refund claims. Procedural infraction is condonable in respect of rebate claims and substantial benefits of export incentives cannot be denied to the Applicant.

4.7 In this regard they wish to reproduce para 17 of the GOI order in RE: Sanket Industries Ltd. _

> *17. "In this regard, Govt. further observeq that rebate/drawback etc. are export-oriented schemes and unduly restricted and technical interpretation of procedure etc is to be avoided in order not to defeat the very purpose of such schemes which serve as export incentive to boost export and earn foreign exchange and in case the substantive fact of export having been made is not in doubt, a liberal interpretation is to be given in case of any technical breaches. In Suksha International v. UOI, 1989 (39) E.L.T. 503 (S.C.), the Hon'ble Supreme Court has observed that an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy gives with the other. In the Union of India v. A. V. Narasimhalu, 1983 (13) E.L.T. 1534 (S.C.), the Apex Court also observed that the administrative authorities should instead of relying on technicalities, act in a manner consistent with the broader concept of justice. Similar observation was made by the Apex Court in the Formica India v. Collector of Central Excise, 1995 (77) E.L.T. 511 (S.C.) in observing that once a view is taken that the party would have been entitled to the benefit of the notification had they met with the requirement of the concerned rule, the proper course was to permit them to do so rather than denying to them the benefit on the technical grounds that the time when they could have done so, had elapsed. While drawing a distinction between a procedural condition of a technical nature and a substantive condition in interpreting statute similar view was also propounded by the Apex Court in Mangalore Chemicals and Fertilizers Ltd. v. Dy. Commissioner, 1991 (55) E.L.T. 437 (S.C.). In fact, as regards rebate specifically, it is now a title law that the procedural infraction of Notifications, circulars, etc. are to be condoned if exports have really taken place, and the law is settled now that substantive benefit cannot be denied for procedural lapses. Procedure has been prescribed to facilitate verification of substantive requirement. The core aspect or fundamental requirement for rebate is its manufacture and*

subsequent export. As long as this requirement is met other procedural deviations can be condoned. This view of condoning procedural infractions in favor of actual export having been established has been taken by tribunal/Govt. of India in a catena of orders, including Bea VXL Ltd., 1998 (99) E.L.T. 387 (Trib.), Alfa Garments, 1996 (86) E.L.T. 600 (Tri.), T.I. Cycles - 1993 (66) E.L.T. 497 (Trib.), Atma Tube Products, 1998 (103) E.L.T. 270 (Trib:), Creative Mobus, 2003 (58) RLT 111 (001), Ikea Trading India Ltd., 2003 (157) E.L.T. 359 (001) and a host of other decisions on this Issue".

4.8 In view of the above it is submitted that the Deputy Commissioner, (Rebate), Central Excise, Raigad had correctly sanctioned the rebate of Rs. 11,29,416/- and same is required to be upheld.

5. The applicant also filed additional submissions iterating therein the following points:-

5.1 The Applicant M/ s Aarti Drugs Limited are manufacturer-Exporter of Basic drugs namely Metronidazole USP/BP . The Learned Commissioner of Customs(Appeals) has allowed the appeal of the Revenue against Order in Original No.1402/11-12/DC(Rebate) /Raigad dated 09/12/2011 passed by the Deputy Commissioner of Central Excise, Rebate ,Raigad, on the ground that the rebate claims to the tune of Rs.11,29,416/- have been wrongly sanctioned as the Appellant company M/s Aarti Drugs Limited has not followed the procedure of self sealing as required vide para 3(a)(xi) of Notification No.19/2004-CE(NT) dated 06/09/2004. In this regard, the Appellant Company wishes to make the following additional submissions.

a. The Appellant respectfully submits that on a plain reading of the provisions of Notification No.19/2004 -CE (NT), it will be observed that in terms of clause (i) of para 3(a), an option has been given to Manufacturer Exporters registered under the Central Excise Rules 2002 and the Merchant Exporters who procure and export the goods directly from the factory or warehouse to have the goods sealed at the place of dispatch by a Central Excise officer or under self sealing. Clause (ii) of para3 (a) further lays down that where the exporter desires self-sealing and self-certification, the manufacturer of the export goods or owner of the warehouse shall take the responsibility of sealing and certification.

