

रजिस्टर्ड डाक ए.डी. द्वारा

: सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास, :

: આંબાવાડી, અહમદાબાદ- 380015. :

क फाइल संख्या : File No : V2(30)133/Ahd-III/2016-17/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-015-17-18

दिनांक Date : 25.05.2017 जारी करने की तारीख Date of Issue 21/6/2017

श्री उमाशंकर आयुक्त (अपील-1) द्वारा पारित

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

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

Arising out of Order-in-Original: 322 & 323/D2007-08 Date: 29.03.2008 Issued by:
Deputy Commissioner, Central Excise, Din: Kalol, A'bad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Pramukh Swami Pharma 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 प्रक्रिया 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 इ.ए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक 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- एबी/35-इ के अंतर्गत:-

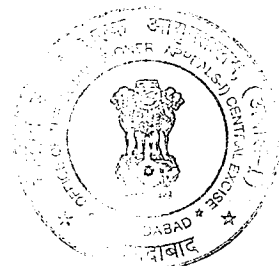
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

(a) 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.

(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 और लगाया गया जुर्माना रूप 5 लाख या उससे कम है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 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 पढ़ी 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 Appellant 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 paise 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ 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 अर्जी एवं अपील को लागू नहीं होंगे।

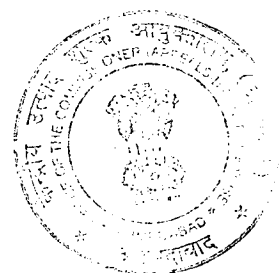
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 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 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 Pramukh Swami Pharma Limited, Plot No. 1185/A, Santej, Taluka Kalol, District Gandhinagar [for short – ‘appellant’] has filed this appeal against OIO No. 322-323/D/2007-2008 dated 29.3.2008 passed by the Deputy Commissioner, Central Excise, Kalol Division, Ahmedabad-III Commissionerate [for short – ‘adjudicating authority’].

2. Briefly, the facts are that appellant, engaged in the manufacture of P.P. Medicines falling under chapter sub-heading 3003 of the first schedule to the Central Excise Tariff Act, 1985 (CETA, 1985) was availing value based SSI exemption upto clearance value of Rs.100 lakhs under notification No. 08/2003 dated 01/03/2003 (as amended) (hereinafter referred to as the ‘SSI notification’) for clearance of its own goods, whereas the goods manufactured for loan licensees under various brand names, not belonging to the appellant, was cleared on payment of Central Excise duty @ 16% from the first clearance in a financial year. Appellant was availing CENVAT credit of duty paid on inputs used in the branded goods manufactured on behalf of loan licensees and cleared on payment of duty from first clearance in a financial year, whereas in respect of its own manufactured goods, CENVAT credit was availed after crossing the SSI exemption limit of Rs.100 lakhs aggregate clearance value in a financial year. The factory of the appellant was falling within ‘rural area’ as defined in paragraph 4 of the SSI notification. The exemption contained in the SSI notification did not apply to specified goods bearing a brand name or trade name whether registered or not, of another person, except in cases where such branded specified goods were manufactured in a factory located in a ‘rural area’. It appeared that the appellant was liable to take into account also the value of branded goods for the purpose of determining the exemption limit of aggregate of first clearance value not exceeding 100 lakhs rupees made on or after 1st April in a financial year and also for the purpose of determining the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers not exceeding 400 lakhs rupees in the preceding financial year. As the appellant had failed to add the value of branded goods for the purpose of determining the said aggregate values of clearances in a financial year two show cause notices dated 21.6.2007 & 5.11.2007 was issued, which was adjudicated vide the impugned OIO dated 29.03.2008.

3. Feeling aggrieved, appellant has filed this appeal on the grounds that:

- a) the goods of loan licensees were manufactured by the loan licensees and not by the appellant and therefore, the entire basis of proceedings that all the goods manufactured in the appellant’s factory were manufactured by the appellant, some of them on its own and some for others was illegal and incorrect. Considering the peculiar provisions of the Drugs and Cosmetics Rules, 1945 framed under Drugs and Cosmetics Act, 1940, the Hon’ble Gujarat High Court in the case of Indica Laboratories Pvt. Ltd. vs U.O.I. – 1990 (50) ELT 210, held that those manufacturers not having their own facilities to manufacture goods like medicaments could get loan license entitling them to utilize infrastructure belonging to

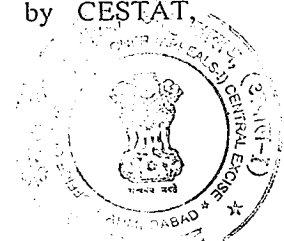


somebody else whereas they could manufacture their goods. Thus a loan licensee was a manufacturer independent of and separate from the factory owner is a settled legal position. The adjudicating authority had failed to appreciate the fact that the goods of the loan licensee could not be considered to be the goods manufactured by the appellant with brand name or trade name of another person and fell outside the purview of SSI exemption scheme under the SSI notification.

