



सत्यमेव जयते

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

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
7th Floor, Central Excise
Building,
Near Polytechnic,
Ambavadi,
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(73)64 /Ahd-II/Appeals-II/ 2015-16 / 2800-2804
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 060-16-17
दिनांक (Date): 31.10.2016, जारी करने की तारीख (Date of issue): 08/11/16

श्री उमा शंकर, आयुक्त(अपील-II) द्वारा पारित
Passed by Shri Uma Shanker , Commissioner (Appeals-II)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-), अहमदाबाद- II, आयुक्तालय द्वारा जारी
मूल आदेश सं _____ दिनांक _____ से सृजित
Arising out of Order-In-Original No. ARIV/Premfabri/2013 Dated: 10-07-2014
issued by: Commissioner, Ahd-II Central Excise (Div-), Ahmedabad-II

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

M/s Prem Fabricators

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 अतत 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

(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 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 हों।

- (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 मैनटल हॉस्पिटल 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और 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 और 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 जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 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 अनुसूचि-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 .

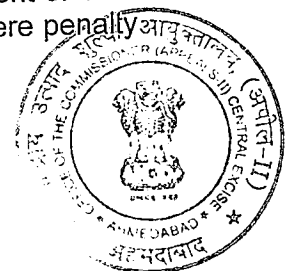
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 मांग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

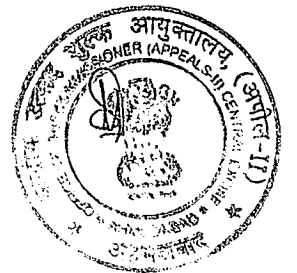
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER IN APPEAL

The subject appeal is filed by M/s. Prem Fabricators, Plot No. 426, Jyoti Power, Moraiya, Changodar, Dist-Ahmedabad, (hereinafter referred to as '*the appellant*') against Order No ARIV/Premfabri/2103 dated 10-7-14 (hereinafter referred to as '*the impugned order*') passed by the Superintendent, Central Excise, AR-IV, Division-IV, Ahmedabad-II (hereinafter referred to as '*the adjudicating authority*'). The appellant is engaged in the manufacture of iron/steel structure falling under CETH 73 of the Central Excise Tariff Act, 1985[hereinafter referred as CETA-1985].

2. The facts in brief of the case is that, vide decision dated. 3.9.2009, passed by the Customs Excise and Service Tax Appellate Tribunal, Ahmedabad in Appeal No. E/652/2008 , party allowed the appeal preferred by the appellant. It was challenged by revenue by way of filing Tax Appeal no. 446 of 2010 and Tax Appeal No.2435 of 2009 before Hon'ble high court of Gujarat. By order dated 2.2.2012 allowed the appeal. However, certain observations were made in the judgment and accordingly the petitioner has made a representation and produced document including the Statement Showing availing Cenvat credit and claimed that the same be adjusted. The Commissioner of C.Ex. by his order dated 8-1- 2014 partly accepted the claim .Since the appellant was not satisfied with the calculation, they made another representation. By letter dated10-7-2014 the Superintendent, Central Excise, Range IV, Division IV, Ahmedabad had ordered the appellant to pay a sum of Rs.57,90,448/- as penalty and another sum of Rs.64,77,905/- as interest. The said order was challenged by the appellant preferring an appeal to Commissioner (Appeal). The appellant received a communication dated 17-9- 2014 from the office of the Commissioner (Appeals-I) to the effect that since the computation has been done by the Superintendent, the appeal would lie before the Customs, Excise and Service Tax Tribunal and not before him. The appellant has filed the appeal, in hon. High court of Gujarat. Vide order dated 23-7-15, the high court has allowed the appeal and the communication dated 17-9- 2014 is set aside. The Commissioner (Appeals-I) is directed to decide the matter after giving an opportunity of hearing to the appellant.



3. The appellant has filed the instant appeal, on the following grounds and contended that the Superintendent has erred in demanding interest and penalty by denying benefit of 25% of penalty in terms of the Order dated 02.02.2012 passed by the Hon'ble High Court. The impugned order passed by the Supdt. is misconceived and same cannot be sustained.

