



• आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क \*  
सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,  
पोलिटेकनिक के पास, आमबाबाडि,  
अहमदाबाद - 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(36)/36/Ahd-I/2016-17  
Stay Appl.No. NA/2016-17

4832-4836

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-060-2016-17  
दिनांक 25.01.2017 जारी करने की तारीख Date of Issue 02/02/2017

श्री उमा शंकर आयुक्त (अपील-I) द्वारा पारित  
Passed by Shri. Uma Shanker, Commissioner (Appeal-I)

ग Joint Commissioner, Div-II केंद्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं  
18/CX-I Ahmd/JC/MK/2016 दिनांक: 3/21/2016, से सृजित

Arising out of Order-in-Original No. 18/CX-I Ahmd/JC/MK/2016 दिनांक: 3/21/2016 issued by Joint  
Commissioner, Div-II Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s. Jainik Industries  
Ahmedabad

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) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक  
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।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit  
Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New  
Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first  
proviso to sub-section (1) of Section-35 ibid :

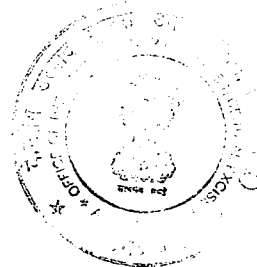
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे  
भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के  
दौरान हुई हो।

(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.

(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।

... 2 ...



(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.

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.

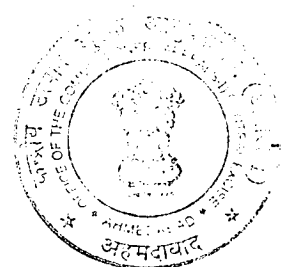
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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.



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 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, provided that the pre-deposit amount shall not exceed Rs.10 Crores. 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 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

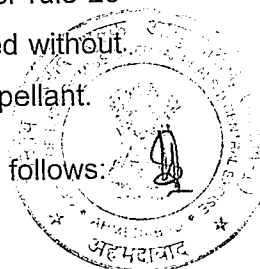
M/s Jainik Industries, Plot No.605/A, Phase-IV, G.I.D.C., Vatva, Ahmedabad (hereinafter referred to as 'the appellant') has preferred the present appeal, being aggrieved by the Order-in-Original No. 18/CX-I Ahmd/JC/MK/2016 dated 21/03/2016 (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Central Excise, Ahmedabad-I (hereinafter referred to as 'the adjudicating authority'). The appellant is holding Central Excise registration No.AACFJ2151MXM001 for manufacture of excisable goods falling under Chapter 29 of the first schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as CETA, 1985).

2. During the course of internal audit conducted by the officers of Audit wing of Central Excise, Ahmedabad-I for the period March-2012 to February-2014, it was noticed that the appellant had not discharged Central Excise duty on the by-product 'Spent Sulphuric Acid' classifiable under tariff heading No.2807 of CETA, 1985, cleared to M/s Novel Spent Acid Management. As per the submissions of the appellant in their letter dated 16/06/2014 and as per the depositions made by Shri Bipinbhai Dahyabhai Joshi, Partner, the impugned product was waste water generated during the manufacture of Dye intermediates and it was required to be sent to M/s Novel Spent Acid Management to be neutralized as per the norms of the Pollution Control Board before the same could be discharged as waste. The Central Excise duty payable on the clearance of 'Spent Sulphuric Acid' during the period 01/03/2012 to 31/05/2014 was worked out to be **Rs.2,77,442/-** and for the earlier period of April-2010 to February-2012, the duty liability was worked out to be **Rs.2,63,400/-**.

3. A show cause notice F.No.V.29/15-75/Jainik/ADC/OA-I/2015 dated 07/05/2015 [SCN] was issued to the appellant demanding Central Excise duty of Rs.1,19,245/- for the period from 01/04/2010 to 07/04/2011 under erstwhile proviso to section 11A(1) of CEA, 1944 and demanding Rs.4,21,597/- for the period from 08/04/2011 to 31/05/2014 under section 11A(5) of CEA, 1944 [total demand Rs.5,40,842/-]; proposing penalty to be imposed on the appellant under erstwhile section 11AC of CEA, 1944 read with Rule 25 of CER, 2002 for the period up to 07/04/2011 and under section 11AC(1)(b) ibid read with rule 25 ibid for the period from 08/04/2011 to 31/05/2014; demanding interest under section 11AB of CEA, 1944 for the period 01/04/2010 to 07/04/2011 and under section 11AA ibid for the period 08/04/2011 to 31/05/2014 and proposing confiscation of excisable goods valued at Rs.43,88,618/- under Rule 25 of CER, 2002.

