

	<p>कार्यालय: प्रधान आयुक्त सीमाशुल्क, मुन्द्रा, सीमाशुल्क भवन, मुन्द्रा बंदरगाह, कच्छ, गुजरात- 370421 OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS: CUSTOM HOUSE, MUNDRA PORT, KUTCH, GUJARAT- 370421. PHONE : 02838-271426/271163 FAX :02838-271425 E-mail id- adj-mundra@gov.in</p>	
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A	FILE NO.	F. No. GEN/ADJ/ADC/98/2024-Adjn-O/o Pr Commr-Cus-Mundra
B	OIO NO.	MCH/ADC/AK/78/2024-25
C	PASSED BY	ARUN KUMAR ADDITIONAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE, MUNDRA.
D	DATE OF ORDER	20.06.2024
E	DATE OF ISSUE	21.06.2024
F	SCN NUMBER & DATE	CUS/APR/MISC/4891/2023-Gr 3-O/o Pr Commr-Cus-Mundra dated 23.06.2023
G	NOTICEE/ PARTY/ IMPORTER	1. M/s. Yatharth Embroidery 2. M/s. Al Cargo Services
H	DIN NUMBER	20240671MO000071287E

1. यहआदेश संबन्धित को निःशुल्क प्रदान किया जाता है।

This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस आदेश से असंतुष्ट है तो वह सीमाशुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमाशुल्क अधिनियम 1962 की धारा128 A के अंतर्गत प्रपत्र सीए- 1 में चार प्रतियों में नीचे बताए गए पते परअपील कर सकताहै-

Any person aggrieved by this Order - in - Original may file an appeal under Section 128A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

“सीमाशुल्कआयुक्त) अपील(
चौथी मंजिल, हुडको बिल्डिंग, ईश्वरभुवन रोड,
नवरंगपुरा,अहमदाबाद 380 009”

“THE COMMISSIONER OF CUSTOMS (APPEALS), MUNDRA

**HAVING HIS OFFICE AT 4TH FLOOR, HUDCO BUILDING, ISHWAR BHUVAN ROAD,
NAVRANGPURA, AHMEDABAD-380 009.”**

3. उक्तअपील यहआदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।

Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-

Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must be accompanied by –

- i. उक्त अपील की एक प्रति और A copy of the appeal, and
- ii. इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं०-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।

This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटी/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये।

Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

- .6 अपील प्रस्तुत करते समय, सीमाशुल्क) अपील (नियम, 1982 और सीमाशुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए।

While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5 % भुगतान करना होगा।

An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

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BRIEF FACT OF THE CASE:

M/s. Yatharth Embroidery, 1071/72, Ambaji Market, Kamela Darwaja, Surat, Gujarat-395002 (holder of IEC No. 5214015569) (here-in-after referred to as “the importer” for the sake of brevity) presented five (05) Bills of Entry through their Customs Broker, M/s AL Cargo Services at Custom House, Mundra, for clearance of imported goods declared as “Mix Design of Lycra Fabric (Polyester 90%, Spandex 10%) dyed and undyed uneven packing, various GSM, Length and size” classifying the same under Tariff Item 60069000 of first schedule of the Custom Tariff Act, 1975.

2. During the course of audit, it was observed that the subject five Bills of Entry, as detailed in the Table-I, were assessed wherein benefit provided at Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 of concessional rate of Basic Customs duty @ 10% was granted. The said entry at Sr. No. 169 reads as under:

Sr. No.	Chapter or Heading or	Description of goods	Rate
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	sub-heading or tariff item		
169.	6006 90 00	All goods	10%

3. Under the impugned five Bills of Entry, the importer imported “Mix Design of Lycra Fabric (Polyester 90%, Spandex 10%) dyed and undyed uneven packing, various GSM, Length and size” and availed benefit of concessional rate of duty under the above said notification by classifying the same under CTH 60069000 which is not available to them since the goods appear to be correctly classified under CTH 60063100 to 60063400. The Customs Tariff Items under CTH 60063100 to 60063400 covers “Other knitted or crocheted fabrics - of synthetic fibres: unbleached or bleached; dyed; of yarns of different colours; printed”. Thus, it appears that in the subject five Bills of Entry, the importer has wrongly classified the goods under 60069000 & availed the exemption under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 for imported goods i.e. “Mix Design of Lycra Fabric (Polyester 90%, Spandex 10%) dyed and undyed uneven packing, various GSM, Length and size” which are synthetic goods and are covered under the CTH 60063100 to 60063400. Therefore, it appears that in the impugned five Bills of Entry, Basic Customs duty was liable to be charged at the prevailing tariff rate i.e. 20%. The details of Bill of entry is as under:

Table- I

Sr.No.	BE No. & Date	Importer	Item Description	CTH	Quantity (kgs.)	Assessable Value	Duty leviable @ 28.10%	Duty levied @ 16.55%	Duty Short levied (Rs.)
1	6400089 dt. 08.01.2020	M/s. Yatharth Embroidery	Mis Design of Lycra Fabric (Polyester 90% Spandex 10%) dyed and un-dyed uneven packing various GSM, Length and Size	60069000	14097.5	1748582	491351	289390	201961
2	6589268 dt. 22.01.2020			60069000	17843.1	2197829	617590	363741	253849
3	6699642 dt. 31.01.2020			60069000	17345.8	2136574	600377	353603	246774
4	6763633 dt. 05.02.2020			60069000	14251.7	1755458	493283	290528	202755
5	6883587 dt. 14.02.2020			60069000	14386.5	1784428	501424	295323	206101
Total									1111440

4. Further, it appears that although the importer was aware that the exemption under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 was not available to the impugned goods, the importer wrongly availed the exemption under the said notification by mis-classifying the goods under 60069000. Thus, it appears that the subject Bills of Entry are liable to be re-assessed by rejecting the declared classification and classifying the goods under CTH 60063100 to 60063400 & denying the exemption. Accordingly, the differential Customs duty totally amounting to Rs. 11,11,440/- is liable to be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with applicable interest at

appropriate rate under Section 28AA of the Customs Act, 1962. Further, it appears that the importer has contravened the provisions of Section 17(1) of the Customs Act, 1962 and has rendered themselves liable to penalty under Section 114A of the Customs Act, 1962. The Customs Broker is also liable for penalty under Section 117 of the Customs Act, 1962 for filing the said Bills of Entry by wrongly assessing the goods which resulted in short payment of Customs Duty/IGST.

5. Relevant Legal provisions, in so far as they relate to the facts of the case:-

A. The Customs Tariff Act, 1975.

B. Self-assessment: After the introduction of self-assessment vide Finance Act, 2011, the onus is on the Importer to make true and correct declaration in all aspects including Classification and calculation of duty, but in the instant case the subject goods have been mis classified and IGST amount has not been paid correctly. Section 17(1) Assessment of duty, reads as:

“An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.”

CBEC's (now CBIC) Circular No.17/2011 dated 08.04.2011, provides for self-assessment by the importers with effect from 08.04.2011 in accordance to the provisions of Finance Act' 2011. Self-Assessment inter-alia requires importers/exporters to correctly declare description of goods, value, classification, applicable rate of duty, benefit of exemption Notification claimed, if any, in respect of export/import goods while filing Bill of Entry/Shipping Bill.

C. Section 28 (4) of the Customs Act, 1962 provides that –

“Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any willful mis-statement; or

(c) suppression of facts,

by the Importer or the exporter or the agent or employee of the Importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty

or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice”.

- D . Section 28 (AA) of Customs Act, 1962 provides interest on delayed payment of duty-

(1) Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

- E. Section 114A of the Customs Act, 1962 deals with the penalty by reason of collusion or any willful mis-statement or suppression of facts. The relevant provision is reproduced below:-

114A - Penalty for short-levy or non-levy of duty in certain cases - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-Section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined:

Provided that where such duty or interest, as the case may be, as determined under sub-Section (8) of Section 28, and the interest payable thereon under Section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this Section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect:

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation. - For the removal of doubts, it is hereby declared that

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- i. *the provisions of this section shall also apply to cases in which the order determining the duty or interest sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;*
- ii. *any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."*

F . Penalty under section 117 envisages where there is no other penalty provision applicable. Said section reads as under:

SECTION 117. Penalties for contravention, etc., not expressly mentioned. -

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding four lakh rupees.

6. Accordingly, a Show Cause Notice No. CUS/APR/MISC/4891/2023-Gr 3-O/o Pr Commr-Cus-Mundra dated 23.06.2023 was issued to M/s. Yatharth Embroidery, 1071/72, Ambaji Market, Kamela Darwaja, Surat, Gujarat-395002 wherein they were called upon to show cause to the Additional Commissioner of Customs, Import, Custom House, Mundra,

having office at PUB Building, 5B, Mundra (Kutch) Gujarat 370421, as to why:

- i. the classification of the said goods under Custom Tariff Heading No. 60069000 should not be rejected and classification under Custom Tariff Heading No. 60063100 to 60063400 should not be made on re-assessment;
- ii. exemption under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017, claimed and availed by the importer in the five Bills of Entry, as detailed in Table-I, should not be denied and the said Bills of Entry be reassessed under CTH 60063100 to 60063400;
- iii. the differential Customs duty amounting to Rs. 11,11,440/-, not paid by the importer in respect of the said five Bills of Entry as detailed in Table-I, by wrongly availing exemption under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017, should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA ibid;
- iv. penalty should not be imposed on them under section 114A of the Customs Act, 1962.

7. Further, Show Cause Notice No. CUS/APR/MISC/4891/2023-Gr 3-O/o Pr Commr-Cus-Mundra dated 23.06.2023 was issued to M/s. AL Cargo Services (CB), 54A, Kalpana Apartment, Sector-5, Vaishali, Ghaziabad, U.P. – 201010, wherein they were called upon to show cause to the Additional Commissioner of Customs, Import, Custom House, Mundra, having office at PUB Building, 5B, Mundra (Kutch) Gujarat 370421, as to why:

- i. Penalty should not be imposed on them under Section 117 of the Customs Act, 1962.