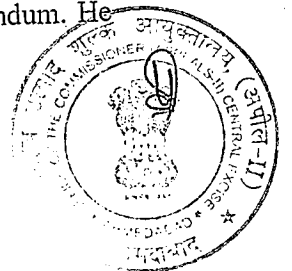
The Superintendent ought to have computed the liability of interest and penalty after adjusting the amount of eligible CENVAT Credit of Rs. 48,44,224/- as decided by Commissioner of Central Excise vide order dated 08.01.2014 .

The Tribunal and Hon'ble High Court have allowed adjustment of CENVAT credit against duty liability. Since the Order passed by the Hon'ble High Court in respect of allowing adjustment of CENVAT credit attained finality, the lower authority ought to have computed liability of interest and penalty on net amount of duty after allowing adjustment of CENVAT Credit.

In the present case, the duty of Excise Due as provided under Section 11A(10) means after having adjustment the CENVAT Credit from amount of duty. As the Appellant deposited the amount of duty, interest and penalty equal to 25% within 30 days from the communication of the Order, the benefit of reduction of penalty and interest ought to have extended. The authority ought to have granted opportunity of personal hearing before passing an impugned order. The same cannot be sustained. Since the supdt. has not furnished a statement showing computation of interest, the impugned order demanding interest cannot be sustained.

That the impugned order is an appealable order as per Section 35(1) of the act. Since the adjudicating authority is a central excise officer in terms of Section 2(b), the Appellant has preferred this appeal. They rely on the following decisions, 1. Metal Weld Electrodes Vs CESTAT 2014 (299) ELT. 3 (Mad.) 2 .C.C.Ex vs. Electro steel Casting Ltd., 2009 (235) ELT 757[T]

3. Personal hearing was accorded on 15.09.2016, Shri hardik modh, advocate, appeared on behalf of the appellant and reiterated the submissions made in appeal memorandum. He



submitted the CESTAT Order copies (1) 2007(215) ELT 424 (TRI.Del) M/S Electron Energy Equip.P. Ltd. and (2) 2016 (334) ELT 491(TRI.Mad.) Vikash J. Shah. I have carefully gone through the case records, facts of the case, submission made by the appellant at the time of personal hearing and the case laws cited by the appellant. I have also gone through the appeal memo .It is an undisputed fact that before issue of order, the appellant has not been called upon to explain the matter. It is also important to note that even if the appeal preferred by the petitioner before the Commissioner is not maintainable, the authority ought to have passed a reasoned order that too after giving a reasonable opportunity of hearing to the petitioner. Hence ,I would like examine the maintainability of this appeal. The provisions of Section 35 (1) of CEA 1944, is reproduced below;

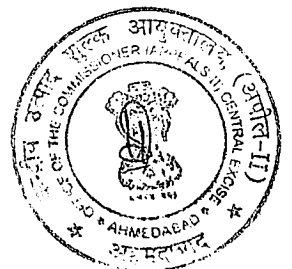
Section 35. Appeals to Commissioner (Appeals). -

(1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer, lower in rank than a Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals) hereafter in this Chapter referred to as the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order :

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

Thus, it can be seen that the wordings of the Section 35 (1) ibid, "by any decision or order", is very wide and it will encompass any communication from a proper officer, which affects rights of the parties, will become appealable. I find that the letter of superintendent dated 10th July 2014, demanding a sum of Rs. 5790448/ as penalty and another sum of Rs. 6477905/ as interest, cast a liability on the appellant and will come under the preview of section 35(1) of the Central Excise Act and the impugned letter becomes appealable. In the case of Electro Steel Casting Ltd. reported in 2009 (235) ELT 757(T) Hon'ble Tribunal has held that;

"Appealable order - Communication by jurisdictional Superintendent whether appealable - Superintendent sought to deny exemption by putting restriction - Superintendent violated instructions of Department in not issuing SCN and granting



hearing - Assessee aggrieved by said order having no option but to go to lower appellate authority for redressal of grievance Lower appellate authority right in entertaining appeal against such communication."

Further in case of BHAGWATI GASES LTD; 2008 (226) E.L.T. 468 (Tri.) Tribunal has held that

"order determining rights of parties or likely to affect rights, communication thereof cannot be said to be a communication simplicitor and is in the nature of an appealable order...."