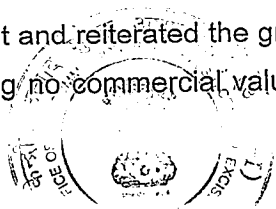
4. The SCN was adjudicated confirming the demand of Central Excise duty along with interest. The impugned goods are held liable to confiscation and a penalty of Rs.1,19,245/- under rule 25 of CER, 2002 read with section 11AC of CEA, 1944 for clearances from 01/04/2010 to 07/04/2011 and penalty of Rs.2,10,799/- under rule 25 of CER, 2002 read with section 11AC(1)(c) of CEA, 1944 for the goods cleared without payment of duty during 08/04/2011 to 31/05/2014 has been imposed on the appellant.

5. The main grounds invoked by the appellant in the present appeal are as follows:



- The appellant in their letter dated 16/06/2015 had categorically stated that what was sent to M/s Novel Spent Acid Management was not Spent Sulphuric Acid but was industrial waste cleared as part of waste management in terms of law provisions imposed by the Pollution Control Board. Further, the appellant was not the only unit who was sending/clearing such waste to M/s Novel Spent Acid Management, who have a common effluent treatment plant and they provide service of effluent treatment to many industries and collect charges for the same.
- The adjudicating authority has simply turned down the argument of the appellant by relying on the decisions in the cases of *Keti Chemicals – 1999 (113) ELT 689* and *Nirma Chemical Works Ltd. – 2002 (146) ELT 485*, without appreciating the fact that both M/s Keti Chemicals and M/s Nirma Chemicals are engaged in the manufacture of soap/detergent products and the quality of Spent Sulphuric Acid generated is distinct in nature whereas the appellant is engaged in manufacture of Dyes Intermediates where the emergence of spent acid is unavoidable/inevitable and the quality of such Spent Sulphuric Acid emerging is totally different as the same cannot be used further in any other industry.
- It is settled law that goods which are not marketable cannot be subjected to levy of excise duty and the appellant would like to rely upon the following decisions in their support:
- *TITAWI SUGAR COMPLEX – 2003 (152) ELT 21 (SC)*
  - *VIKRANT TYRES LTD. – 2004 (171) ELT 23*
  - *UTTAM STEEL LTD – 2005 (190) ELT 33*
  - *MADRAS ALUMINIUM CO. LTD. – 2006 (193) ELT 98*
  - *LEE PHARMA PVT. LTD. – 2010 (252) ELT 557*
  - *DHAKAD METAL PVT. LTD. – 2010 (257) ELT 535*
  - *MAGNUM VENTURES – 2014 (303) ELT 226*
  - *MARKFED VANASPATI & ALLIED INDUS. – 2000 (116) ELT 204*
- The spent sulphuric acid was generated during manufacturing process as waste water / industrial waste that had no further use or commercial value and was required to be drained only after treatment in terms of the pollution control regulations. The adjudicating authority has failed to understand this contention. The appellant had not sold the spent acid for any value or consideration but they had rather paid service charges to M/s Novel Spent Acid Management for treatment of such spent acid. Even if the spent acid was sold for some purpose, it does not make the goods excisable as held in the case of *M/s CHEMPLAST SANMAR LTD. – 2015 (317) ELT 495*, distinguishing the decision in the case of *M/s KETI CHEMICALS* relied upon by the adjudicating authority. The adjudicating authority has surprisingly justified the action of the Audit offices in adopting the value of the spent acid as Rs.0.50 per kg. Neither any market survey has been conducted nor any data has been disclosed for arriving at the value of spent acid and the impugned order is not tenable and is required to be set aside.
- The appellant is registered with Central Excise since 1995 and the records were comprehensively audited on number of occasions and spent acid generated even in those periods was cleared to M/s Novel Spent Acid Management. Therefore, it cannot be said that the facts were suppressed with intent to evade payment of any duty. When the element of intent is absent, extended period of limitation cannot be invoked and the demand prior to 01/04/2013 was hit by law of limitation.

6. Personal hearing in the appeal was held on 04/01/2017. Shri J.T. Vyas, Advocate appeared on behalf of the appellant and reiterated the grounds of appeal. He submitted that it was hazardous waste having no commercial value and was disposed off as per

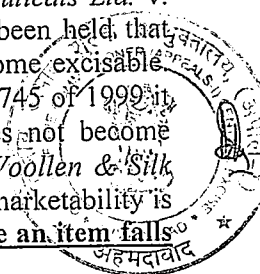


Pollution control regulations. He pointed out explanation to section 2(d) to show that Sulphuric acid (spent) is not goods.

