



केंद्रीय कर आयुक्त (अपील)



सत्यमेव जयते

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

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रजिस्टर डाक ए.डी.द्वारा

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क फाइल संख्या (File No.): V2(32) 8/EA-2/Ahd-II/Appeals-II / 2016-17
ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-307-16-17
दिनांक (Date): 30/01/2018, जारी करने की तारीख (Date of issue): 16-2-2018
श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित
Passed by Shri Uma Shanker, Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-I), अहमदाबाद- II, आयुक्तालय द्वारा जारी
मूल आदेश सं _____ दिनांक _____ से सृजित
Arising out of Order-In-Original No. 1238/AC/16-17/Refund Dated: 11/08/2016
issued by: Assistant Commissioner., Central Excise (Div-I), Ahmedabad-II

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

M/s Asiatic Colour Chem Industries 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) (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।

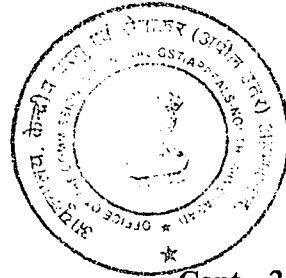
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by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

(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।

As filed



Cont...2

- (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 :-

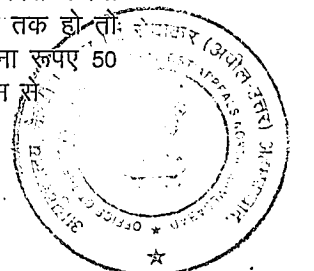
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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, अपीलो 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.

- (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।

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।

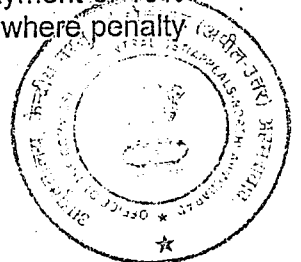
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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



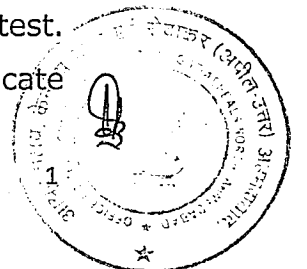
ORDER IN APPEAL

M/s. Asiatic Colour-chem Industries Ltd. (100% EOU), (*hereinafter referred to as the 'respondent'*) situated at Plot No. 306A, 1503 & 04, Phase-I, G.I.D.C., Naroda, Ahmedabad, had filed a claim for refund of Education Cess and Secondary & Higher Secondary Education Cess of Rs.12,76,840/-, being paid in excess, 3rd time for the months of July, 2008 to March, 2010. The Adjudicating Authority vide OIO No.1238/AC/16-7/Refund dt.11.08.2016, sanctioned the refund of Education Cess of Rs.8,51,226/-, and Secondary & Higher Secondary Education Cess of Rs.4,25,614/-, (totalling to Rs.12,76,840/-) to the respondent. The Department aggrieved by the said OIO, filed an appeal against the same, before me.

2. The facts of the case, in brief, are that the respondent had filed a Application for refund claiming as stated below -

"Cess & S&H paid in excess under protest. As per rule required to be paid 2 times only. It was paid 3 times. The later 1 time was paid under protest."

The grounds for claiming refund mentioned by the respondent in his application for refund, were very vague. The respondent had not submitted any documents for ascertaining the payment of the amount claimed as refund. The respondent did not appear to have followed the procedure for payment of duty under protest, as prescribed in CBEC's Excise Manual of Supplementary Instructions, 2005, and therefore the limitation period for claiming refund i.e. one year from the 'relevant date' as prescribed under Section 11B (1) of the Central Excise Act, 1944, was applicable. Also no evidence was put forth by the respondent to establish that the incidence of duty had not been passed on by the respondent to their buyers or any other person. Therefore, a Show Cause Notice was issued to the respondent, asking as to why the refund claim should not be rejected for one or more reasons mentioned above, and if it is sanctioned, then why it should not be credited to the Consumer Welfare Fund under the relevant provisions. The respondent in their defence stated that a dispute was going on which was finally settled by the decision of Sarla Performance Fibres Ltd. v/s. CE Vapi which was also relied in Claris Life Sciences Ltd., that for DTA clearances, the calculation of duty applicable will not include third time payment of Education Cess and Secondary & Higher Secondary Education Cess. They also indicated that the refund is *suo moto* admissible in terms of the order passed by the Commissioner (Appeals) and that all payments were made under protest. The respondent further also submitted a Chartered Accountant's certificate