WRITTEN SUBMISSION

8 . Submissions made by M/s. AL Cargo Services vide their letter dated 08.02.2024:

8.1 The noticee has submitted that the Impugned Notice issued under Section 28(4) of the Customs Act, 1962 is invalid as admittedly, no DIN [Document Identification Number] has been assigned to it, which is a mandatory requirement as per the CIBC's own instructions vide Circular No. 122/41/2019-GST dated 05.11.2019 and Circular No. 128/47/2019-GST dated 23.12.2019. The relevant paras are re-produced below:

Circular No. 122/41/2019-GST dated 05.11.2019:

"Para 2. The Board in exercise of its power under Section 168(1) of the CGST Act, 2017/Section 37B of the Central Excise Act, 1944 directs that

no search authorization, summons, arrest memo, inspection notices and letters issued in the course of any enquiry shall be issued by any officer under the Board to a taxpayer or any other person, on or after the 8th day of November 2019 without a computer-generated Document Identification Number (DIN) being duly quoted prominently in the body of such communication. The digital platform for generation of DIN is hosted on the Directorate of Data Management (DDM)'s online portal "cbicddm.gov.in"

Para 3. Whereas DIN is a mandatory requirement, in exceptional circumstances communications may be issued without an auto generated DIN. However, this exception is to be made only after recording the reasons in writing in the concerned file. Also, such communication shall expressly state that it has been issued without a DIN. The exigent situation in which a communication may be issued without the electronically generated DIN are as follows: -

- i. When there are technical difficulties in generating the electronic DIN, or
- ii. When communication regarding investigation/enquiry, verification etc. is required to issue at short notice or in urgent situations and the authorized officer is outside the office in the discharge of his official duties."

Circular No. 128/47/2019-GST dated 23.12.2019:

"Para 2: Vide the aforementioned Circular, the Board had specified that the DIN monitoring system would be used for incorporating a DIN on search authorizations, summons, arrest memo, inspection notices etc. to begin with. Further, a facility was provided to enable the recipient of these documents/communications to easily verify their genuineness by confirming the DIN online at cbic.gov.in. In continuation of the same, the Board has now directed that electronic generation and quoting of Document Identification Number (DIN) shall be done in respect of all communications (including e-mails) sent to tax payers and other concerned persons by any office of the Central Board of Indirect Taxes and Customs (CBIC) across the Country. Instructions contained in this para would come into effect from 24.12.2019."

Because taking the abovementioned Circulars into consideration, it can be clearly inferred that the Notice/intimation issued under Section 28(4) of the Customs Act, 1962 is invalid, and therefore any proceedings arising out of the same are liable to be set aside on this ground alone.

8.2 it is submitted that the impugned Show Cause Notice dated 23.06.2023 should not have been issued under Section 28(4) of the Customs Act, 1962 and the same can be proved from the following points:

- (i) That it is submitted that admittedly, the Show Cause Notice under Section 28(4) of the Customs Act, 1962 can only be issued where any duty has not been levied or not paid or has been short levied or short paid or erroneously refunded or interest payable has not been paid, part-paid or erroneously refunded by reason of collusion or any willful mis-statement

or suppression of facts.

(ii) That in the matter for which the Show Cause Notice has been issued, admittedly, the said Show Cause Notice has been issued on the basis of documents which were submitted along with the B/E and were duly checked by the Customs Authorities after following the due procedure of law before the said goods were cleared from Customs.

(iii) That it is not the case that the documents were found to be incorrect or the goods on examination were found to be different from the goods declared in the said B/Es.

(iv) That admittedly, the impugned Notice was issued only on the basis of documents already in possession of the Customs Department.

(v) Hence, taking the abovementioned points into consideration, it can be clearly inferred that if there is any duty has not been levied or not paid or has been short levied or short paid or erroneously refunded or interest payable has not been paid, part-paid or erroneously refunded the same was not by any collusion or any willful mis-statement or suppression of facts.

(vi) Hence, since there is no collusion or any willful misstatement or suppression of facts, hence under no circumstances the impugned Show Cause Notice could have been issued under Section 28(4) of the Customs Act, 1962.

8.3 The noticee has further submitted that the impugned Show Cause Notice is hit by limitation of time and the same can be proved from the following points:

(i) Since the Show Cause Notice should not have been issued under the Section 28(4) of the Customs Act, 1962, hence, any alleged demand could only have been raised under Section 28(1) of the Customs Act, 1962.

(ii) Admittedly, the time period of issuance of Show Cause Notice under Section 28(1) of Customs Act, 1962 is two years from the date of B/Es. The date of B/Es is between 08.01.2020 to 14.02.2020 and hence, the impugned Show Cause Notice for the said B/Es should have been issued on or before 08.01.2022 to 14.02.2022. (iii) Since admittedly, the impugned Show Cause Notice was only issued on 23.06.2023, hence, the same is hit by limitation of time and hence liable to be set aside on this ground alone.

