

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(24)115/Ahd-III/2015-16/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-207-16-17

दिनांक Date 23.01.2017 जारी करने की तारीख Date of Issue

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 स 59/CE/REF/DC/2015-16 दिनांक : 10.03.2016, सृजित

Arising out of Order-in-Original: 59/CE/REF/DC/2015-16 Date: 10.03.2016  
Issued by: Deputy Commissioner, Central Excise, Div: Kalol, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

**M/s. Zest Packers Pvt. Ltd.(Unit-8)**

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, 4<sup>th</sup> 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।

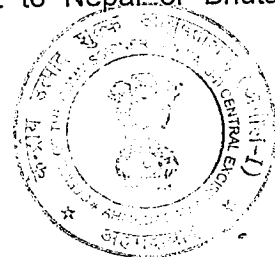
(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(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 मैन्टल 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 इए-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 वहाँ 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 वहाँ 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1998 की धारा 23 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 होगा।

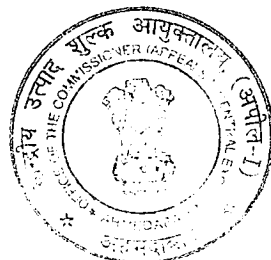
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 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 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

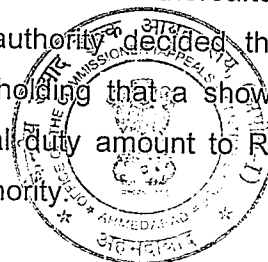
M/s Zest Packers Pvt. Ltd. (Unit-8), 95/3, Shed No. B/4-B, Trimul Estate, P.O.: Khatraj, Taluka: Kalol, District: Gandhinagar (hereinafter referred to as 'the appellant') has preferred the present appeal, being aggrieved by the Order-in-Original No. 59/CE/Ref/DC/201516-Refund dated 10/03/2016 (hereinafter referred to as 'the impugned order') passed by the Deputy Commissioner, Central Excise, Kalol Division, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated, the facts of the case are that the appellant is holding Central Excise registration No.AAAGZ4200CEM008 and is working under the Chewing Tobacco and unmanufactured Tobacco Packing Machine (Capacity Determination and collection of Duty) Rules, 2010 (hereinafter referred to as 'the said rules'). The appellant had filed an abatement claim of **Rs.18,69,677/-** for the month of **October-2015**. The appellant had paid duty of Rs.38,64,000/- for the whole month (Rs.35,89,000/- through e-payment and Rs.2,74,770/- through CENVAT account on 05/10/2015). The appellant had operated one pouch packing machine of M.R.P. Re.0.50 having capacity of 301 pouches per minute and above from 01/10/2015 to 16/10/2015 in the month of October-2015. During the period from 17/10/2015 to 31/10/2015 (for fifteen days), no manufacturing activity of notified goods was undertaken in the unit.

3. The appellant had declared the product as 'Chewing Tobacco without lime' vide their letter dated 25/09/2015 and had paid Rs.38,64,000/- for the month of October-2015 in view of Notification No.5/2015-C.E. dated 01/03/2015. In this regard, samples of the product was drawn and sent to the Chemical Examiner, Central Excise and Customs Laboratory, Vadodara for testing. The Chemical Examiner, vide letter RCL/AH/C.EX./35 dated 05/11/2015 submitted the test report stating as follows:

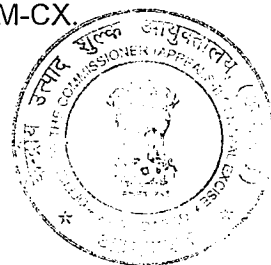
***"The sample is in the form of brownish coloured cut tobacco leaves in loose packing in polyethylene bag without any label. The sample is composed of cut tobacco leaves & flavouring agent. Such preparations are known as "Scented Jarda".***

