

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील -I) का कार्यालय, केन्द्रीय उत्पाद शुल्क, :
: सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास, :
: आंबावाडी, अहमदाबाद- 380015. :

क फाइल संख्या : File No : V2(69)1 /Ahd-III/2015-16/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-015-16-17

दिनांक Date : 20.05.2016 जारी करने की तारीख Date of Issue 23/07/16

श्री उमाशंकर आयुक्त (अपील-I) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-I) Ahmedabad

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-I आयुक्तालय द्वारा जारी मूल
आदेश सं _____ दिनांक : _____ से सृजित

Arising out of Order-in-Original: 121/Ref/2014 Date: 05.02.2015

Issued by: Assistant Commissioner, Central Excise, Din: Kadi, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Cengres Tiles Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे
बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as
the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision
Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building,
Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the
following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने
में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में
चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

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

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

(b) In case of rebate of duty of excise on goods exported to any country or territory outside
India of on excisable material used in the manufacture of the goods which are exported to any
country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया
माल हो।

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



ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- णबी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

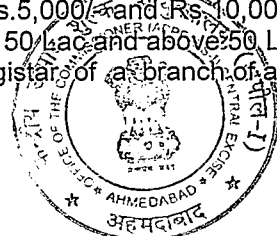
(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any



nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।

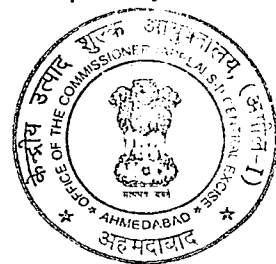
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores, Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(6)(i) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER IN APPEAL

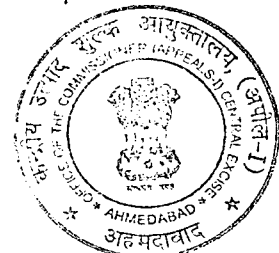
This appeal has been filed by **M/s Cengress Tiles Ltd, Survey No.1178/2, Nandasan, Taluka Kadi, Dist- Mehsana** (hereinafter referred to as "the appellant") against Order-in-Original No.121/Ref/2014 dated 05.02.2015 (hereinafter referred to as the "impugned order") passed by the Assistant Commissioner of Central Excise, Kadi Division, Ahmedabad-III.

2. The appellant had filed a refund claim of **Rs.16,60,328/-** on 27.08.2014 before the adjudicating authority on the ground that they had paid the said amount wrongly on 31.10.2013 during the course of audit towards audit observation regarding (i) wrong availment of Cenvat credit of service tax paid on construction activities used for setting up of factory or part thereof, used for laying foundation for machinery, used for erecting machinery or used for any other civil works, (ii) wrong availment of Cenvat credit on iron/sheets/coils/channels etc used in maintenance and repair and (iii) wrong availment of input service tax credit of service of used for maintenance of capital goods. A show cause notice dated 26.11.2014 was issued to the appellant for rejecting the said refund claim on the ground that the appellant have accepted the audit objection and in turn they have paid the duty along with interest involved therein without protest for concluding the litigation and also not issuing show cause notice; that since all the proceedings has been concluded and once the same has been settled, the issue cannot be reopened. The said show cause notice was adjudicated by the adjudicating authority by rejecting the said refund claim on the ground mentioned in the show cause notice.

3. Being aggrieved, the appellant had filed the present appeal on the ground that the appellant was only issued audit report and it does not mean they have accepted all the liability; that the amount paid at the time of audit was under pressure and the audit party was insisted for the payment otherwise they would not have paid the said amount; that the adjudicating authority has not said that the refund is not admissible but stated that the disputed amount was paid along with interest and the matter was concluded, hence cannot reopened. The appellant has not paid one percent penalty as per Section 11 A (7) of the Act, hence the adjudicating authority's observation that the matter deemed to be concluded under the said section is not correct.

4. A personal hearing in the matter was fixed on 10.12.2015 and Shri M.A.Patel, consultant appeared before the same. He reiterated the grounds of appeal and submitted additional submissions which also taken into consideration

5. I have carefully gone through the facts of the case and submissions made by the appellant. The case is relating to eligibility refund amount of input service credit paid/reversed by the appellant during the course of audit.