8.4 On bare perusal of the impugned Show Cause Notice dated 23.06.2023, no role of the Noticee in the alleged short payment of duty and the same can be proved from the following points:

(i) Admittedly, the documents submitted by the Noticee were found to be correct.

(ii) Admittedly, the goods were found to be same as declared during examination.

(iii) Admittedly, the documents submitted by the Noticee were the same documents which were verified by the Appraiser and all other custom authorities before clearance of the same from the port.

(iv) Admittedly, no allegation has been raised in the impugned Notice which states that the Noticee was aware or had knowledge about any mis-declaration leading to short payment of duty.

(v) Hence, taking the abovementioned points into consideration, it can be clearly inferred that there is no role of the Noticee in the alleged short payment of duty.

8.5 It is submitted that penalty cannot be imposed on the Noticee under Section 117 of the Customs Act, 1962 and the same can be proved from the following points:

(i) It is submitted that taking the abovementioned facts and grounds into consideration, admittedly, no fact or evidence has been brought on record which shows that the Noticee had any knowledge or mens rea for the alleged short payment of duty. Hence, in absence of mens rea, no penalty can be imposed under Section 117 of the Customs Act, 1962.

(ii) The Noticee seeks to rely on the following judgments:

a. Sun Pharmaceutical Industries Vs. Commr. Of Customs, Mumbai - III [2019 (366) E.L.T. 928 (Tri-Mumbai)] wherein the Hon'ble Tribunal was pleased to hold the following:

"Para 5. We find that while finalizing the assessment of the export goods the adjudicating authority has accepted the FOB value as declared by the appellant and allowed the DEPB benefit accordingly. Therefore, imposition of penalty under Section 117 of the Customs Act, 1962 in our opinion is unwarranted. Hence, the penalty is set aside and our opinion is unwarranted. Hence, the penalty is set aside and the appeal is allowed with consequential relief, if any, in accordance with law."

b. Stanley Paulus Vs. Commr. Of CT. & C. EX, Thiruvananthapuram [2019 (370) E.L.T. 285 (Tri-Bang)] wherein the Hon'ble Tribunal was pleased to hold the following:

"Para 6. After considering the submissions of both the parties and perusal of the material on record, I find that the packet containing 193 posters of Maldives Airlines was being handed over to Rasheed who was flying to Maldives and this quantity is not a prohibited quantity and moreover the value of the same was only 19,300. Further the Learned AR did not convince me that the said baggage is not a bona fide baggage and is in violation of the Baggage Rules. He has not been able to point out which Rule has been violated in the present case. Moreover, nothing has been brought on record against the appellant so as to involve him in the illegal export. In view of my discussion above, I do not find any justification for imposing the penalty of Rs. 5,000/- (Rupees Five Thousand only) on the appellant under Section 117 of the Customs Act. Therefore, I set aside the said penalty by allowing the

appeal of the appellant."

c. In RE: Sanjeev Kumar, [2018 (364) E.L.T. 1134 (G.O.)], the Hon'ble Revision Authority was pleased to hold the following:

"Para 4. The Government has examined the matter and it is noticed that except the fact that the applicant had requested Mr. Rajesh Kumar to bring some goods for him from abroad, there is no evidence to show that he had asked Mr. Rajesh Kumar to bring the foreign goods by smuggling thereof. The applicant had not even paid any advance money also to Mr. Rajesh Kumar from which it is implied that he had intended to make payment only after goods were handed over to him. Hence, on the basis of the applicant's mere request to Mr. Rajesh Kumar to bring imported goods, it cannot be held that the applicant had violated any provision of Customs Act or abetted any such contravention. Therefore, Government finds that applicants case is not covered under Section 117 of the Customs Act. Further, the Government agrees with the applicant that in the identical case of Mr. Sandeep Kumar, the Commissioner (Appeals) himself has held that evidences are not crystal clear to prove that Mr. Sandeep Kumar contravened any provision of the Customs Act and had abetted any such contravention. Further, the Order of the Commissioner (Appeals) setting aside the penalty on Mr. Sandeep Kumar has also not been agitated before the Government by filing a revision application as per the records of this Office. Thus, even the Revenue has accepted that the penalty is not warranted on Mr. Sandeep Kumar. Since Mr. Sanjeev Kumar had also requested Mr. Rajesh Kumar to bring imported goods like Mr. Sandeep Kumar had requested, the Government is convinced that no penalty can be imposed on Mr. Sanjeev Kumar also.

d. Bhola Singh Vs. Collector of Customs (Preventive), [1993 (66) E.L.T. 105 (Tribunal)], wherein the Hon'ble Tribunal was pleased to hold the following:

"Para 5. We have heard both sides. As far as the imposition of penalty is concerned, it is seen that the show cause notice was issued to the appellant under Section 117 of the Customs Act requiring him to show cause why he should not be penalised. Hence, imposition of penalty under Section 112 of the Customs Act is not in accordance with law. Secondly, under Section 117 it should be shown that the appellant abetted the offence. There is nothing to show that the appellant abetted the offence. The statement of Chhabila Rai does not show that the appellant had any knowledge about the smuggling of the Ganja. The learned Additional Collector in his order stated that the appellant had confessed the same by his statement dated 24-3-1980. But the seizure was made on 9-7-1980 and the appellant could not have confessed about that offence on a previous date i.e., 24-3-1980. Even if it is assumed that the learned Additional Collector was referring to any statement taken after the date of seizure, such a statement was not mentioned in the show cause notice. Without mentioning the same in the show cause notice, it could not be relied upon. Therefore, the reason for imposing penalty on the appellant stating that he was found in the smuggling is not in accordance with law. Accordingly, we set aside the penalty of Rs. 10,000/- on the appellant under Section 112 of the Customs Act.

e. Overland Agency Vs. Commissioner of Customs (Prev.), Kolkata [2006 (198) E.L.T. 444 (Tri-Kolkata)] wherein the Hon'ble Tribunal was pleased to hold the following:

"Para 5. Heard both sides. In the present case, I find that the appellant filed an appeal against the order passed by the Commissioner under Sections 112 and 117 of the Customs Act, 1962 imposing penalty on the appellant. This Tribunal vide its Order No. S-270/A-364, dated 4-5-2005 [2005 (192) E.L.T. 480 (Tribunal)], set aside the order of the imposition of penalty on the appellant and exonerated the appellant from the charges framed therein. In the case of Continental Cargo Services referred to above, it has been held that the revocation of CHA Licence depends on the outcome of the show-cause notice issued against the appellant. In the present case, the penalty imposed on the appellant was set aside by this Tribunal vide its Order dated 4-5-2005 and the appellants were exonerated from charges levied against him. In the present case, the shipment took place under the supervision of the Superintendent of Customs, Haldia. On the previous occasion, the shipment was permitted only after the permission was given by the Commissioner concern which was invariably recorded on the body of the Bill of export. But in the present case, no such order number or note recorded on the Bill of export. Even then the export was permitted by the Superintendent of Customs. It reveals that there must be some permission or direction from the superior authority to permit the shipment from Haldia otherwise the Customs authorities would not have permitted the shipment of wheat from Haldia. The shipment was completed in the presence of Superintendent of Customs. It was within the knowledge of the Customs authorities. Had there been no permission, the said shipment would not have been permitted by the Customs authorities. There was no loss of Government revenue or there was any dutiable or prohibitory items were exported. In the present case, the appellants acted on the instruction of exporter. Interpolation was done by the authorised representative of the exporter. There is no positive evidence on record to show that the appellant was an accomplice abettor. It has been held in a number of cases that mere failure by the Customs House's Agent to carry out his duties in accordance with law by itself is not sufficient ground to impose personal penalty under Section 117 of the Customs Act, 1962, unless there is evidence to show that the failure was on account of mala fide intention. No such intention has been established by the respondents. The exporter did not take any benefit or incentive for the export. The export was done by an agency of the West Bengal Govt, and it was exported under the supervision of Customs authorities. The penalties on the appellant in other proceeding have been set aside by this Tribunal vide its Order dated 4-5-2005. The revocation of CHA licence is not desirable. In view of the above discussions, I set aside the impugned order and allow the appeal with consequential relief to the appellant.

f. Sajman Sheikh Vs. Commissioner of Customs, Kolkata [2003 (155) ELT 156 (Tri-Kolkata)]. wherein the Hon'ble Tribunal was pleased to hold the following:

"Para 4. After hearing Shri R. Bhoradwaj, Id. Advocate and Shri A.K. Mondal, Id. SDR and after going through the impugned order, I find that there is no evidence on record to show that the fabrics in question belonged

to the appellants. In their first initial statement given on the spot, both the appellants have denied the ownership of the goods in question and had disclosed that the bags containing fabrics was kept by the unknown person at the tea stall where they were having tea. To the similar effect is the statement of another person, Shri Sushata Ghosh who was also having tea on the said stall. The Revenue has not brought any evidence on record to connect the appellants with the seized and confiscated fabrics. The Deputy Commissioner has observed that failure on the part of the appellants to reply the show cause notice or appearing for personal hearing suggest their guilty conscious and as such they are liable to penalty. The above reasons of the adjudicating authority cannot held to be valid inasmuch as the failure on part of the appellants to defend themselves before the adjudicating authority by no stretch of imagination reflects upon the appellants' guilty mind. In the absence of any evidence to the contrary, I find no justification for imposition of penalty upon the appellants. Accordingly, penalties are set aside. Inasmuch as, the appellants have not questioned the confiscation of fabrics, no order is being passed in respect of the same. Both the appeals are disposed of in the above terms. Stay Petitions also get disposed of.

Taking the above grounds into considerations, it is submitted that the Noticee had no role to play or had any prior knowledge about the alleged short payment of duty, hence the impugned Show Cause Notice insofar as the Noticee is concerned is liable to set aside.

