



- आयुक्तालय (अपील-1) केंद्रीय उत्पादन शुल्क \*  
सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,  
पोलिटैकनिक के पास, आमबाबाडि,  
अहमदाबाद - 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(39)/34/Ahd-I/2016-17 / 651-655  
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-065-2016-17  
दिनांक 27.02.2017 जारी करने की तारीख Date of Issue 02.03.2017

श्री उमा शंकर आयुक्त (अपील-1) द्वारा पारित  
Passed by Shri. Uma Shanker, Commissioner (Appeal-I)

ग Asst. Commissioner, Div-IV केंद्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं  
18/Assistant Commissioner/15-16 दिनांक: 23/03/2016, से सृजित

Arising out of Order-in-Original No. 18/Assistant Commissioner/15-16 दिनांक: 23/03/2016  
issued by Asst. Commissioner, Div-IV Central Excise, Ahmedabad-I

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

M/s. Dhariyal Polymers Pvt Ltd  
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती 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.

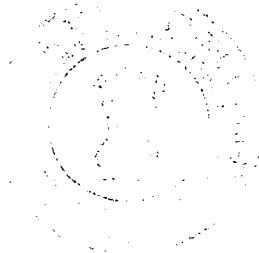
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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।

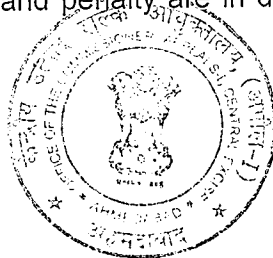
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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

This appeal has been filed by M/s. Dhariyal Polymers Private Limited, 8/2 B, 8/3, Narol Village, Behind Gopi Textile, Narol Isanpur Road, Ahmedabad- 382 405 [for short - 'appellant'] against OIO No. 19/AC/15-Ref dated 23.3.2016 [for short - 'adjudicating authority'] issued by the Assistant Commissioner, Central Excise, Division IV, Ahmedabad-I Commissionerate.

2. Briefly stated, the facts are that the respondent filed a refund claim on 12.09.2013 [resubmitted on 24.2.2014] for Rs. 2,59,66,095/- towards duty paid on goods cleared to M/s. ONGC under International Competitive Bidding[ICB]. Incidentally, goods cleared towards ICB are exempted from duty vide notification No. 12/2012-Central Excise [Sl. No. 336] dated 17.3.2012.

3. A show cause notice dated 28.1.2014 came to be issued to the respondent, asking him to show cause as to why the refund, filed beyond the prescribed time, should not be rejected on limitation. This show cause notice was adjudicated vide OIO No. 13/AC/2013-Ref dated 28.3.2014, wherein the then adjudicating authority, rejected the refund on limitation. Aggrieved, the respondent approached the Commissioner(A) who vide his OIA No. AHM-EXCUS-001-APP-026-2014-15 dated 1.7.2014, set aside the OIO dated 7.4.2014 and allowed the appeal, with consequential relief. This OIA was reviewed by the Committee of Commissioners, and an appeal was preferred before the Hon'ble CESTAT, who vide its order No. A/12125/2014 dated 1.12.2014, remanded the case to the original adjudicating authority, to reconsider the issue afresh.

4. Based on the directions of the Hon'ble Tribunal, the adjudicating authority has passed the aforementioned impugned order dated 23.3.2016, wherein he has rejected the refund. It is against this rejection of refund that the appellant has filed this appeal raising the following grounds:

- that at no stage of the proceedings the refund application was proposed to be rejected on the ground that the jurisdiction to decide the same was not with the Central Excise authority but was with DGFT;
- that the only ground proposed in the show cause notice was that the refund application was barred by time which ground was not upheld vide OIA dated 1.7.2014;
- the appellant had established that the said duty amount was not debited to expenses and was accounted as receivables in the books of accounts, the adjudicating authority should have held that the appellant had not passed on the burden of the said duty to the buyer;
- the Delhi High Court vide its decisions in Alston [2015(319) ELT 434 and 2015(325) ELT 72] has not held that the refund application should not be filed with the Central Excise authority and that the same has to be filed with DGFT authority; the High Court has merely remanded the matter to DGFT.

5. Personal hearing was granted on 9.01.2017. Shri J.C.Patel, and Shri Rahul Gajeria, Advocates, along with Shri Yogesh Dhariyal, CEO, appeared on behalf of the

appellant and reiterated the grounds raised in the appeal. Further they alternatively stated that they are entitled for re-credit.

6. I have gone through the facts of the case, the appellant's grounds of appeal, and submissions made during the course of personal hearing. The issue to be decided are (i) whether the adjudicating authority erred in rejecting the refund to the appellant; (ii) whether they are entitled to re-credit if refund is not allowed.