that the amount of Rs. 12,76,876/-, paid by the respondent has not been passed on to their buyers or any other person. The Adjudicating Authority vide OIO No. 1238/AC/16-17/Refund dt.11.08.2016, sanctioned the refund of Education Cess of Rs.8,51,226/-, and Secondary & Higher Secondary Education Cess of Rs.4,25,614/-, (totalling to Rs.12,76,840/-), to the Respondent.

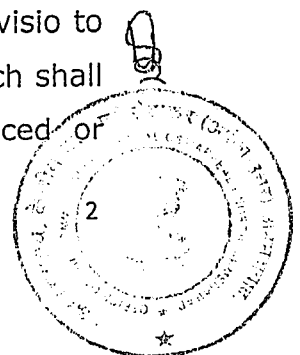
3. The Department aggrieved by the impugned order, filed an appeal before me on the grounds that (i) the adjudicating authority had erred in sanctioning the refund claim on the basis of the Commissioner (Appeal)'s order, which simply relies on the decision of the Tribunal in the case of Sarla Performance Fibres Ltd. and M/s. Claris Life Sciences Ltd. & others; (ii) In a similar matter in the case of M/s. Kemrock Industries and Exports Ltd., the Tribunal had ruled in favour of the respondent, however the department filed an appeal against the said order, which has been admitted by the Supreme Court and so the levy of Education Cess and Secondary & Higher Secondary Education Cess on the aggregate Customs duty is sub-judice; and (iii) the adjudicating authority had erred in sanctioning refund of the Education Cess under Section 93 of the Finance Act, 2004, and Secondary & Higher Secondary Education Cess under Section 138 of the Finance Act, 2007, which was rightly payable in terms of the statutory provisions and correctly paid by the respondent.

4. During the personal hearing, Shri Ashwani Saini, Commercial Manager of the respondent, appeared before me and explained the case on 20.12.2017. The respondent also submitted an additional submission on 3.01.2018.

5. I have carefully gone through the facts of the case on record, grounds of appeal in the Appeal Memorandum, written submissions & cross-objections and oral submissions made by the respondent.

6. The question to be decided is as to whether (i) the Adjudicating Authority had erred in sanctioning the refund of Education Cess of Rs.12,76,840/-, vide the impugned OIO dt. 11.08.2016.

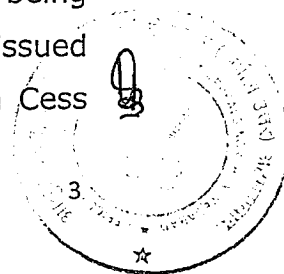
7. The refund claim of the respondent for Rs. 12,76,840/-, is for the refund of Education Cess and Secondary & Higher Secondary Education Cess calculated third time (popularly known as third time Cess) on the Basic Excise duty payable under the Proviso (ii) to Section 3 of the Central Excise Act, 1944, for the period from July, 2008 to March, 2010. As per proviso to Section 3(1) of the Central Excise Act, 1944, the duties of excise which shall be levied and collected on any excisable goods which are produced of



manufactured by a 100% EOU and brought to any other place in India, shall be an amount equal to the aggregate of the duties of Customs which would be leviable under the Customs Act, 1962, on like goods produced or manufactured outside India, if imported in to India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provisions of the Central Excise Act, 1944, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975. The illustration showing the various components of duties that make the aggregate of duties to customs that would be leviable on like goods if imported in to india, when the value of the goods is Rs. 100/-, is indicated below :

Assessable Value	=	Rs.100
Customs duty @ 7.5%	=	Rs.7.5
(1) 50% of 7.5	=	Rs.3.75
Assessable Value for purpose of CVD	=	Rs.103.75
(2) CVD @ 10%	=	Rs.10.38
(3) 2% Edu. Cess on CVD	=	Rs. 0.21
(4) 1% Sec.& Hr. Sec. Edu. Cess	=	Rs. 0.10
(5) Total (1) to (4)	=	Rs.14.44
(6) 2% Customs Edu. Cess on (5)	=	Rs. 0.29
(7) 1% Sec.& Hr.Sec. Ed.Cess on(5)	=	Rs. 0.14
(8) Total duty payable (5)+(6)+(7)	=	Rs.14.87.