5.1 I find in the instant case that the appellant had paid an amount of Rs.16,60,328/- (service tax liability + interest) during the course of audit observation. The said amount was pertaining to service tax credit wrongly taken by them in respect of (i) wrong availment of Cenvat credit of service tax paid on construction activities used for setting up of factory or part thereof, used for laying foundation for machinery, used for erecting machinery or used for any other civil works, (ii) wrong availment of Cenvat credit on iron/sheets/coils/channels etc used in maintenance and repair and (iii) wrong availment of input service tax credit of service of used for maintenance of capital goods. The admissibility of the Cenvat credit availed by the appellant is not the core issue in the present case, but whether the appellant is eligible for refund of the amount paid by them during the course of audit objection which was closed as settled on the basis of payment made. The adjudicating authority in the impugned order held that the appellant has paid/reversed the amount after agreement with the audit observation raised by the audit party and on the basis of their agreement the observation was settled as closed by the department.

5.2 It is an undisputed fact that the appellant had debited the Cenvat credit with interest towards the revenue para raised by the audit officer. On the basis of such payment, the disputed issue was closed by the audit officer by issuing audit note. However, I feel that once the debit is made by the appellant, there should be a legal obligation to initiate proceedings for confirmation of the amount so paid. I find that as per provisions of Section 11 A(2) of the Central Excise Act, 1944, the person who has paid the duty under clause (b) of sub-section (1) of section 11 A, shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made there under. Further, I also find that, the Audit Manual prescribes a letter (Annexure-CE-X as per Central Excise & Service Tax Audit Manual 2015 and Annexure-S as per Central Excise Audit Manual 2008) which is to be given by every assessee to the concerned Commissioner in terms of Section 11 A (2) for waiver of show cause notice/penalty in. The format of the said letter is as under:

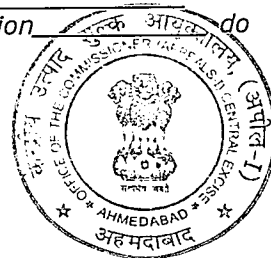
*DRAFT OF THE LETTER TO BE WRITTEN BY THE ASSESSEE UNDER
SECTION 11A (2) OF THE CENTRAL EXCISE ACT, 1944,*

To,
The Commissioner
Customs, Central Excise and Service Tax,
Audit Commissionerate

Sir,

Subject: Letter given for waiver of show cause notice in terms of Section 11A(2) of the Central Excise Act, 1944- reg.

I / We M/s _____, address _____ do
falling under the jurisdiction of Range _____ and Division _____
hereby state and request as under:-



a) As per the provisions of Section 11A(1)(b) of the Central Excise Act, 1944, where any Central Excise duty has not been levied or paid or has been short levied or short paid or erroneously refunded, the person, chargeable with the Central Excise duty, may pay the amount of such duty before service of notice on him under sub section (1) of Section 11 A and inform the central excise officer in writing in terms of sub section (2) of section 11 A, who, on receipt of such information shall not serve any notice in respect of the amount so paid;

b) During the course of verification of our records / returns, by the Audit team from the office of Audit Commissionerate _____, it is observed that there is a short payment / non levy / non - payment of duty / wrong availment of CENVAT credit on account of reasons mentioned as per the Annexure enclosed hereto. We have agreed to the points raised during verification / scrutiny and have paid the said amounts of duty and / or reversed the CENVAT credit of Rs. _____ vide GAR-7 Challan No. _____ / CENVAT Register Entry No. _____ dated _____. We have also discharged the applicable interest liability.

4. In terms of the provisions of Section 11A (2) of the Central Excise Act, 1944, we request that the demand show cause notice may not be issued to us in this case and no penalty may be imposed on us as the above short levy / short payment / non levy / non-payment / wrong availment of Cenvat credit are not intentional on our part.

5. We request that the above issues may be treated as closed with this letter since we have complied with the provisions of the Central Excise law. It is hereby confirmed that this amount is paid voluntarily and no appeal will be filed against such payment or we will not claim any refund in future.