(b)Where the exporter desires self-sealing and self-certification for removal of goods from the factory or warehouse or any approved premises, the owner, the working partner, the Managing Director or the Company Secretary of the manufacturing unit of the goods or the owner of warehouse or a person duly authorized by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify on all the copies of the application that the goods have been sealed in his presence, and shall send the original and duplicate copies of the application along with the goods at the place of export, and shall send the triplicate and quadruplicate copies of the application to the Superintendent or Inspector of Central Excise having jurisdiction over the factory or warehouse within twenty four hours of removal of the goods.

(c) The above provisions show that self sealing is a procedural requirement and not a mandatory condition.

(d) The Applicants have got in house testing facility and samples are tested in each export consignment. Drug Controller has awarded Good Manufacturing Practices Certificate for the in-house testing lab of the Applicant. Test reports of the in house test lab of the Applicant are accepted for granting export incentives as per CBEC Circular no.57/97 cus dated 31/10/1997.

(e) The export shipments made by the Applicant contained basic drugs and the same were exported on the basis of the orders placed by the customers. The goods covered by four ARE I's were duly presented before the Customs Authorities for inspection and were exported through proper and legal route. Necessary documents required at the time of export of goods were prepared and presented to appropriate authorities including customs authorities and the goods were exported with due clearance/endorsement by concerned authorities including custom authorities. The rebate sanctioning authority while sanctioning the rebate claim observed in order in original that the physical export of goods covered by the ARE 1 has been certified by the Customs officer in Part B of original and duplicate copies and also supported by Bill of Lading. Export orders received from overseas buyers are already submitted with the main submissions and the export payments have also been realized in the normal course through normal banking channels. These facts put together clearly prove that the goods

which were ordered by the overseas buyers have been removed from the factory under ARE I's and were actually exported.

(f) The case law relied upon by the Department in this case is M/s Kirloskar Brothers Limited vs. Collector of Central Excise, Pune. In this regard, it is respectfully submitted that the ratio of the said case cannot be applied in this case because in that case refund claim was not sanctioned as certain conditions were not met. Here, the facts are different and rebate claims are involved which are more of export incentives in nature. The provisions relating to rebates have to be liberally construed and procedural infractions in such cases are condonable. Substantial benefits of export incentives cannot be denied to the Applicant.

(g)The Applicant wish to quote the judgment of the Hon'ble Supreme Court in the case of Mangalore Chemicals & Fertilizers Ltd Vs. Dy. Commissioner, 1991(55) ELT 437(SC).

Interpretation of statute - Exemption and refund - Condition precedent - Distinction to be made between ❑ procedural condition of a technical nature and a substantive condition - Non-observance of the former condonable while that of the latter not condonable as likely to facilitate commission of fraud and introduce administrative inconveniences.

In fact as regards rebate specifically it is now a trite law that the procedural infraction of Notifications, circulars etc are to be condoned if exports have really taken place and the law is settled now that the substantive benefit cannot be denied for procedural lapses. Procedure has been prescribed to facilitate verification of substantive verification. The core aspect or fundamental requirement for rebate is its manufacture and subsequent export. As long as this requirement is met other procedural deviations can be condoned. The view of condoning procedural infractions in favour of actual export having been established has been taken by Tribunal/ Government of India in a catena of orders namely Birla VXL Ltd,1998(99)ELT 387(Trib.), Alfa Garments,1996(86) ELT600(Tri.), T.I.Cycles 1993(66)ELT 497 Trib., Atma Tube Products 1998(103) ELT,270(Trib.) Creative Mobus,2003(58)RLT111(GOI) IKEA Trading India Ltd,2003(157)ELT359(GOI) and a host of other decisions.

In view of the foregoing the applicant submitted that the Deputy Commissioner, (Rebate) Central Excise Raigad had correctly sanctioned the rebate of Rs.11,29,416/- and the same is required to be upheld.

6. A personal hearing in the case was held on 17.01.2018. Shri R.K. Sharma, Advocate, Smt. Soma Sharma, Advocate and Shri Mangesh Jha, Assistant, appeared on behalf of the assistant. None was present for the respondent. The applicant reiterated the submission filed through Revision Application and the written brief and case laws. In view of the same, it was pleaded that the Order-in-Appeal be set aside and Revision Application 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. On perusal of records, Government observes that the applicant's rebate claim made under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 – C.E. (NT) dated 06.09.2004 was sanctioned by Deputy Commissioner, Central Excise(Rebate), Raigad vide order-in-original No. 1402/11-12/DC (Rebate)/Raigad dated 09.12.2011 however, the department filed appeal against the said Order in Original on the ground that the rebate claims to the tune of Rs.11,29,416/- had been wrongly sanctioned as the applicant had not followed the procedure of self sealing as required vide para 3(a)(xi) of Notification No.19/2004-CE(NT) dated 06.9/004.