7. The appellant's primary contention is that the refund application has been rejected with a direction that the claim be resubmitted to DGFT, which was not a ground in the show cause notice. I find that that the adjudicating authority, has based on the two judgements of the Hon'ble High Court of Delhi, only advised that the claim be resubmitted to DGFT.

8. I have already decided the issue vide my OIA No. AHM-EXCUS-001-APP-048-2016-17 dated 23.12.2016 in the case of M/s. Dhariyal Chemical. Since the issue is same, the operative part is reproduced below :

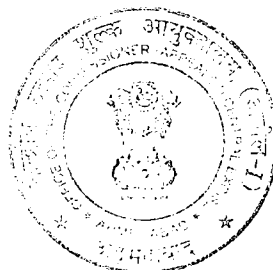
"9. However, the issue needs a critical examination in view of recent decision of Hon'ble High Court of Bombayt in the case of Sandoz Private Limited [reported i 2016(341) ELT 22 (Bom)]. The respondent has contended that they were paying duty in accordance with the practice which was then prevailing i.e. of paying the duty and thereafter claiming refund from DGFT. However, it is on record that subsequently, DGFT rejected their refund claim in view of policy circular No. 16(RE-2012/2009-14) dated 15.3.2013. It was then that the respondent approached the department by filing the refund claim to avail refund of duty paid towards clearance made towards ICB. To understand the issue in depth, I would like to reproduce para 3 of DGFT policy circular No. 16(RE-2012/2009-14) dated 15.3.2013, which states as follows:

"It has come to the notice of this Directorate that some RAs of DGFT and the Offices of Development Commissioners of SEZ are providing refund of TED even in those cases where supplies of goods, under deemed exports, is ab-initio exempted.

2. There are three categories of supplies where supply of goods, under deemed exports, are ab- initio exempted from payment of excise duties. These are as follows:

- (i) Supply of goods under Invalidation letter issued against Advance Authorisation [Para 8.3© of FTP];
- (ii) Supply of goods under ICB [Para 8.3(c) of FTP]; and
- (iii) Supply of goods to EOUs [Para 6.11(c) (ii) of FTP]

3. Prudent financial management and adherence to discipline of budget would be compromised if refund is provided, in cases, where exemption is mandated. In fact, in such cases the relevant taxes should not have been collected to begin with. And if, there has been an error/oversight committed, then the agency collecting the tax would refund it, rather than seeking reimbursement from another agency. Accordingly, it is clarified that in respect of supplies, as stated at Para 2 above, no refund of TED should be provided by RAs of DGFT/Office of Development Commissioners, because such supplies are ab-initio exempted from payment of excise duty."



The scheme of refund of Terminal excise duty in respect of clearances against ICB was earlier allowed by the DGFT. Subsequently, DGFT in its wisdom, stopped it and the aforementioned policy circular came to be issued. The respondent, under the erstwhile scheme was availing the benefit by clearing goods under payment of duty and thereafter claiming duty by way of refund. When the DGFT clarified on the scheme of refund, which their office was granting and stopped it, the respondent approached the department, for the refund. However, nothing has been produced to show that CBEC has issued any notification granting refund in cases where clearances are made to ICB, on payment of duty. As far as CBEC is concerned, I find that there is an exemption in place, which is clear and final. The respondent could either avail the benefit of the exemption or pay duty on his own volition. The respondent chose the latter. The respondent thereafter, has tried to side track the exemption notification, by firstly paying duty and thereafter claiming refund of the same. By no stretch of imagination can one say that this is what was intended by the Government vide notification No. 12/2012 dated 17.3.2012. In-fact DGFT, is emphatically clear that the department can only be approached in case there is error/oversight committed leading to payment of taxes. The adjudicating authority in the impugned order dated 3.7.2015 has clearly held that the payment of duty on clearance against ICB cannot be termed as collected by error/oversight and that it was a matter of practice. This raises a larger question: Can benefit of a notification be availed, by way of refund?. The clear cut answer is No. Exemptions are to be availed as is provided for in the notification and not by circumventing it. This also answers the respondent's argument that since no duty was to be paid, the refund ought to have been granted. It is the respondent's own argument that the exemption was not absolute. Therefore, now to contend that since duty was paid, the department should refund it is a futile argument, since the respondent on his own free will chose to pay duty. In view of the foregoing, it is held that the refund allowed by the adjudicating authority vide the impugned OIO, was not correct.