The duty liability for Jarda Scented tobacco for machine having capacity of 301 pouches per minute and above was stipulated as **Rs.82,11,000/-** per month under Notification No.25/2015-C.E. dated 30/04/2015 but the appellant had actually paid only an amount of Rs.38,64,000/-. A show cause notice F.NoV.24/18-46/CE/REF/15-16 dated 04/01/2016 ('hereinafter referred to as 'the SCN') was issued to the appellant proposing to reject the abatement claim filed for the month of October-2015 on the ground that the appellant had to pay the correct duty for the entire month first and thereafter claim abatement for the period of closure. The adjudicating authority decided the SCN rejecting the abatement claim vide the impugned order, holding that a show cause notice had already been issued demanding the differential duty amount to **Rs.43.47 Lakhs**, which was pending adjudication with appropriate authority.



4. The appellant has preferred the present appeal against the impugned order on the following grounds:

- The SCN had been issued for rejecting the abatement claim only because the Chemical Examiner had opined in his test report that preparations containing cut tobacco leaves and flavouring agent are known as 'Scented Jarda'. The appellant had not accepted the test report as it had been given without any empirical test and had requested the adjudicating authority to get the sample re-tested from any other laboratory which is fully equipped to test manufactured tobacco products.
- The issue whether the goods manufactured by the appellant was 'Chewing Tobacco or Jarda Scented Tobacco had not been adjudicated by the proper officer, in the absence of which, the adjudicating authority had erred in passing the impugned order treating the goods as Jarda Scented Tobacco.
- The adjudicating authority had erred in denying the abatement of duty claim under Rule 10 of the said rules on the wrong finding that the appellant had not paid correct duty without appreciating the fact that when there was no order quantifying the amount of duty payable, no duty was payable by the appellant and the abatement of duty cannot be denied. In the case of CCE & ST LUCKNOW vs K P PAN PRODUCTS PVT. LTD. – 2015 (325) ELT 113 (Tri.Del.), the Tribunal had held that as there was no notice of demand and show cause notice had not been issued to demand the duty, question of adjustment of duty by the adjudicating authority does not arise.
- There is no provision in the Central Excise Rules authorizing the Central Excise officers to draw the sample of excisable goods and to send the same to Chemical Examiner for obtaining his opinion akin to Section 144 of the Customs Act that empowers the proper officer to take sample of goods for examination or testing. In the absence of any Rule framed by the Central Government, the Central Excise officer has no power to draw samples of excisable goods. And thus the test report was without sanctity of law and cannot be relied upon by the department and the SCN was void ab-initio.
- The adjudicating authority had passed the impugned order relying wholly on the test report without allowing the cross-examination of the Chemical Examiner, which was in gross violation of the principles of natural justice. It had been held in the case of VISALAKSHI MILLS (P) LTD. vs CCE, MADURAI – 1998 (104) ELT 499 (Tribunal) that refusal to allow cross examination of Deputy Chief Chemist amounted to violation of principles of natural justice. Similar position had been held in the cases of ENGLISH INDIAN CLAY LTD. vs CCE, PANCHKULA – 2015 (317) ELT 590 (Tri.Del.); in the case of SHYAM TRADERS vs CCE, LUCKNOW – 2012 (278) ELT 468 (Tri.-Del.); in the case of JAYSHREE VYPAR LTD. vs CCE, RAJKOT – 2015 (327) ELT 380 (TRI.AHMD.) and in the case of MANIK CHEMICALS PVT. LTD. vs U.O.I. – 2015-TIOL-HC-AHM-CX.

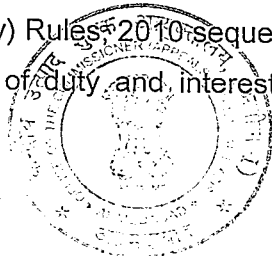


- The Chemical Examiner is required to give the result of chemical test carried out by him. He is not supposed to classify the product. Tribunal in the case of HAZOOR SAHIB CHEMICALS PVT. LTD. vs CC, KANDLA – 2008 (226) ELT 444 (Tri.Ahmd.) had held that the classification based on suggestion of the Chemical Examiner was not permissible. Similar view has been expressed in several other decisions.
- There is no dispute that all the conditions specified in Rule 10 of the said rules were complied by the appellant. Therefore, it was not open to the adjudicating authority to reject the abatement claim on some non-existent reasons.

