



सत्यमेव जयते

::आयुक्त (अपील-II) का कार्यालय,केंद्रीय उत्पाद

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
7th मंजिल, केंद्रीय-उत्पाद शुल्क भवन, 7th Floor, Central Excise
पोलिटैक्निक के पास, Building,
आम्बवाडी, अहमदाबाद : 380015 Near Polytechnic,
Ambavadi,
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(52)90 /Ahd-II/Appeals-II/ 2016-17 /1555 to 1569
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 102-16-17

दिनांक (Date): 28.03.2017, जारी करने की तारीख (Date of issue): 10/04/17

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker, Commissioner (Appeals-II)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No. MP/01/Dem/2012-2013 Dated: 07/04/12

issued by: Assistant Commissioner Central Excise (Div-II), Ahmedabad-II

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Shree Prakash Textiles Pvt. 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 an 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) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अंतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

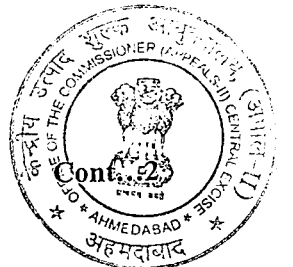
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

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

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

(D) 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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-बी/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, अपीलों 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 न्यायाधिकरण 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 रूपर 5 लाख या उससे कम है वहां रूपर 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहां रूपर 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 जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

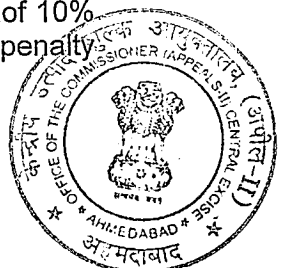
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस सन्दर्भ 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।

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

The subject appeal is filed by M/s Shree Prakash Textiles (Gujarat) Ltd., Laxmivijay Hosiery Mills Compound, Naroda Road, Ahmedabad (hereinafter referred to as 'the appellant') against OIO Nos.MP/01/DEM/ 2012-13 dated 04.07.2012 (hereinafter referred to as 'the impugned order') issued by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-II (hereinafter referred to as 'the adjudicating authority').

2 This appeal was transferred in call book due to the appellant had filed TA no.189/2008 in the Hon'ble High Court of Gujarat .The brief facts of the case are, that the appellant is a textile processing unit and engaged in the business of undertaking processes like bleaching, dying, pinting, finishing etc. on textile fabrics. The appellant had filed refund claim of Rs. 4,32,795/- on 27.1.2003, on the ground that on introduction of the Compounded levy scheme vide Notification No. 42/98-C.E;(N.T.) Dated 18.12.1998, they had paid Excise duty from April 1999 to February 2000 on the A.P.C. (Annual Production Capacity] fixed by the Commissioner, Central Excise, Ahmedabad vide his letter dated 22.12.1998 for the Year1999-2000. While fixing the said A.P.C. for the above period, the portion of galleries was also included. Vide Notification No.14/2000-C.E.(N.T.) dated 01.03.2000, the Board has clarified that galleries which are not assisting in heat setting and drying of fabrics are not to be taken into consideration to arrive at the A.P.C.. Moreover, the issue has attained finality in view of the Apex Court Order dated 17.9.2002 passed in Civil Appeal No. 4972 of 2001 filed by the Commissioner of Central Excise, Jaipur-II v/s M/s. S.B.P.L. Ltd. & Others. The appellant has, therefore, filed the refund claim of Rs. 4,32,795/- of differential duty paid on the galleries for the period of 1999-2000. After going through the claim papers/ documents, the said appellant was served with Show Cause Notice proposing rejection of the claim. Subsequently, the said Show Cause Notice was decided and refund was sanctioned vide OIO No. MP/184/REF/2002 dated 02.07.2003. The Department had preferred an appeal against the impugned order dated 02.07.2003 and an SCN was issued to the appellant to safeguard the revenue. Whereas, it appeared that the refund sanctioned to the said appellant was not correct and legal and required to be recovered under Section 11A of the Central. Excise Act,1944. Therefore, a Show Cause Notice dated 30.06.2004 was issued to the appellant proposing recovery of Rs. 4,32,795/- under Section 11A of the Central Excise Act 1944, with interest. Said SCN was adjudicated vide the impugned order wherein the demand along with interest was confirmed.