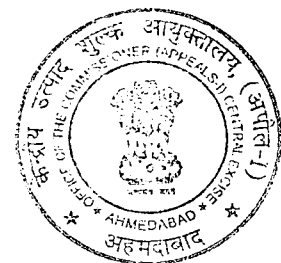
Yours faithfully

Date: _____

Place: _____

Signature CEO / Director / Authorised Signatory
(Name & Designation)

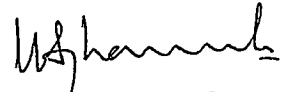
5.4 In this instant case, I find on records that no such declaration/intimation appeared to be given by the appellant or obtained by the department. Therefore, this office has issued letters in several occasions, lastly on 14.03.2016 to the adjudicating authority as well as the concerned Audit Section of central excise Commissionerate to provide copy of the letter/ declaration, if any given by the appellant at the time of closure of audit objection. However, no reply has been received from their end till. In the circumstances, I feel that the amount so paid/reversed by the appellant has not been appropriated and not properly settled the legal issue by the department. Therefore, if the appellant later on noticed that they have paid/reversed the amount wrongly during the course of audit observation, they have all rights to file refund of such amount and the said refund claim shall be allowed as per provisions of Section 11 B of the Central Excise Act. Further, I find that likewise situation has been discussed in the case of M/s Bodal Chemicals Vs CCE Ahmedabad-1 by the Hon'ble Tribunal, reported in 2013 (291) ELT 399. In the said decision, the Hon'ble Tribunal, by following decision in the case of M/s Lark Wires and Infotech Ltd (2008- 231-ELT 154-Tri), it has been held that If an assessee has correctly availed the Cenvat credit and is directed to reverse the same by audit officers on the ground which is not examined by them, it would amount to forcibly directing the appellant to reverse the Cenvat credit. The Hon'ble Tribunal also held that the reversal of Cenvat credit during audit observation was not a conclusion of any legal process.



5.5 Further, in the case of NSP Electronics Ltd reported in 2016 (331) ELT 451 (Bang), the Hon'ble Tribunal has held that. "once the debit is made at the instruction of the audit team, the Revenue is under legal obligation to initiate proceedings for confirmation of amount in question, by deciding the legal issue. In absence of any proceedings to appropriate the amount provisions of Section 11 B CEA not applicable and appellant is entitled to refund".

5.6 Further, the adjudicating authority, in the instant case, has held that all the proceedings has been deemed to be concluded in view of provisions of Section 11 A (7) of the CEA. The above finding is not correct. All proceedings are deemed to be concluded under the above said provisions, if the appellant pays duty with interest and 1% penalty. In the instant case, the appellant has paid only duty with interest, hence the said provisions is not applicable to the instant case. The provisions of Section 11 A (2) of the Central Excise Act is applicable to the instant case and the said provision refrains the department for issuing show cause notice to the appellant or from initiating further proceedings, if the appellant inform the payment if any made, in writing to the central excise officer as prescribed under the audit manuals. However, in the instant no such legal conclusion has been made.

5.5 In view of above discussion and applying ratio of the above cited decisions, I set aside the impugned order and allow the appeal filed by the appellant with consequential relief.



(UMA SHANKER)
COMMISSIONER (APPEALS-I)
CENTRAL EXCISE, AHMEDABAD

Attested

/05/2016


(Mohanan V.V.)#

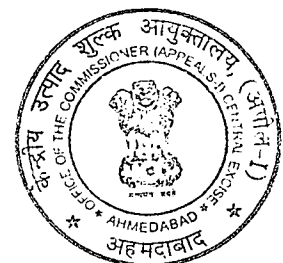
Superintendent (Appeals-I)
Central Excise, Ahmedabad
By R.P.A.D.

To

**M/s Cengress Tiles Ltd,
Survey No.1178/2,
Nandasan, Taluka.Kadi, Dist- Mehsana**

Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, Central Excise, Division-Kadi, Ahmedabad-III
5. Guard file.
6. P.A (Commissioner-Appeals-I) file.



2



1944