8. Government observes that the Appellate authority i.e. Commissioner (Appeals) while setting aside the order-in-original No. 1402/11-12/DC (Rebate)/Raigad dated 09.12.2011 passed by Deputy Commissioner, Central Excise (Rebate), Raigad and allowing the appeal filed by the department observed as under :-

Para 6.1 of Chapter 8 of CBEC's Excise Manual of Supplementary Instructions reads as follows —

6.1 The facility of self-sealing and self-certification is extended to all categories of manufacturer-exporters subject to compliance with the

existing procedure. For this purpose the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit exporter or a person (who should be permanent employee of the said manufacturer-exporter holding reasonably high position) duly authorized by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify on all the copies of the application (ARE-1) that the description and value of the goods covered by this invoice/ARE-I/ARE-2 have been checked by me and the goods have been packed and sealed with lead seal/one time lock seal having number _____under my supervision.

From the above it is clear that the above mentioned provision is mandatory provision and the respondents has not followed the Procedure, as laid down in para 3(a) (xi) of the Notification No.19/2004-CE (NT) dated 06.9.2004. Moreover, it has also been pointed out by the Department that goods in respect of all the ARE-1 under present rebate claim were not opened and examined by Customs, therefore, identity of the goods exported was not established. The respondents have also not submitted any documentary evidence to prove that goods were actually opened and examined by the Customs Department. Mate receipt and Bill of Lading, has been submitted before me by the respondents, showing the names of exported goods, actually does not help much because Bill of Lading & Mate receipt show the names of exported goods in a routine manner on the basis of declaration of the exporter however it does not mean that the goods have actually been examined by statutory authority like Customs. It is also an admitted fact that respondents have committed this lapse on earlier occasions also. Therefore, the rebate claims were wrongly sanctioned and accordingly, the impugned order has to be set aside.

9. Government observes that Para (3)(a)(xi) Notification No. 19/2004-C.E. (N.T.) dated 6-9-2004 provides, where the exporter desires self-sealing and self-certification for removal of goods from the factory or warehouse or any approved premises, the owner, the working partner, the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person duly authorized by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify all the copies of the application that the goods have been sealed in his presence, and shall send original and duplicate copies of

the application along with goods at the place of export, and shall send triplicate and quadruplicate copies of application to the Superintendent or Inspector of Central Excise, having jurisdiction over the factory or warehouse, within twenty-four hours of removal of the goods.

10. From the above Government observes that the procedure for sealing by Central excise Officer or Self-Sealing and Self Certification procedure has been prescribed in relation to identify and correlation of export goods at the place of dispatch. Since in respect of rebate claims under reference in the present case the procedure prescribed under Notification No. 19/2004-C.E. (N.T.) has not been followed scrupulously by the applicant and therefore correlation between the excisable goods claimed to have been cleared for export from factory of manufacturer and the export documents as relevant to such export clearances cannot be established.

11. Government observes that the Department in its appeal before Commissioner (Appeals), had pointed out that goods in respect of all the ARE-1s under present rebate claims were not opened and examined by Customs, therefore, identity of the goods exported was not established. It is also observed from the impugned Order in Appeal that the applicant had not submitted any documentary evidence to prove that goods were actually opened and examined by the Customs Department. In view of the same Commissioner (appeals) in his impugned order observed that Mate receipt and Bill of Lading, submitted before him by the applicant, showing the names of exported goods, actually did not help much because Bill of Lading & Mate receipt show the names of exported goods in a routine manner on the basis of declaration of the exporter however it did not mean that the goods have actually been examined by statutory authority like Customs.

12. The applicant in its application with response to the above, has contended that the goods exported are basic drugs and the same were exported on the basis of order placed by the customers. The goods covered under above ARE-1 were duly presented to Customs Authorities and were exported through proper and legal route. Necessary documents required

the time of export of goods were prepared and presented to appropriate authorities including customs authorities and the goods were exported with due clearance/endorsement by concerned authorities including customs authorities. However, the applicant even before the Government has failed to produce any evidence to show that the goods cleared from the factory were ever opened/checked and verified at Customs end. The applicant has mainly relied on plea that procedural infraction of Notifications, circulars etc are to be condoned if exports have really taken place and the law is settled now that the substantive benefit cannot be denied for procedural lapses.