10. The Hon'ble High Court of Bombay, in Writ Petition No. 2927/2015 in the case of *M/s. Sandoz Private Limited v/s UOI*, [reported at 2016(341)ELT 22(Bom)] while considering a similar matter in respect of refund of TED filed by an EOU, has held as follows:

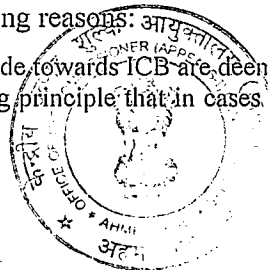
41. Once there was a clear stipulation in the policy itself, then, all that the circular does is to clarify this obvious position. If there was no obligation to pay duty, then, there is no question of claiming a refund in the manner done. If this is what has been held and appears to be the essential finding, then, that is not in any manner contrary to the mandate of the provisions and particularly of section 5 of the FTDR Act. This is not a case where anything is being stated and for the first time so as to term it as an amendment to the policy and, therefore, would apply prospectively. Insofar as the subject issue is concerned, all that the respondents have done is to clarify that para 8.3(c) and para 6.2(b) and 6.11(c)(ii) of the FTP read harmoniously and together imply that no refund on supplies under para 8.3 is admissible. When there is an exemption, then, this refund claim was rightly disallowed. We do not think that any individual decision and in the case of a distinct assessee would, therefore, be of assistance to the present petitioners.

42. Though in the past such claims have been granted does not mean that the practice or the past orders should govern the issue necessarily. When the petitioners themselves were aware of a policy circular and sought to urge that it would not be governing the controversy and for the period for which refund is claimed, then, it is clear that they were required to overcome the said stipulations and the circular itself. That having found rightly to be clarifying the obvious position, we have no hesitation in concluding that the refund applications were properly and correctly disallowed.

[emphasis supplied]

9. In view of the foregoing, I had set aside the original order granting refund in the aforementioned case. Hence, I am of the firm view that no cash refund can be allowed in such cases. However, I find that the appellant has raised a new ground in this appeal during the course of personal hearing. He has sought re-credit, in respect of the duty which he has already paid, despite the exemption granted in respect of clearances made towards International Competitive Bidding. I find merit in the request for re-credit so made, on account of the following reasons:

- [a] clearances made towards ICB are deemed exports as per chapter 8 of FTP 2009-2014;
- [b] the underlying principle that in cases of exports it is the goods which are to be exported and not the taxes;



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[c] that the net effect would remain the same since the appellant has paid duty, which if re-credited would not lead to a situation where he gets benefitted by way of en-cashing the credit lying in his account;

[d] the encashment of CENVAT credit through refund, which might have prompted payment of duty at the first place inspite of the exemption, stands negated.

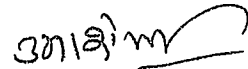
10. However, even for re-credit, the appellant has to prove that he had not passed on the incidence of duty. Since the appellant had only stated that [a] M/s. ONGC had not availed the CENVAT Credit and; [b] that the amount was shown as 'receivables' in his books of account and as he had not submitted the copy of balance sheet, accounts, chartered accountants certificate, the appellant was asked to immediately provide the same. The appellant vide his letter dated 11.1.2017, [received on 1.2.2017] certified that he has not received any amount of duty from M/s. ONGC. He also attached [a] copies of invoices of clearances made under ICB to M/s. ONGC during the period from December 2010 to April 2012; [b] copy of terminal excise receivable account for the period 1.4.2014 to 26.3.2015; and [c] copy of the certificate issued by M/s. Baheti Bhadada and Associates, Chartered Accountant.

10.1. On going through the invoices it is seen that though Central Excise duty and education cess are mentioned in the invoices, the net amount, excludes the central excise duty and the education cess. Further, Shri Krutesh Patel, Partner in M/s. Baheti Bhadada and Associates, Chartered Accountant, has certified that the appellant has *receivable claims* of Rs. 2,59,66,095/- of terminal excise duty; that they had verified the concerned ledger and the same was shown as receivables from revenue authorities in *Note 12 Short Term Loans and Advances* of balance sheet as on 31<sup>st</sup> March 2014.

11. In view of the foregoing, I order re-credit of the amount of Rs. 2,59,66,095/-, into the CENVAT account of the appellant as I am satisfied that the claim made by the appellant is not hit by the bar of unjust enrichment in respect of the clearances made to M/s. ONGC.

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

12. The appeal filed by the appellant stands disposed of in above terms.

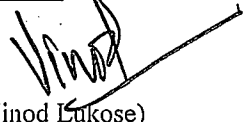


(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 27/2/2017

Attested

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



BY RPAD.

To,

M/s. Dhariyal Polymers Private Limited,  
8/2 B, 8/3, Narol Village,  
Behind Gopi Textile, Narol Isanpur Road,  
Ahmedabad- 382 405

Copy to:-

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