5. Personal hearing in the appeal was held on 04/01/2017. Shri V.K. Agarwal, Advocate and Shri P.M. Pandya, Consultant appeared for personal hearing. The learned Advocate reiterated the grounds of appeal. He pointed out the test report and submitted that since there is no confirmed demand then abatement cannot be adjusted. He submitted the citations HINDUSTAN ZINC LTD. vs CCE, JAIPUR-II - 2009 (15) 633 (Tri.-Del.) ; VOLTAS LTD. vs CCE, HYDERABAD-II - 2006 (201) ELT 615 (Tri.-Bang.) and INDIAN OIL CORPORATION vs COLLECTOR OF CENTRAL EXCISE, BARODA – 2006 (202) ELT 37 (SC).

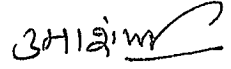
6. I have carefully gone through the facts of the case on records and submissions made by the appellant. In the present case, the appellant had declared the goods in form-1 filed on 25/09/2015 as "Chewing Tobacco without Lime (Brand-JLT)" and had paid Rs.38,64,000/- for the month of October-2015 in terms of Notification No.05/2015-CE dated 01/03/2015. The appellant filed requisite intimation and got the machine sealed resulting in non-production of the notified goods during 17/10/2015 to 31/10/2015. The appellant had filed the impugned abatement claim amounting to Rs.18,69,000/- on 05/11/2015 for the closure period of 17/10/2015 to 31/10/2015, which has been rejected by the adjudicating authority. Thereafter, on the basis of chemical examination report issued by the Chemical Examiner, Central Excise & Customs Laboratory, Vadodara dated 05/11/2015, the annual capacity was re-determined by the adjudicating authority treating the notified goods as 'Jarda Scented Tobacco' and the duty payable per month was quantified as Rs.82,11,000/- in terms of Notification No.25/2015-CE dated 30/04/2015, which was communicated to the appellant on 18/11/2015.

7. The adjudicating authority has clearly brought out in paragraph 11.10 of the impugned order that a Show Cause Notice bearing File No.V.24/15-134/DEM/OA/15-16 dated 12/02/2016 has been issued to the appellant by the Additional Commissioner, Central Excise, Ahmedabad-III demanding differential duty arising out of the re-determination of duty payable as discussed supra, which is pending for adjudication. On reading the provisions of 'Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010' sequentially, it is seen that Rule 9 ibid pertains to manner of payment of duty and interest, which is



disputed in the present case. The resolution of this dispute by way of adjudication of the Show Cause Notice bearing File No.V.24/15-134/DEM/OA/15-16 dated 12/02/2016 (demand notice) is imperative before determining the admissibility of the claim of abatement under Rule 10 ibid. Therefore, the abatement claim is required to be re-examined and re-considered in line with the classification of the notified goods as well as the payment of duty and / or interest determined during adjudication of the above mentioned demand notice. Accordingly, I remand the case back to the adjudicating to freshly decide the abatement claim in the above lines, following legal requirements and after granting sufficient opportunities to the appellant as per the principles of natural justice.

8. अपीलकर्ता द्वारा दर्ज अपील का निपटारा उपरोक्त तरीके से किया जाता है। The appeal filed by the appellant stands disposed of in the above terms.

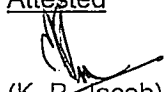


(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 23/01/2017

Attested

  
(K. P. Jacob)  
Superintendent (Appeals-I)  
Central Excise, Ahmedabad.

By R.P.A.D.

To  
M/s Zest Packers Pvt. Ltd. (Unit-8),  
95/3, Shed No.B/4-B,  
Trimul Estate – Khatraj,  
Taluka: Kalol,  
District Gandhinagar.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner, Central Excise (System), Ahmedabad-III.
4. The Deputy Commissioner, Central Excise, Kalol Division, Ahmedabad-I.
5. Guard File.
6. P. A FILE