Therefore, if the assessable value of the goods sold in DTA was Rs.100/-, then the amount of the aggregate duties of customs for the purpose of Section 3(1) of the Central Excise Act, 1944, would be Rs.14.87. So, Rs.14.87 in this case would be the Basic Excise duties, despite the fact that the components of Customs/Central Excise Education Cess and Secondary & Higher Secondary Education Cess are included therein. As per clause 2 of Section 93 of the Finance (No.2) Act, 2004, the Education Cess on excisable goods, and as per clause 138 of the Finance Act, 2007, the Secondary and Higher Secondary Education Cess, shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944. During the scrutiny of the ER-2 returns filed by the respondent during the period from February, 2009 to May, 2009, it was noticed that the respondent had paid the Education Cess and Secondary & Higher Secondary Education Cess leviable and payable on the duties of excise, under protest by making endorsements in their PLA. The payment of Education Cess and Secondary & Higher Secondary Education Cess by the respondent under protest being conditional payment of duty, a Show Cause Notice dt.12.02.2010, was issued to the respondent to demand, confirm and appropriate the Education Cess



and Secondary & Higher Secondary Education Cess. On similar issue, six different Show Cause Notices for subsequent periods were also issued to the respondent. The Adjudicating Authority vide OIO No. 15 to 21/AC/2012-Demand dt. 28.12.2012, decided all the seven SCN's, and ordered recovery of duty and appropriation of the duty subsequently paid by the respondent. The respondent filed an appeal against the OIO dt.28.12.2012, before the Commissioner (Appeals), Ahmedabad. The Commissioner (Appeal) vide OIA dt. 08.07.2013, covering the period February, 2009 to December, 2011, set aside the OIO dt.28.12.2012, and allowed the appeal in favour of the respondent. The Department, filed an appeal against the OIA dt. 08.07.2013, which was pending and there was no stay order against the OIA dt.08.07.2013. As there was no stay against the OIA dt.08.07.2013, and the Adjudicating Authority was content that there was no unjust enrichment involved in the matter, he sanctioned the refund claim of Rs.12,76,840/-, vide the impugned order dt. 11.08.2016.

8. I feel the Adjudicating Authority has followed judicial discipline by allowing the refund of 3rd time Cess on the basis of judgements in assessee's own cases as well as other cases. The Adjudicating Authority has relied on the diktats of the CBEC's Instruction of F. No. 201/01/2014-CX.6 DT.26.06.2014, Instruction of F.No. 276/186/2015-CX.8A dt.1.06.2015, and Circular No. 572/9/2001-CX dt.22.02.2001, wherein it has been inter alia prescribed to the effect that no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. I therefore find no justification to interfere with the impugned order dt.11.08.2016. I uphold the impugned order and dismiss the department's appeal.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
9. The appeal filed by the department, stands disposed off in above terms.

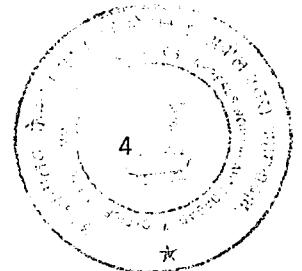
उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

ATTESTED

(Signature)
(R.R. NATHAN)
SUPERINTENDENT,
CENTRAL TAX APPEALS, AHMEDABAD.



To,

M/s. Asiatic Colour Chem Industries Ltd. (100% EOU),
Plot No. 306a, 1503 & 04, Phase-I, G.I.D.C.,
Naroda,
Ahmedabad-382330.

Copy to:

- 1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
- 2) The Commissioner, Central Tax, Ahmedabad-North.
- 3) The Dy./Asst. Commissioner, Division-I, Central Tax, GST, Ahmedabad (North), Ahmedabad.
- 4) The Asst. Commissioner(System), Central Tax, Hqrs., Ahmedabad (North).
- 5) Guard File.
- 6) P.A. File.