Even in the case of Vikash J Shah reported in 2016 (334) ELT 491 (Mad), Hon'ble High court of Madras in Para 5.4 of the order, has held that

"Thus is clear that when the content of the communication was impregnated with missiles (demand), which may at any time, escape and hit against the assessee, then the assessee are entitled to challenge the same, though it is worded as "letter" and not as an "order". It was really astonishing to read such a finding by the Commissioner of Income tax (Appeals) that the appeal is not maintainable, by construing the communication as a letter and not as an order".

I find support from above judicial decisions & various other orders in this regard.

4. I find that, the Superintendent has erred in demanding interest and penalty by denying benefit of 25% of penalty in terms of the Order dated 02.02.2012 passed by the Hon'ble High Court. The impugned order passed by the lower authority is misconceived both on facts and in law and the same is not sustainable. The lower authority ought to have computed the liability of interest and penalty after adjusting the amount of eligible CENVAT Credit of Rs. 48,44,224/- as allowed vide order dated 08.01.2014 .Since the lower authority computed interest and penalty on total amount of duty without adjusting CENVAT Credit, the same is bad in law .

5. I find that, since the Commissioner vide Order-In-Original dated 19.03.2008 did not allow the adjustment of CENVAT credit against duty



liability; the Appellant challenged the same before the higher forum. The Hon'ble Tribunal and the Hon'ble High Court was pleased to allow adjustment of CENVAT credit against duty liability. Since the Order passed by the Hon'ble High Court in respect of allowing adjustment of CENVAT credit attained finality, the Superintendent ought to have computed liability of interest and penalty on net amount of duty after allowing adjustment of CENVAT Credit. This also gets support from the decision of Hon'ble High court of Madras Vikash J Shah reported in 2016 (334) ELT 491 (Mad). Hon'ble High court of Madras has held that

"Penalty and interest - No liability at all to pay the tax, as the tax payable is already available in the form of Cenvat in the hands of Department - Tribunal given a finding that the assessee ought to have been given the benefit of Cenvat credit - In absence of the Department challenging the findings of the Tribunal that there is no justification to deny Cenvat credit, the Revenue has no case and the Department is not at liberty to demand either interest or penalty - When the Central Excise Act, 1944 and the Rules framed thereunder, permit the adjustment of Cenvat credit, and when the Cenvat credit is granted, there is no outstanding duty payable and therefore, the question of payment of interest and penalty do not arise - Sections 11AB and 11AC of Central Excise Act, 1944. "

6. I find that, In the present case, the duty Due as provided under Section 11A(10) means after having adjustment the CENVAT Credit from the amount of duty. As the Appellant has deposited the due amount of duty, interest and penalty equal to 25% within 30 days from the communication of the Order, the benefit of reduction of penalty and interest ought to have been extended. I find that, since the impugned order has been passed without granting opportunity of personal hearing, the same is in violation of principles of natural justice and therefore, the same is not sustainable. The decision of the Hon'ble High court of Madras in case of Vikash J Shah reported in 2016 (334) ELT 491 (Mad), must be allowed to the appellant. I find that, the adjudicating authority has not furnished a statement showing computation of interest, the impugned order demanding interest cannot be sustained. In view of above, the impugned order dated 10-7-2014 is hereby set aside. The lower authority is directed to decide the matter after giving an opportunity of hearing to the appellant and by

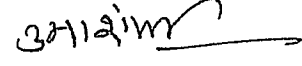


following the decision of Hon'ble High Court of Madras as discussed above.

7. In view of the foregoing discussion and findings, I set aside the impugned order, and allow the appeal filed by the appellant.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

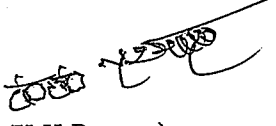
The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

Attested



(K.K.Parmar)

Superintendent (Appeals-II)
Central excise, Ahmedabad.

By Regd. Post Ad.

M/s. Prem Fabricators,
Plot No. 426, Jyoti Power,
Moraiya, Changodar,
Dist-Ahmedabad.

Copy to :

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II.
3. The Asstt. Commissioner, Central Excise, Div-IV, Ahmedabad-II
4. The Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.
5. Guard file.
6. PA file.

