केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर शुल्क भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, Central Excise Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/3/Ahd-I/2017-18/1425 to 1445
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-077-2017-18**
दिनाँक Date : **25.09.2017** जारी करने की तारीख Date of Issue 10-10-17

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

ग Asst.Commissioner Commissioner, केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं **MP/21/AC/DIV-III/2016-17** दिनाँक: **23/1/2017,** से सृजित

Arising out of Order-in-Original No. **MP/21/AC/DIV-III/2016-17** दिनाँक: **23/1/2017** issued by Asst.Commissioner Commissioner, Central Excise, Ahmedabad-I

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

M/s R.K.Synthesis Ltd.
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 a 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 पूवोक्त 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।

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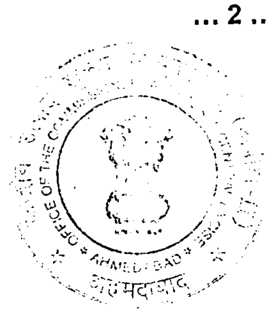

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(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 केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी 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.

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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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 रू.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 in 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 अपीलो 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 R.K.Industries [now R.K.Synthetics Limited], Plot No. 3411/1&2, Phase IV, GIDC, Vatwa, Ahmedabad 382 445 (hereinafter referred to as 'the appellant') has filed this appeal, against OIO No. MP/21/AC/Div.III/2016-17 dated 23.1.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Division-III, of the erstwhile Ahmedabad-I (hereinafter referred to as 'the adjudicating authority').

2. The facts briefly are that during the course of internal audit, for the period April-2011 to July -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, Vatva, on the pretext that the impugned product was waste generated during the manufacture of excisable goods. However, it was noticed by the audit officers that Spent Sulphuric Acid, though being waste, was a by-product capable of being reused, commercially saleable, marketable and classifiable under Chapter sub-heading 2807 of CETA, 1985. A show cause notice dated 18.1.2016 was issued to the appellant *inter alia* demanding central excise duty of Rs. 4,16,863/- along with interest and further proposing penalty on the appellant. This notice was adjudicated vide the impugned OIO wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on the appellant.

3. Feeling aggrieved, the appellant has filed this appeal on the following grounds:

- that what was sent to M/s. Novel Spent Acid Management was not spent sulphuric acid but industrial liquid waste; that these waste were cleared on the basis of provisions imposed by the Pollution Control Board;
- that the adjudicating authority had failed to observe that Keti Chemicals [1999 (113) ELT 689 (Tri.LB)] & Nirma Chemical Works were engaged in manufacturing soap/detergent & hence the quality of spent sulphuric acid, generated is of distinct nature;
- that the appellant manufactures dyes intermediates where emergence of spent acid is unavoidable/inevitable and the quality is totally different which is incapable of further use in any other industry; that this spent acid so emerged is not a marketable commodity;
- that the appellant has not sold any spent acid for any value or any consideration;
- that they would like to rely on the case of M/s. Chemplast Sanmar Limited [2015(317) ELT 495];
- that since the spent acid is nothing but waste polluted acidic water and has no value, the appellant was not in a position to provide the value of spent acid cleared by them;
- that no lawful method has been adopted in fixing the value of the spent acid on which duty is being demanded;
- that the impugned OIO be set aside.

4. Personal hearing in the case was granted on 17.8.2017. However, the appellant vide his letter dated 14.8.2017 enclosing OIO No. 23-24/Cx-I Ahmd/JC/KP/2017 dated 20.6.2016 passed by the Joint Commissioner, Central Excise, Ahmedabad-I, informed that the matter may be decided and that they did not intend to be heard in person. The letter further stated that the industrial waste generated was not marketable nor did it have any commercial value; that they had to pay service charges to M/s. Novel Spent Acid Management for treatment of the spent acid.

5. I have carefully gone through the facts of the case on records and submissions made by the appellant. The issue to be decided in the present appeal is whether 'Spent Sulphuric Acid' attracts Central Excise duty by virtue of being an excisable product or otherwise.