13. Government observes that it is a settled issue that benefit under a conditional notification cannot be extended in case of non-fulfillment of conditions and/or non-compliance of procedure prescribed therein as held by the Apex Court in the case of Government of India v. Indian Tobacco Association - 2005 (187) E.L.T. 162 (S.C.); Union of India v. Dharamendra Textile Processors - 2008 (231) E.L.T. 3 (S.C.). Also, it is settled that a notification has to be treated as a part of the statute and it should be read along with the Act as held in the case of Collector of Central Excise v. Parle Exports (P) Ltd. - 1988 (38) E.L.T. 741 (S.C.) and Orient Weaving Mills Pvt. Ltd. v. Union of India - 1978 (2) E.L.T. J311 (S.C.) (Constitution Bench).

14. Government in the instant case notes that the impugned goods were cleared from the factory without ARE-1s bearing certification about the goods cleared from the factory under self-sealing and self-certification procedure and therefore the conditions and procedure of sealing of goods at the place of dispatch were not followed and therefore the correlation between the goods cleared from the factory and those exported cannot be said to have been established. Government, further holds that absence of Self sealing, Self Certification on the ARE-1s / not following the basic procedure of export as discussed above, cannot be treated as just a minor or technical procedural lapse for the purpose of availing the benefit of rebate of duty. As such there is no force in the plea of the applicant that this lapse should be

considered as a procedural lapse of technical nature which is condonable in terms of case laws cited by applicant.

15. Government further notes that the applicant relied on the various judgments regarding procedural relaxation on technical grounds. The point which needs to be emphasized is that when the applicant seeks rebate under Notification No. 19/2004-N.T., dated 6-9-2004, which prescribes compliance of certain conditions, the same cannot be ignored. While claiming the rebate under such Notification No. 19/2004-N.T., dated 6-9-2004 the applicant should have ensured strict compliance of the conditions attached to the said Notification. Government place reliance on the judgment in the case of Mihir Textiles Ltd. v. Collector of Customs, Bombay, 1997 (92) E.L.T. 9 (S.C.), wherein it is held that :

> *"concessional relief of duty which is made dependent on the satisfaction of certain conditions cannot be granted without compliance of such conditions. No matter even if the conditions are only directory."*

16. In view of the foregoing, Government observes that the impugned goods which were cleared from the factory without ARE-1s bearing certification about the goods cleared from the factory under self-sealing and self-certification procedure and therefore the conditions and procedure of sealing of goods at the place of dispatch were not followed and therefore the correlation between the goods cleared from the factory and those exported cannot be said to have been established. Government, therefore, holds that non observations of the conditions and procedure of self-sealing as provided in the Notification No.19/2004–CE(NT) dated 06.09.2004 cannot be treated as minor procedural lapse for the purpose of availing benefit of rebate of duty on impugned export goods. Therefore, the various judgments relied on by the applicant regarding procedural relaxation on technical grounds as well as applicant's plea about treating this lapse as procedural one cannot be accepted. Moreover, the reliance placed by the applicant on GOI order No.197-198/2013 dated 28.02.2013 [2013 (295) E.L.T. 152 (G.O.I.)] in the case of M/s Superfil Products Limited. is completely out of place as in the

said case the procedural requirement was of getting goods cleared under DEEC Scheme, examined and sealed by Superintendent, Central Excise, which was not followed and instead, the same were cleared for export under self-sealing and self -certification basis. This procedural lapse was condoned by the Revisionary authority as the goods were cleared for export under self sealing and self certification basis in terms of para 3(a)(i) of Notification No. 19/2004-CE(N.T.) dated 06.09.2004. Whereas, in the instant case the procedure for sealing either by Central excise Officer or Self-Sealing and Self Certification procedure had not been followed by the applicant. Hence, the facts are different and distinguishable.

17. In view of above all Government finds no merits in the present revision application of the applicant and the impugned Order-in-Appeal is upheld for being legal and proper.

18. The revision application is therefore rejected being devoid of merits.

19. So ordered.

27.4.18

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

ORDER No 134 /2018-CX (WZ) /ASRA/Mumbai DATED 27-04-2018.

To,
M/s Aarti Drugs Ltd.,
Plot No. N-198,
MIDC, Tarapore,
Diust: Palghar,

True Copy Attested

एस. आर. हिरुलकर
S. R. HIRULKAR

Copy to:

1. The Commissioner of GST & CX, Belapur Commissionerate.
2. The Commissioner, Central Excise, (Appeals) Raigad.
3. The Deputy / Assistant Commissioner(Rebate), GST & CX Mumbai Belapur.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.