7. I have carefully gone through the facts of the case on records and submissions made by the appellant. The issue for decision before me is whether 'Spent Sulphuric Acid' attracts Central Excise duty by virtue of being an excisable product. The adjudicating authority has relied on the decision of Hon'ble Larger Bench of the Tribunal in the case of *COLLECTOR OF C. EX., AHMEDABAD Versus KETI CHEMICALS - 1999 (113) E.L.T. 689 (Tribunal)* and affirmed by the Hon'ble Supreme Court in the case of *COLLECTOR OF C. EX., AHMEDABAD Versus NIRMA CHEMICAL WORKS LTD.- 2002 (146) E.L.T. 485 (S.C.)* to confirm the demand and impose penalty. The appellant has disputed the relevance of these case laws on the ground that M/s KETI CHEMICALS and M/s NIRMA CHEMICAL WORKS LTD., were manufacturers of soap/detergent products and the by-product 'Spent Sulphuric Acid' in those cases were distinct from the 'Spent Sulphuric Acid' emerging as non-marketable waste in the present case in the manufacture of Dyes Intermediates.

8. On studying the decision in the case of *COLLECTOR OF C. EX., AHMEDABAD Versus KETI CHEMICALS - 1999 (113) E.L.T. 689 (Tribunal)*, it is clear that Hon'ble Larger Bench of CESTAT have exhaustively dealt with 'Spent Sulphuric Acid', discussing its status as a by-product emerging during the process of manufacture with reference to Explanatory notes to HSN; its classification under chapter 28 of CETA, 1985; how it is distinct from non-excisable waste and scrap akin to dross and skimmings and how it attracts Central Excise duty as excisable goods. The ratio of the Hon'ble Tribunal Larger Bench decision in the case of *COLLECTOR OF C. EX., AHMEDABAD Versus KETI CHEMICALS - 1999 (113) E.L.T. 689 (Tribunal)* as affirmed by the Hon'ble Supreme Court in the case of *COLLECTOR OF C. EX., AHMEDABAD Versus NIRMA CHEMICAL WORKS LTD.- 2002 (146) E.L.T. 485 (S.C.)* has been applied by the adjudicating authority in the impugned order without any findings on the 'Spent Sulphuric Acid' to show that it emerges as a result of manufacture and is not a waste as claimed by the appellant. The said ratio can apply only after the twin test of manufacture and marketability of 'Spent Sulphuric Acid' is established in the present case. In the case of *COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH-I vs. MARKFED VANASPATI & ALLIED INDUSTRIES - 2003 (153) E.L.T. 491 (S.C.)*, Hon'ble Supreme Court has held as follows:

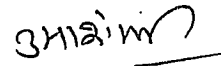
"6. However, it appears to us that the observation made in this authority are "per incuram". In so observing, the decision of a Larger Bench of this Court in the case of *Collector of Central Excise, Indore v. Universal Cable Ltd.* reported in [1995 Supp (2) SCC 465], has not been noted or considered. In this case an argument that a good become excisable because it is covered by Tariff Entry, has been negated. In the case of *B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise* reported in [1995 Supp (3) SCC 1] it has also been held that merely because there is a change in the Tariff Item the goods does not become excisable. Subsequently in a judgment dated 13th February, 2003 in Civil Appeal No. 6745 of 1999 it has been held that merely because an item falls in a Tariff Entry, it does not become excisable unless there is manufacture and the goods is marketable. In *Lal Woollen & Silk Mills'* case (supra) it has not been held that the twin test of manufacture and marketability is not to apply. It is not possible to accept the contention that merely because an item falls



in a Tariff Entry it must be deemed that there is manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is on the revenue. In this case no new evidence is placed to show that there is manufacture. "Spent earth" was "earth" on which duty has been paid. It remains earth even after the processing. Thus if duty was to be levied on it again, it would amount to levying double duty on the same product."

In light of the above, I find that the confirmation of demand in the impugned order is not sustainable unless it is established that the impugned product emerges as a by-product during the course of manufacture and that the same is marketable. I remand that case back to the adjudicating authority to carry out verification of the manufacturing process as well as other aspects such as marketability and value and give specific findings as to whether the 'Spent Sulphuric Acid' in the present case is a marketable by-product emerging during the process of manufacture or it is non-marketable waste and thereafter determine the demand of duty, interest and penalties accordingly. The appellant must be given adequate opportunity to present its case in accordance with the principles of natural justice.

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




(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 5/01/2017

Attested

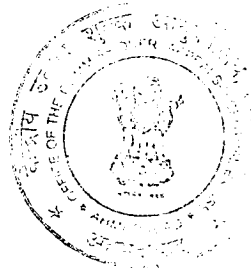
  
(K. P. Jacob)  
Superintendent (Appeals-I)  
Central Excise, Ahmedabad.

By R.P.A.D.

To  
M/s Jainik Industries,  
Plot No. 605/A, Phase-IV, G.I.D.C., Vatva  
Ahmedabad.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Principal Commissioner of Central Excise, Ahmedabad-I.
3. The Additional Commissioner, Central Excise (System), Ahmedabad-I.
4. The Deputy Commissioner, Service Tax Division-IV, Ahmedabad-I.
5. Guard File.
6. P.A.



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