6. I find that the adjudicating authority has confirmed the demand based on the following findings:

- the classification and dutiabilty of spent sulphuric acid is a settled issue having been decided by the Larger Bench of the Hon'ble Tribunal in the case of Keti Chemicals [1999(113) ELT 689 (Tri-LB)]; that the Hon'ble Tribunal had at para 10 of the said decision held that spent sulphuric acid is classifiable under heading 28.07 of the Schedule of CETA '85; that this case is applicable in the present dispute:
- that the decision of CESTAT was upheld by the Hon'ble Supreme Court in the case of Nirma Chemical Work [2002(146) ELT 485].

7. On going through the decision in the case of Keti Chemicals [1999 (113) E.L.T. 689 (Tri)], it is clear that Hon'ble Larger Bench of CESTAT have exhaustively dealt with the 'Spent Sulphuric Acid' emerging in that case by way of discussing its characteristics as a by-product emerging during the process of manufacture with reference to Explanatory notes to HSN; by way of confirming its classification under chapter 28 of CETA, 1985: and distinguishing it from non-excisable waste and scrap akin to dross and skimming and establishing as to how it emerges as excisable goods exigible to Central Excise duty. Much water has flown down the Ganges since decision of Keti Chemicals in 1999. In the following cases, Hon'ble Courts have held as follows:

1) In the case of Mettur Thermal Power Station – [2016 (335) ELT 29 (Mad.)].

> *it has been held that fly ash cannot be subjected to levy of Excise duty because it is not an item of goods which has been subjected to process of manufacture as per Section 2(d) and 3 of Central Excise Act, 1994.*

2) In the case of Nirlon Ltd. [2016 (332) ELT 734 (Tri. – Mumbai)] .

> *Waste products i.e. impure dowtherm diphyl, old damaged PTA scrap, wash water, old and used sludge and other oils and old assorted bearings arising during process of manufacture of yarn were held not manufactured and not distinct products.*

3) The Hon'ble Supreme Court in the case of Grasim Industries Ltd – [2011(273)ELT 10 (SC])

> *have held with regards to Metal, scrap & waste specified under Heading 74.02 of Central Excise Tariff that Section Note 8(a) to Section XV of Central Excise Tariff has very limited purpose of extending coverage to the particular item to the relevant tariff entry in the Schedule for determining the applicable rate of duty and this note cannot be construed to have any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of CEA, 1944. The Apex Court further held that Goods are not exigible to Excise duty merely because of their specification in a particular tariff entry unless they are manufactured in India and charge of levy of Excise duty under Section 3 of CEA, 1944 is attracted when goods are excisable under Section 2(d) ibid and are manufactured goods in terms of Section 2(f) ibid. The conditions contemplated under Section 2(d) and Section 3 ibid has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act.*

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4) In the case of Ahmedabad Electricity Co. Ltd. – [2003 (158) ELT 3 (SC)].

> *it has been held by Hon'ble Supreme Court that in Section 3 of CEA, 1944, the words '<u>excisable goods' have been qualified by the words 'which are produced or manufactured in India'. Therefore, simply because goods find mention in one of the entries of the First Schedule</u> does not mean that they become liable for payment of Excise duty. Goods have to satisfy the test of being produced or manufactured in India, which is sine quo non for imposition of duty.*