PERSONAL HEARING

9. Following the principles of natural justice, opportunity of personal hearing was given to the noticees on 23.04.2024, 15.05.2024 and 13.06.2024 in the subject case. However, noticee M/s. Yatharth Embroidery have neither submitted the reply of Show Cause Notice nor attended the personal hearing. Further, noticee M/s. AL Cargo Services have submitted their reply vide letter 08.02.2024 and Shri Chinmaya Seth, authorized representative of M/s. AL Cargo Services attended personal hearing on 13.06.2024 and reiterated their submission vide letter dt. 08.02.2024.

DISCUSSON & FINDING

10. I have carefully gone through the facts of the case, Show Cause Notice dated 23.06.2023, the noticees' submissions in submitted vide letter dated 08.02.2024.

11. The main issues involved in the case which are required to be decided in the present adjudication are as below:

- i. Whether the classification of the said goods i.e. "MIX DESIGN OF LYCRA FABRIC (polyester 90% spandex 10%) Dyed" should be rejected under Custom Tariff Item No. 60069000 and the same should be classified under Custom Tariff heading No.60063100 to 60063400 or otherwise.
- ii. Whether the exemption claimed and availed by the importer under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 in

the Five Bills of Entry, as detailed in Table-I, should be denied and the differential Customs duty amounting to Rs. 11,11,440/- is required to be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 along with interest at appropriate rate under Section 28AA *ibid* or otherwise.

- iii. Whether the importer is liable to penalty under Section 114A of the Customs Act, 1962 or otherwise.
- iv. Whether Customs Broker is liable for penalty under section 117 of the Customs Act, 1962 or otherwise.

12. The facts of the case are that noticee imported goods "Mix Design of Lycra Fabric (Polyester 90%, Spandex 10%) dyed and undyed uneven packing, various GSM, Length and size" classifying the same under Tariff Item 60069000 of first schedule of the Custom Tariff Act, 1975 and availed the benefit of concessional rate of Basic Customs duty @10% under Serial No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 in the Five Bills of Entry, as detailed in Table-I.

13. It has been noted that "all goods", falling under tariff item 60069000, are eligible to a concessional BCD rate @ 10%, as provided under Entry/Sr.No. 169 of Notification No. 82/2017-Cus dated 27.10.2017. Entry 169 reads as under:

Sr. No.	Chapter or Heading or sub-heading or tariff item	Description of goods	Rate
169.	6006 90 00	All goods	10%

14. The tariff heading of 6006 *inter alia* covers "OTHER KNITTED OR CROCHETED FABRICS". The details are as given below:

6006		OTHER KNITTED OR CROCHETED FABRICS		
6006 10 00	- Of wool or fine animal hair	kg.	*10%	-
	- <i>Of Cotton :</i>			
6006 21 00	-- Unbleached or bleached	kg.	*10%	-
6006 22 00	-- Dyed	kg.	*10%	-
6006 23 00	-- Of yarns of different colours	kg.	*10%	-
6006 24 00	-- Printed	kg.	*10%	-
	- <i>Of synthetic fibres :</i>			
6006 31 00	-- Unbleached or bleached	kg.	*20%	-
6006 32 00	-- Dyed	kg.	*20%	-
6006 33 00	-- Of yarns of different colours	kg.	*20%	-
6006 34 00	-- Printed	kg.	*20%	-
	- <i>Of artificial fibres :</i>			
6006 41 00	-- Unbleached or bleached	kg.	*20%	-
6006 42 00	-- Dyed	kg.	*20%	-
6006 43 00	-- Of yarns of different colours	kg.	*20%	-
6006 44 00	-- Printed	kg.	*20%	-
6006 90 00	- Other	kg.	*10%	-

15. In the view of the above, it is clear that heading 60069000, covers other knitted or crotched fabric. However, importer has declared the impugned goods as "Mix Design of Lycra Fabric (Polyester 90%, Spandex 10%) dyed and undyed uneven packing, various GSM, Length and size" which is dyed and undyed fabrics of synthetic fibres as the impugned goods contains 90% polyester. The single "-" classification of Chapter Heading 6006 covers other knitted or crocheted fabrics of synthetic fibres. Unbleached or bleached, Dyed, of yarns of different colours and printed fabric of synthetic fibres are further classified under CTH 60063100, 60063200, 60063300 and 60063400 respectively which are subheadings classified on double "--" level under single "-" i.e. of synthetic fibres. Further, the duty structure under CTH 60063100, 60063200, 60063300 and 60063400 on double "--" level is 20%, therefore, I find that the impugned goods merits classification under single "-" i.e. of synthetic fibres and BCD leviable in the instant case is 20%.

16. Further I find that Rule 3(a), of General Rules for Interpretation of the Schedules of Customs Tariff Act, 1975 (as amended time to time) states that the heading which provides the most specific description shall be preferred to headings providing a more general description. In the present case, the impugned goods contain 90% polyester and therefore the impugned goods merits classification under single "-" i.e. of synthetic fibres of 6006 of the First Schedule to the Customs Tariff Act, 1975.

