



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

☎ : 079-26305065

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)/101/Ahd-I/2016-17
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-028-2017-18
दिनांक 24.07.2017 जारी करने की तारीख Date of Issue 8/8/17

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

ग Asstt. Commissioner, Div-II केन्द्रीय कर, Ahmedabad-I द्वारा जारी मूल आदेश सं
03/AC/DIV-II/REF/2016-17 दिनांक: 10/11/2016, से सृजित

Arising out of Order-in-Original No 03/AC/DIV-II/REF/2016-17 दिनांक: 10/11/2016 issued by
Asstt. Commissioner, Div-II, Central Tax, Ahmedabad-I

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

M/s Anu Udyog
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) केन्द्रीय 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, 4th 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 :

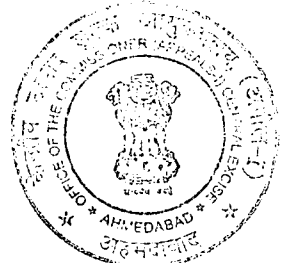
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे
भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के
दौरान हुई हो।

(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 प्रबंध 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 टीआइ-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.

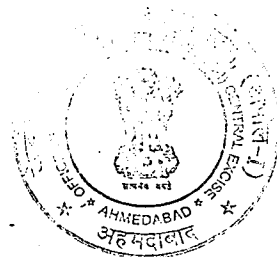
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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) 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

(a) 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.



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।

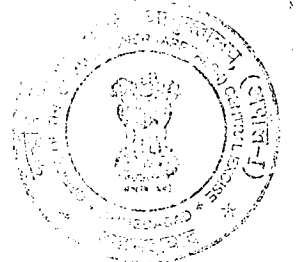
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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



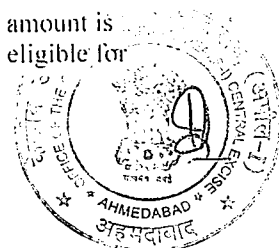
ORDER-IN-APPEAL

M/s. Anu Udyog, Plot No. 1420, Phase-III, Va:wa, GIDC, Ahmedabad 380 052, [for short - 'appellant'] has filed this appeal against OIO No. 3/AC/Div II/Ref/2016-17 dated 10.11.2016 passed by the Assistant Commissioner, Central Excise, Division II, Ahmedabad [for short - 'adjudicating authority']. The appeal was received in the Appeal section on 4.1.2017.

2. Briefly, the facts are that the appellant filed a refund claim on 22.3.2013, claiming refund of Rs. 7,75,590/- in respect of goods viz 'MS Vessel' and 'MS Storage tanks' cleared on payment of duty vide two invoices to M/s. Nandan Exim Limited. The Central Excise duty was mistakenly paid by the appellant since the goods were supplied under Status Holder Incentive Scrip (SHIS) Scheme issued under notification No. 33/2012-CE dated 9.7.2012. A show cause notice dated 26.6.2013 was issued to the appellant *inter alia* alleging that the appellant failed to follow the condition prescribed in the notification supra; that the scrip was not produced before the jurisdictional officer for the purpose of making suitable endorsement on the reverse side; that the copy of the ER-3 returns did not depict that they had claimed any exemption against the clearance of goods; that instead the said clearance was shown to have been done under payment of full duty. The notice was adjudicated vide OIO no. 2/DC/Ref/2013 dated 30.10.2013, wherein AC, Central Excise, Division II, Ahmedabad-I held that the SHIS scrip was presented for endorsement; that the conditions of notification *ibid*, were fulfilled. On the averment of the appellant that since the original scrip was endorsed and as duty was paid twice via debit from the scrip as well as their RG 23 debit/PLA, they were eligible for refund of duty, he held that since the appellant had charged and collected the duty from the scrip holder, he ordered crediting of the amount into the Consumer Welfare Fund by adhering to the doctrine of unjust enrichment. Feeling aggrieved, the appellant filed an appeal which was decided by the Commissioner(A) vide his OIA No. AHM-EXCUS-001-APP-64-13-14 dated 31.12.2013, wherein he remanded back the matter to the adjudicating authority to reconsider the issue afresh. Department thereafter, feeling aggrieved approached the Hon'ble Tribunal but subsequently withdrew the appeal in view of Board's circular no. 390/Miscellaneous/163/2011 dated 17.8.2011. Thereafter, the adjudicating authority vide his impugned OIO, dated 10.11.2016, supra, has again credited the amount into Consumer Welfare Fund.