In the case of Keti Chemicals *supra*, Hon'ble Tribunal has held that Spent Sulphuric Acid is a 'by product'. The Tribunal has relied on the decision in the case of DCW Ltd.[1996 (81) E.L.T. 381], where Spent Sulphuric Acid finds a regular market with industrial users and as such, it is goods and would not fall under the category of rubbish materials thrown away in the process of manufacturing. <u>In the case of the appellant, there is nothing on record to show that the Spent Sulphuric Acid was marketable or had regular users.</u> In-fact the appellant has stated that they were paying service charges to M/s. Novel for treatment of Spent Acid sent to them. Further in Keti Chemicals, the decision in the case of Indian Tube Co. Ltd.[1988 (37) ELT 418 (Tri.)] has been distinguished on the ground that the <u>waste, involved in this case (waste pickle liquor) was not marketable or saleable since the manufacturers were paying transport charges to deliver it free.</u> On considering the facts of the instant case, the appellant is clearing the impugned product as waste incurring expenses for its treatment as waste fit for disposal under the stipulations of Gujarat Pollution Control Board. Thus spent Sulphuric Acid in the present case is treated as waste by Gujarat Pollution Control Board, which is a statutory body. It must be noted here that whether a product (or by product) is a waste or not should be rightly decided by an expert. I find that in this case "Gujarat Pollution Board" being a statutory expert body has clarified it as "Waste". Further, whether it is dutiable or not will now depend upon its marketability and I find that the appellants are disposing it of, after treatment and <u>not selling it</u>. Had this product been marketable, a prudent businessman will try to fetch whatever little price it can by selling it. <u>The adjudicating authority, I find has not examined this distinguishing aspect before applying the ratio of Keti Chemicals in the present case while Keti Chemicals has based its decision on this aspect after considering the case of Indian Tube Ltd (supra).</u> Further, in Keti Chemicals, the Tribunal has examined and distinguished the Apex Court decision in the case of Indian Aluminium Company, where it was held that <u>Aluminium dross and skimmings lack not only metal body but also metal strength.</u> <u>In the present case, the appellant has vehemently stated that the quality of Spent Sulphuric Acid in the present case is not suitable for any further use</u>. This aspect has not been examined in the impugned order, which is vital because as per this claim the ratio of Keti Chemicals would be distinguishable. Thus in the impugned order there is no discussion or finding establishing that Spent Sulphuric Acid was a <u>manufactured</u> and <u>marketable by-product</u> arising during the course of manufacture. There is no mention of any buyers or prospective users for this very product (as per its strength). It is settled law as per the Apex Court decision in the case Ahmedabad Electricity Company Ltd [2003(158)ELT3(SC)] that the onus to establish that the goods emerge during the process of manufacture is on the department. Further, the impugned product is cleared by the appellant as waste under the laws of pollution control administered by Gujarat State Pollution Control Board (GPCB), in accordance with the statutory

norms prescribed by GPCB. As regards the marketability of the impugned product. the appellant claims that the Spent Sulphuric acid is not suitable for further use and the same is disposed off as waste after treatment by N/s Novo Spent Acid Management. I find that it has been concluded on the basis of the information available on the website of M/s Novo Spent Acid Management and its possession of VAT number that the impugned product cleared by the appellant to M/s Novo Spent Acid Management is subsequently sold by them. Such an assertion does not suffice and the confirmation of demand in the present case is not sustainable unless evidence is adduced with regards to both the marketability and valuation of the impugned goods. The Hon'ble Tribunal in the case of Chemplast Sanmar Ltd. [2015 (317) ELT 495 (Tri - Chennai)] held that the rationale of Keti Chemicals[1999 (113) ELT 689 (Tri.-LB)] would only be applicable if the Revenue could prove that the goods were sold and used in the further manufacture of any item.

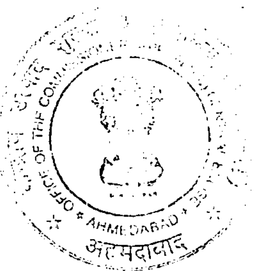
8. In the case of Markfed Vanaspati & Allied Industries [2003(153)ELT 491(SC)]. Hon'ble Supreme Court has held that it is not possible to accept the contention that merely because an item falls in a Tariff Entry it must be deemed that there is manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is marketable is on the Revenue. Following this ratio. I find that the confirmation of demand in the impugned order is not sustainable unless the twin test of manufacture and marketability is confirmed and hence I remand the case back to the adjudicating authority for giving specific findings as to whether the 'Spent Sulphuric Acid' in the present case is a waste as claimed by the appellant or is a marketable by-product emerging during the process of manufacture as claimed in the impugned order. The decision on the demand of duty. interest and penalties is required to be based on such findings. The appellant must be given adequate opportunity to present its case in accordance with the principles of natural justice.

9. अपीलकर्ता द्वारा दर्ज अपील का निपटारा उपरोक्त तरीके से किया जाता हैं.
The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)
Date: /09/2017

Attested

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



By R.P.A.D.

To.

F.No.V2(29)3/Ahd-I/2017-18

By R.P.A.D.

To,

M/s R.K.Industries [now R.K.Synthetics Limited].
Plot No. 3411/1&2, Phase IV,
GIDC, Vatwa,
Ahmedabad 382 445

Copy to:

1. The Chief Commissioner of Central Tax. Ahmedabad.
2. The Principal Commissioner of Central Tax. Ahmedabad-I.
3. The Additional Commissioner. Central Tax (System). Ahmedabad-I.
4. The Assistant Commissioner. Central Tax. Division-III. Ahmedabad-I.
5. Guard File.
6. P.A.