3. Aggrieved by the impugned order, the appellant preferred this appeal. They have contended that;

- the appellant has prima facie a strong case in its favor and therefore it is fit case where the condition of pre-deposit of the amount of duty and interest may be waived and stay against the recovery of the same during pendency of the appeal may be granted in their favor;
- the adjudicating authority has grievously erred and acted in complete dereliction of the judicial propriety in taking upon itself the burden of deciding the issues when not only the



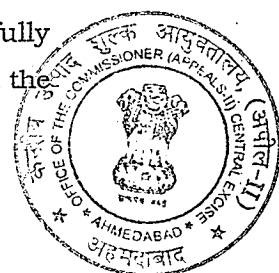
same issue has been framed for consideration before the Hon'ble High Court that too in the main matter out of which the present proceeding had arisen;

- the adjudicating authority ought to have awaited for its conclusion instead of proceeding in the matter and causing unnecessary multiplicity of proceeding;
- the adjudicating authority has not appreciated that the appeal filed by the appellant had been admitted by the Hon'ble Gujarat High Court and therefore, the validity and legality of the order of the Appellate Tribunal was under challenge and the same was not final or conclusive;
- the impugned order is even otherwise illegal and contrary to the facts on record inasmuch as the procedure followed by the Revenue in determining APC would show that there is no proper course of adjudication is followed while determining their APC;
- the APC was determined considering even the measurements and dimensions of galleries which was based on information and data submitted by the appellant and obtained from other sources; the APC was determined in ex-parte manner and without following the principles of natural justice;
- the refund claim filed by the appellant was such a proceeding wherein the appellant was at liberty to dispute and challenge the determination of APC which was even otherwise void;
- the refund of duty on APC is rightly and legally allowable in their favour as they had deposited the compounded levy amounts for the period of year 1999-2000 under protest, and a refund claim was filed for such amount in view of the law laid down by the Hon'ble Supreme Court in case of Sangain Processors (Bhilwara) Ltd; they had deposited the amounts as compounded levy duty for galleries under protest and hence, refund claim was not hit by limitation; recoveries sought to be made from the appellant as duties on galleries is therefore without any authority in law;

The adjudicating authority has gravely erred in not correctly appreciating the effect of judgment of the Hon'ble Gujarat High Court in the case of Premraj Dyeing and Printing Pvt. Ltd. cited by the appellant;

- The provisions provides for interest in addition to duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment duty. In the instant case, there is no short levy or short payment or non-levy or nonpayment of any excise duty; recovery of interest under the said provisions of the Act is bad and illegal and liable to be set aside;

4. Personal hearing was accorded on 20.12.2016. Smt. Shilpa Dave, Advocate appeared on behalf of the appellant. She reiterated the submissions of ground of appeal. also submitted that, the Issue is decided vide their TA no.189/2008 dated 02-03-15 by the hon'ble High Court of Gujarat in their favour, and also case law of M/s. Premraj Dying and Printing Pvt. Ltd.vide SCA No.3095 of 2004 wherein the issue has been decided by the Hon'ble High Court vide judgment dated 13.06.2012. She requested to allow the refund. I have carefully gone through the Case Records, SCN, the impugned order; the ground of appeal and the

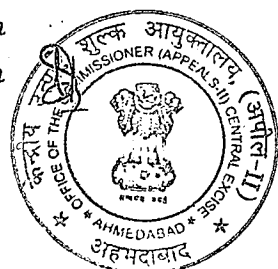


case laws relied upon.

5. In the instant case, the issues involved are 1. Whether the dimensions of galleries should be included while fixing Annual Production Capacity of a factory of an independent textile processor wherein a hot air stenter is installed, and 2. Whether a refund claim is sustainable in law for claiming restitution of the compounded levy amount attributable to galleries if no appeal is filed against the decision determining APC under the APC Determination Rules.