3. It is against the impugned OIO dated 10.11.2016, that the appellant feeling aggrieved, has filed this appeal on the grounds that:

- (a) the adjudicating authority has accepted the fact that the appellant has already paid duty from PLA which was not required to have been paid, as the said clearances were under SHIS;
- (b) that documents showing payment of duty is made by debit in PLA and amount is not recovered from buyer or any other person in any manner; that they are eligible for refund claimed;



(c) that the claimant has also produced their ledger account favouring M/s. Nandan Exim Limited and certificates issued by M/s Nandan Exim certifying that no Central Excise duty has been paid by them towards invoices no. 28/6.10.2012 and 29/10.10.2012; that they have also enclosed certificate of a CA dated 16.12.2013 which certifies that no central excise duty has been paid by M/s. Nandan Exim Limited against the aforementioned two invoices;

(d) that the name of M/s. Nandan Exim Limited was changed to M/s. Nandan Denim Limited w.e.f. 3.9.2013;

(e) that except for the invoices nos. 28 and 29, they have no other transaction with the said M/s. Nandan Denim Limited [earlier known as M/s. Nandan Exim Limited];

(f) that the appellant has not passed on the burden of duty to the buyer;

(g) that the documents on record prove that incidence of duty was absorbed by the appellant only and was not recovered from the buyer;

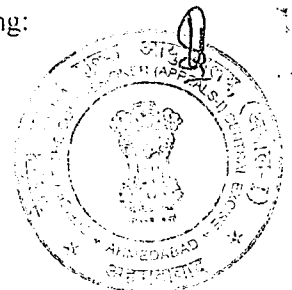
4. Personal hearing in respect of the appeal was held on 20.6.2017. Shri P.P.Jadeja, authorised representative, appeared on behalf of the appellant. He reiterated the grounds of appeal.

5. I have gone through the facts of the case, the grounds of appeal and the oral submissions made by the authorised representative. The issue to be decided in this appeal is whether the appellant is eligible for refund of Rs. 7.75.590/- which stands credited into the Consumer Welfare Fund by the adjudicating authority vide his impugned OIO dated 10.11.2016.

6. I find that the appellant has approached the Appellate Commissioner for the second time with the same plea that the refund ought to have been granted to him rather than crediting it to the Consumer Welfare Fund. I further find that there is no dispute as far as the merits are concerned. The only dispute is with regards to the refund being credited to the Consumer Welfare Fund. In this regard I find that the doctrine of unjust enrichment is a just and salutary doctrine, which means that no person can seek to collect duty from both ends. What is to be verified or ensured is that the claimant of refund has not collected duty from his purchaser on one end and further collects the same duty from the State, on the grounds that it has been collected from him contrary to law.

7. The adjudicating authority in his impugned OIO has held that he cannot accept the certificates of M/s. Nandan Exim Limited [the buyer] and the Chartered Accountant's certificate as a conclusive proof that the duty incidence has not been passed to the claimant as these are mere declarations which lack supporting documents. The Commissioner(A) vide his earlier OIA dated 31.12.2013, had remanded the case with a direction that it be re-examined as the said CA certificate and the letter from the buyer were not produced before the then adjudicating authority so as to enable him to decide the issue of unjust enrichment.

8. Along with the appeal papers the appellant has enclosed the following:



(i) Two certificates from M/s. Nandan Exim Limited [both not dated], certifying that they had not paid the Central Excise duty involved in both invoices nos. 28 and 29 to M/s. Anu Udyog, Ahmedabad.

(ii) Certificates dated 16.12.2013 by M/s. K V Mehta and Company, Ahmedabad, Chartered Accountants, certifying that from the verification of the books of accounts and records provided by M/s. Anu Udyog, they have not received central excise duty in respect of invoices no. 28 and 29 from M/s. Nandan Exim Limited.

(iii) Certificate from M/s. P A Parekh and Company, Chartered Accountants, that total Central Excise duty of Rs. 7,75,590/- is paid against invoices no. 28 and 29; that the said amount of excise duty paid by M/s. Anu Udyog has been showed as "receivables" in the vbooks of accounts of the appellant and separate ledger account of such receivable has also been maintained by them; that the said amount of excise duty has not been charged as expenditure in books of accounts by the appellant and therefore the incidence of excise duty against the referred invoices has not been passed on to ONGC or any other person or customers and the incidence of such duty paid has been borne by the appellant.