- b) the adjudicating authority erred in not considering the fact that the clearances of loan licensee manufacturers were assessed to full rate of duty of Excise and such goods fell outside the purview of the SSI exemption. In the case of Tenmed Pharmaceuticals – [2005 (190) ELT 190 (Tri.-Chennai)], it has been held that value of clearances of loan licensees on full rate of duty are not to be included for determining aggregate value of first clearance of the SSI notification. Hon'ble Supreme Court in the case of Laxmi Steel Rolling Mills – [2004 (182) ELT A.149] dismissed the departmental appeal against CESTAT order holding that when goods were cleared by affixing brand / monogram of another person on full payment of duty, value of such clearances was not to be taken into account for the purpose of determining the aggregate value of clearance for home consumption. Further in the case of Nebulae Healthcare Ltd. [2007 (209) ELT 125], it has been held that value of branded goods ineligible for exemption under SSI exemption was not to be taken into account while commuting the aggregate value for the purpose of SSI Notification.
- c) in the case of Caprihans India Ltd. – [2006 (195) ELT 240 (Tri.-Mumbai)], it has been held that duty already paid was to be adjusted towards duty to be paid. Similar view was upheld in the case of Vinir Eng. Pvt. Ltd. – [2004 (168) ELT 34 (Tri.-Bang.)]. The adjudicating authority had erred in holding that there was suppression of facts by the appellant that his unit fell in rural area. The notion that the department has to be made aware of the rural status of an area by the appellant is baseless. The jurisdiction of divisions and ranges are determined by the department on the basis of village, Taluka, District etc. by the department. Further, the appellant's unit was audited by the department and it was filing ER-I returns regularly. There was no intention to evade payment of duty by the appellant and there was no *mala fide* on its part and the dispute was based on an issue of interpretation. Hence no penalty could be imposed.

4. Personal hearing in the appeals filed by the appellant, along with appeals on the same issue filed by M/s Shantam Pharmaceuticals Pvt. Ltd.; M/s Aan Pharma Pvt. Ltd.; M/s Rhombus Pharma Pvt. Ltd., was held on 22/03/2017 as requested by Shri M.H. Rawal. Consultant appearing on behalf of the appellants and all the other assesseees. The learned Consultant submitted that the common issue pertained to SSI exemption to manufacturers of PP medicine having factories in rural areas wherein different units were served with show cause notices for including the clearance value of loan licensees with the clearance value of their own goods and requested that a common hearing be held for all the cases. He further submitted that the issue had been settled by Supreme Court in the case of M/s Nebulae Healthcare Ltd. – [2015 (325) E.L.T. 431 (S.C.)] and as per Order No. A/11505-11506/2015 dated 02/09/2015 issued by CESTAT, Ahmedabad in the case of M/s Kosha Laboratories.

5. I have gone through the facts of the case and submissions made in the appeal memorandum. On perusal of records I find that the appeals were transferred to call book in view of Stay Order No. S/219/WHB/AHD/2008 dated 10/03/2008 passed by CESTAT, Ahmedabad in a similar matter in an appeal filed by M/s Kosha Laboratories. Now Order No. A/11505-11506/2015 dated 02/09/2015 in the matter of M/s Kosha Laboratories vs Commissioner of Central Excise, Ahmedabad-III, has been issued by CESTAT,



Ahmedabad. The operative part of this order having a direct bearing on the facts the appeals filed by the appellant against the impugned orders is reproduced as follows:

"6. We find that the Tribunal in the case of Pharmanza (India) (supra) on the identical situation observed that the duty paid on the branded goods is more than duty now being demanded, should neutralize entire demand required to be verified and matter was remanded. The relevant portion of the said decision is reproduced below:-