6. On going through the submissions made by the appellant, I observe that pursuant to the impugned order, the amount of refund of Rs.4,32,795/- was sanctioned and paid to the appellant. I further observe that thereafter, the revenue had filed an appeal before the Commissioner (Appeals), contending that the appellant had not challenged determination of Annual Capacity of Production for the period of year 1999-2000 and therefore, the appellant could not have claimed refund of the amount of duty on galleries without having challenged the APC fixation. It is also seen that therefore, the appellant was issued SCN dated 30.06.2004 by the JAC for recovery of amounts already refunded to them in pursuance of the said order. It is also seen that the appeal of the Department was rejected by the Commissioner (Appeals) vide OIA No. 131/2005 dated 24.6.2005 on the ground that no duty was payable on galleries, that amount of duty was paid in excess by the appellant for want of proper interpretation of the Notification and that the appellant had disputed levy of duty on gallery portion from the beginning by paying the same under protest. Against the said OIA dated 24.6.2005, it is observed that the department had filed a second appeal before the Appellate Tribunal. In this matter, the Appellate Tribunal allowed the appeal of the department vide Order dated 11.5.2007 on the ground that refund claim without challenging APC fixation was not maintainable because APC fixation was an appealable order, and without challenging the same, Assistant Commissioner's action of sanctioning refund, amounted to review of the order of the Commissioner. Being aggrieved by the said order, the appellant thereafter, filed an application for rectification of mistake before the Appellate Tribunal wherein they pleaded that the Appellate Tribunal, Ahmedabad has held in a number of cases that APC fixation was not an appealable order, and the refund claim for duties deposited on gallery portion was maintainable even without challenging APC fixation. It is further seen that the said ROM application filed by the appellant was also dismissed on the ground that acceptance of prayer made in ROM application would amount to re-hearing of the matter which was beyond the scope of ROM application. I further observe that on being aggrieved of the said order the appellant had filed a Tax Appeal No. 189 of 2008 before the Hon'ble Gujarat High Court, which was admitted on 14.02.2008 in terms of the following question of law:-

1. *Whether the Tribunal has substantially erred in law in holding that determination of Annual Production Capacity was an appealable order under Section 35 B of the Central Excise Act 1944 ?*
2. *Whether the Tribunal has substantially erred in law in denying refund to the appellant on dimensions of galleries and panel patti despite the judgment of Hon'ble Supreme Court in SPBL Limited, 2002 (146) ELT 254 (SC) ?*



7. In this matter, I find that, said tax appeal has been decided by the Hon'ble Gujarat High Court vide order dated 02-03-15 ,it is held that,

'3. Having heard learned counsel.....the questions are answered in favour of the assessee and against the department.'

Furher,I rely upon the order of the Hon'ble High Court of Gujarat in the case of M/s. Premraj Dying and Printing mills Pvt. Ltd. Vs. UOI 2013[288] ELT 357[Guj] dated 13.06.2012. In this case, the identical issue has been decided and it has ordered in para 19 that:

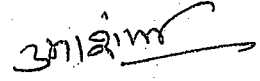
"Under the circumstances, the orders under challenge in these petitions are set aside. All proceedings are placed back to the Deputy Commissioner for further consideration of the refund claims in the light of the show cause notice issued to each petitioner bearing in mind the observations made hereinabove. Such exercise should be completed expeditiously and preferably within a period of six months from the date of receipt of a copy of this judgement".

I therefore, find that in view of the order of Hon'ble High Court of Gujarat in case of M/s. Shree Prakash Textiles, the case is remanded back to the adjudicating authority to decide the case afresh.

8. In view of above discussion and findings, I hold that said refund is admissible to the appellant

9. अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

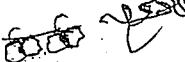
9.. The appeal filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

Attested



[K.K.Parmar)

Superintendent (Appeals-II)
Central Excise, Ahmedabad.

By Regd. Post A. D

M/s. Shree Prakash Textiles (Gujarat) Ltd.,

Laxmi vijay Hosiery Mills Compound,

Naroda Road,

Ahmedabad.

Copy to :

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II.
3. The Assistant Commissioner, Central Excise, Division-II, Ahmedabad-II.
4. The Assistant Commissioner (Systems), Central Excise, Ahmedabad-II
5. Guard file.
6. P.A. file.