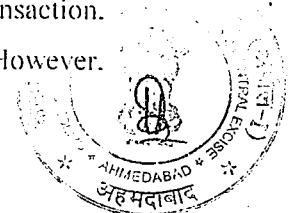
9. The Hon'ble Tribunal in the case of M/s. Tirumala Bearing Private Limited [2016(335) ELT 145 (Tri-Bang)], has on the question of unjust enrichment held as follows:

5. The facts are not in dispute. Admittedly the appellants have given a Chartered Accountant certificate indicating that duty element has not been received by them from their buyers. As per the majority order of the Tribunal in the case of Business Overseas Corporation v. CCE (Import & General), New Delhi [2015 (317) E.L.T. 637 (Tri.-Del.)], it was observed that the production of a Chartered Accountant certificate shifts the burden to the Revenue to prove recovery of extra duty collected from the customers by producing positive evidence. As the Revenue failed to advance any evidence to rebut the Chartered Accountant certificate, the allegation of unjust enrichment cannot be upheld. Similarly in the case of Deepak International v. CC&ST, Kanpur [2014 (304) E.L.T. 438 (Tri.-Del.)], it was observed that Chartered Accountant certificate certifying extra duty paid not recovered from buyers to be given due evidentiary value especially when the said extra duty reflected in balance sheet as loan and advances recoverable from the Revenue. The appellants have taken a categorical stand in the present proceedings that the adjudicating authority examined the balance sheet of the year 2000-2001 whereas the importation was made in the month of March, 2001 and it was reflected in the next financial year, which stands taken into account by the Chartered Accountant. Further we find that the Tribunal in the case of CCE&ST, Jalandhar v. Shankar Printing Mills [2015 (391) E.L.T. 295 (Tri.-Del.)], it was observed that as long as the amounts were shown in the balance sheet as recoverable and certified by the Chartered Accountant, the assessee can safely be held to have fulfilled principles of unjust enrichment. To the same effect is the Tribunal's decision in the case of CCE, Surat-II v. Binkaia Synthetics Ltd. [2013 (294) E.L.T. 156 (Tri.-Ahmd.)]. As such, we are of the view that the Chartered Accountant certificate is a good evidence to show that the disputed duty amounts have not been collected from the customers and the same cannot be sidelined lightly without production of any other evidence to show that the said certificate is a wrong certificate.

9.1 Further, the Hon'ble Tribunal in the case of M/s. Salve Pharmaceuticals Private Limited [2016(339) ELT 297], on the question of unjust enrichment, held as follows :

4. Further I also find from the available records that upon verification of the Balance Sheet and the annual accounts, the practicing Chartered Accountant vide Certificate dated 14-9-2012 has certified that the incidence of excess paid Central Excise duty has not been passed on to any other person and the same has been borne by the appellant. Since the books of accounts maintained by the appellant clearly shows that the incidence of duty has not been passed on and the Chartered Accountant also certified the same aspect, I am of the view that the refund claim cannot be rejected on the ground of doctrine of unjust enrichment.

10. I find that the Revenue has not been able to produce any positive evidence to prove that the duty has been collected from the buyers more so when the Chartered Accountant, the appellant and the buyer, have categorically stated otherwise. The adjudicating authority has held that the worksheet showing entries of monetary transaction, pertains to M/s. Nandan Denim Limited and not M/s. Nandan Exim Limited. However,



with the appeal papers the appellant has enclosed a copy of fresh certificate of incorporation of Registrar of Companies, Ministry of Corporate Affairs, which shows that M/s. Nandan Exim Limited has changed its name to Nandan Denim Limited. The other argument of the adjudicating authority is that since an amount of Rs. 8,09,580 has a remark as duty debited under SHIS for purchase of tank and vessel, the duty has been paid and no further transactions appear in the said worksheet crediting the duty amount. I find that the appellant in the appeal papers has enclosed both the SHIS account as was maintained in his books of accounts and a worksheet of M/s. Nandan Denim Limited. Both the account and the worksheet nowhere shows that the central excise duty element has been paid by the buyer to the appellant.

11. In view of the foregoing, relying on the law as is laid down by the Tribunal and also in view of the fact that the revenue has not been in a position to provide positive evidence against the certificates issued by the Chartered Accountant and the buyer, I allow the appeal filed by the appellant and set aside the impugned OIO with consequential relief.

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

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : 24.07.2017

Attested

Vinod Lukose
(Vinod Lukose)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By RPAD.

To,

M/s. Anu Udyog,
Plot No. 1420, Phase-III,
Vatwa, GIDC,
Ahmedabad 380 052.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Tax, Division II, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South.
- ✓ 5. Guard File.
6. P.A.