3. Learned advocate has assailed the impugned orders on limitation as also on merit. As regards limitation, he submits that the reasoning adopted by Commissioner that the appellants has suppressed the fact that their factory was located in rural area, cannot be upheld inasmuch as the said fact is not capable of being suppressed. Revenue was very well aware of location of their factory and as such, it cannot be said that there was any suppression on their part. Arguing on merit, learned advocate has drawn our attention to the earlier order passed by the Tribunal in case of *M/s. Kline Chemicals P. Ltd.* (Order No. A/1460/WZB/AHD/2008, dt. 29-7-08), [2009 (237) E.L.T. 405 (T)] wherein after taking note of the Larger Bench decision of the Tribunal in case of *CCE, Coimbatore v. M/s. Marutham Textiles (P) Ltd.*, 2003 (153) E.L.T. 219 (Tri.-LE), it was held that the duty paid on the clearances, which the Revenue has contended to be exempted, should be considered as deposit and said duty is required to be adjusted against the duty now being demanded from the appellant.

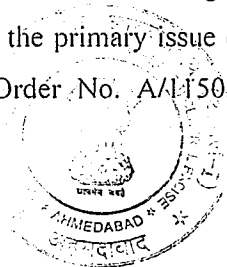
4. By following the ratio of above decision, we agree with the learned advocate. Admittedly, the branded goods have been cleared on payment of duty, which according to Revenue should not have the paid duty. As such, duty already paid on such branded goods is required to be adjusted against the duty now being demanded from the appellant. It is the appellant's contention that the duty paid on the branded goods is much more than the duty now being demanded and would neutralize the entire demand, and is required to be verified. For the said purpose, we remand the matter to the original adjudicating authority. We also find favour with the appellant's plea of limitation, we direct the Commissioner that such re-quantification exercise is to be done only for the period within limitation.

5. Both the appeals are disposed off in above manner.

7. In the case of Pharmanza (India) (supra), the Tribunal dropped the demand for the extended period of limitation on the identical situation. Hence, we do not find any merit in the appeal filed by the revenue. As there is no suppression of fact, penalty imposed under Section 11AC cannot be sustained.

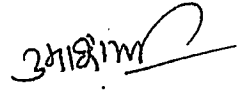
8. In view of the above discussion, we remand the matter to Adjudicating Authority to examine whether the duty being demanded upheld by Commissioner (Appeals) would be neutralized against the amount of duty paid by them. The appeal filed by revenue is rejected. The appeal filed by the assessee is disposed of in above terms."

6. It has been intimated by Superintendent (RRA), Central Excise, Ahmedabad-III vide letter F.No. IV/16-17/Ahd-III/RRA/Misc-CESTAT/2016-17 dated 05/07/2016 that CESTAT Order No. A/11505-11506/2015 dated 02/09/2015 passed in the case of M/s Kosha Laboratories has been accepted by the department on monetary ground. It is settled law that judicial discipline binds the adjudicating authority / appellate authority to follow the principles laid down by Tribunals / Courts, unless it is set aside by a higher forum. The appellant has also relied upon the decision of Hon'ble Supreme Court in the matter of *Nebulae Health Care Ltd.* - [2015 (325) ELT 431(S.C.)]. However, this case law is distinguishable in as much as the Apex Court was not confronted with the issue relating to branded goods manufactured in 'RURAL' area, which happens to be the primary issue of contention in the instant case. Therefore, following the ratio of Order No. A/11505-



11506/2015 dated 02/09/2015 in the matter of M/s Kosha Laboratories vs Commissioner of Central Excise, Ahmedabad-III, passed by CESTAT, Ahmedabad is correct and proper in the instant case. Accordingly, I remand the matter to the adjudicating authority to examine all the issues in line with the ratio given by Hon'ble Tribunal in the case of M/s Kosha Laboratories *supra* and pass a reasoned order after giving the appellant fair opportunity to represent their side of the case in accordance with the principles of natural justice.


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


(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 25/08/2017

Attested


(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise, Ahmedabad.

BY RPAD.

To,

M/s Pramukh Swami Pharma Limited,
Plot No. 1185/A, Santej,
Taluka Kalol, District Gandhinagar

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner(Systems) Central Excise, Ahmedabad - III
4. The A.C. / D.C., Central Excise Division: Kalol, Ahmedabad-III
5. Guard file
6. P. A.