17. As detailed in the Show cause notice and subsequently discussed in foregoing paras, the Noticee have imported the goods described as "MIX DESIGN OF LYCRA FABRIC (polyester 90% spandex 10%) dyed and undyed uneven packing, various GSM, Length and size" vide five Bills of Entry mentioned in Table-I and wrongly classified the same under CTH 60069000 and paid basic customs duty @ 10%, whereas the impugned

goods merit classification under CTH 6006 “-of synthetic fibres” attracting Basic Customs duty @20%. Importer has declared the imported goods as Mix Design of Lycra Fabric and classified all items under one CTH 60069000. However, the importer has not separately declared the imported goods as dyed fabric and undyed fabric and not classified the same under CTH 60063100 to 60063400 as there are separate Chapter Headings for Unbleached or bleached, Dyed, of yarns of different colours and printed fabric of synthetic fibres under CTH 60063100 to 60063400.

I find that the importer has imported the impugned goods under five Bills of Entry as detailed in Table-I by wrongly classified under CTH 60069000 and claiming exemption under the Sr.No. 169 of Notification No. 82/2017-Cus dated 27.10.2017 as discussed above, which is not admissible in view of the statutory provisions discussed hereinabove, with a willful intention to evade applicable customs duty and thus, contravened the provisions of Section 12 and 17 of the Customs Act, 1962. The act and omission / commission on the part of the importer have resulted in short-payment of BCD amounting to Rs. 11,11440/ which is required to be demanded and recovered from them under Section 28 of Customs Act, 1962 along with interest at appropriate rate as applicable under Section 28AA of the Customs Act, 1962.

18. Further, from the advent of self-assessment in 2011, it is the responsibility of the importer while presenting the bill of entry under Section 46 of the Custom Act, 1962, “shall make and subscribe to a declaration as to the truth and correctness of the contents of the bill of entry and to classify the goods under appropriate tariff item”. In the instant case, the importer has willfully suppressed the facts and deliberately misclassified the imported goods with a malafide intention to evade the duty. Therefore, the ingredients of wilful mis-statement with intent to evade duty is vividly present in the instant case for invocation of extended period under Section 28(4) of the Customs Act, 1962 for demand and recovery of duty short levied or short paid. I, therefore hold that the noticee has short paid customs duty by reasons of wilful mis-statement and contravention of provisions of Customs Act, 1962 with intent to evade payment of duty and therefore, extended period of five years, instead of normal period of two years, under Section 28(4) of the Customs Act, 1962 is correctly invoked in the present case.

19. In respect of demand of interest under Section 28AA of the Customs Act, 1962, I find that in terms of Section 28AA of the Customs Act, 1962, the person who is liable to pay duty (BCD+ SWS+IGST) in accordance with the provisions of Section 28 is also liable to pay interest thereon. As discussed above, the differential amount of duty i.e. basic customs duty is liable to be demanded and recovered under Section 28(4) of the Customs Act, 1962, therefore, the importer is also liable to pay interest at appropriate rate under Section 28AA of the Customs Act, 1962.

20. Liability of M/s. Yatharth Embroidery to penalty under Section 114A of the Customs Act, 1962.

In respect of proposal of penalty under Section 114A of the Customs

Act, 1962, I find that Section 114A *ibid* provides for imposition of penalty where the duty has not been levied/ short-levied by reason of collusion or any wilful mis-statement or suppression of facts. I find that Section 17(1) *ibid* provides, "an importer entering any imported goods under section 46 shall, save as otherwise provided in Section 85 self-assess the duty, if any, leviable on such goods". Section 46 (1) *ibid* provides, "The importer of any goods shall make entry thereof by presenting electronically to the proper officer a bill of entry for home consumption or warehousing in the prescribed form. Section 46(4) *ibid* provides, "The importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods. Section 46(4A) *ibid* provides, "The importer who presents a bill of entry shall ensure the following, namely: — (a) the accuracy and completeness of the information given therein; (b) the authenticity and validity of any document supporting it; and (c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.]"

As discussed above, misclassification and evasion of customs duty are in contravention of the provisions of Section 46(4) *ibid*. Since ingredients of mis-statement and suppression of facts with intent to evade duty is present in the instant case, said duty is liable to be demanded and recovered from the importer under Section 28(4) of the Customs Act, 1962. Therefore, I hold the noticee liable to penalty under Section 114A of the Customs Act, 1962. However, as per first proviso to Section 114A of the Customs Act, 1962, if the importer pays the amount of duty determined in this order along with interest payable thereon within thirty days from the date of communication of this order, the amount of penalty liable to be paid shall be twenty-five percent of the duty determined in this order. The benefit of reduced penalty shall be available if the amount of reduced penalty is also paid within the aforesaid period of thirty days.

21. Liability of M/s. AL Cargo Services (CB) to penalty under Section 117 of the Customs Act, 1962.

21.1 The noticee has contended that the Impugned Notice issued under Section 28(4) of the Customs Act, 1962 is invalid as admittedly, no DIN [Document Identification Number] has been assigned to it, which is a mandatory requirement as per the CIBC's own instructions vide Circular No. 122/41/2019-GST dated 05.11.2019 and Circular No. 128/47/2019-GST dated 23.12.2019.

In this regard, I find that the Show Cause Notice No. CUS/APR/MISC/4891/2023-Gr 3-O/o Pr Commr-Cus-Mundra dated 23.06.2023 was issued with DIN No. 20230671MO000000A58F and the same has been intimated to the noticee by Assistant Commissioner of Customs, Group-3, Customs House, Mundra. Hence, I do not find force in noticee's contention.

21.2 The noticee has further contended that the Show Cause Notice should not have been issued under the Section 28(4) of the Customs Act, 1962, any alleged demand could only have been raised under Section 28(1) of the Customs Act, 1962, hence the impugned Show Cause Notice is hit by limitation of time and hence liable to be set aside on this ground alone.

In this regard, I find that in the instant case, the importer has willfully suppressed the facts and deliberately misclassified the imported goods with a malafide intention to evade the duty. Therefore, the ingredients of wilful mis-statement with intent to evade duty is vividly present in the instant case for invocation of extended period under Section 28(4) of the Customs Act, 1962 for demand and recovery of duty short levied or short paid. I, therefore find that the noticee has short paid customs duty by reasons of willful mis-statement and contravention of provisions of Customs Act, 1962 with intent to evade payment of duty and therefore, extended period of five years, instead of normal period of two years, under Section 28(4) of the Customs Act, 1962 is correctly invoked in the present case.

21.3 The noticee has submitted that penalty cannot be imposed on the Noticee under Section 117 of the Customs Act, 1962 as no fact or evidence has been brought on record which shows that the Noticee had any knowledge or mens rea for the alleged short payment of duty. The noticee has further submitted that they had no role to play or had any prior knowledge about the alleged short payment of duty, hence the impugned Show Cause Notice insofar as the Noticee is concerned is liable to be set aside.

21.3.1 As regards above contention of the noticee, I find that it is not a case where there are some evidences on record against the CB that they had previous knowledge of such happening. Further there is also no evidence to show that CB has connived with the importer for duty evasion. I find that in the case of Commissioner of Customs Vs B. Dhananjayan (CESTAT Chennai) Custom Appeal No. 40323 of 2021, the tribunal held that agent is not an inspector, but rather a processing agent of documents with respect to clearance of goods through Customs House; there was nothing on record to show that the appellant therein had knowledge that the goods mentioned in the shipping bills did not reflect the truth of the consignment sought to be exported and in the absence of such knowledge, there cannot be any mens rea attributed to the appellant or its proprietor.

21.3.2 In view of above discussion, I do not impose any penalty on the Customs Broker.

22. In view of foregoing discussion and findings, I pass the following order.

ORDER

- i. I reject the classification of the impugned goods under CTH 60069000 imported vide five Bills of Entry as detailed herein Table-I and deny listing of the goods under Sr.No. 169 of Notification No. 82/2017-Cus dated 27-10-2017 and order to reclassify same under CTH “-of synthetic fibres” of 6006 i.e. 60063100 to 60063400 of Customs Tariff Act, 1975;
- ii. I confirm the demand of differential Customs duty amounting to Rs. 11,11,440/- (Rupees Eleven Lakh Eleven Thousand Four Hundred Forty only) leviable on the impugned goods in respect of Bills of Entry as detailed herein Table-I and order the same to be recovered from them under Section 28(8) read with 28(4) of the Customs Act, 1962 along with applicable interest at appropriate rate under Section 28AA ibid;
- iii. I impose a penalty of Rs.11,11,440/- (Rupees Eleven Lakh Eleven Thousand Four Hundred Forty only) on M/s. Yatharth Embroidery under Section 114A of the Customs Act,1962;
- iv. I refrain from imposing any penalty on CB, M/s. AL Cargo Services under Section 117 of the Customs Act,1962;

23. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act, 1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

2 4 . Show Cause Notice dated 23.06.2023 issued vide F. No.- CUS/APR/MISC/4891/2023-Gr 3-O/o Pr Commr-Cus-Mundra is hereby disposed off in above terms.

Arun Kumar
ADDITIONAL COMMISSIONER
Custom House, Mundra.

F. No. I/2066730/2024

Date: 20-06-2024

To,

1. M/s. Yatharth Embroidery,
1071/72, Ambaji Market,
Kamela Darwaja, Surat,
Gujarat-395002.
2. M/s. AL Cargo Services (CB),
54A, Kalpana Apartment,
Sector-5, Vaishali, Ghaziabad,
U.P. – 201010.

Copy to:

1. The Deputy/Assistant Commissioner (RRA), Customs House, Mundra
2. The Deputy/Assistant Commissioner (TRC), Customs House, Mundra
3. The Deputy/Assistant Commissioner (EDI), Customs House, Mundra
for uploading the same on the website of Customs House, Mundra
4. Guard File.