

भारतीय डाक

RM583927465IN IVR:8277583927465

RE MUMBAI GPO <900001>

Counter No:11,28/05/2019,16:49

To:CUSTOM EXCISE, SER TAX A TRONL

PIN:600006, Greaves Road S.O

From:VIKRAMATH S ,CHAND

Wt:1910gms

Am:503.00(Cash)

<Track on www.indiapost.gov.in>

<Dial 1800 266 6868>



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VAKALATNAMA

**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, CHENNAI**

**CUSTOM APPEAL NO. OF 2019 ARISING OUT OF ORDER-IN-
ORIGINAL NO. 04/2019 DATED 28.02.2019**

M/s. Fulchand Exports,

...Appellants

Versus

The Commissioner of Customs, Tuticorin

...Respondent

I / We, M/s. Fulchand Exports do hereby appoint and authorize Mr. Vikramarth Sheo Chand to act, appear and plead on our behalf in the captioned matter.

In Witness Whereof, We have set our hands to this writing this __th day of May, 2019.

For and behalf of

M/s. Fulchand Exports

We Accept:



Basant Fulchand

Appellant

**For Adv. Vikramarth S. Chand
C-1703, Lloyds Estate,
Vidyalankar College Road,
Wadala East,
Mumbai – 400 031**

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C-1703, Lloyds Estate,

Vidyalankar College Road,

Wadala East,

Mumbai – 400 031



FULCHAND EXPORTS

Cotton Knitwear Mfrs. & Exporters
Estd. 1972

206 / 207, Creative Industrial Estate, 72, N. M. Joshi Marg, Mumbai - 400 011. INDIA. Phone : +91-22-2306 1596 • 2306 1658 • 2306 1659 • Fax : +91-22-2309 9883

__th May, 2019

The Assistant Registrar,
Customs, Excise & Service Tax Appellate Tribunal,
Shastri Bhavan,
Annexe Building,
1st Floor, 26,
Haddows Road,
Chennai – 600 006

Sub: Appeal against Order In Order-in-Original No. 04/2019 dated 28.02.2019

Dear Sir,

We refer to the above captioned subject and as per Circular dated 27.02.2017 & 17.03.2017, we are making the following undertaking for the purpose of filing the appeal.

“Matter not previously filed or pending before any other legal forum including Hon'ble High Court / Supreme Court.” The Appellant/applicant further declare that he has not previously filed any appeal, writ petition or a suit regarding the impugned order, before any court or any other authority or any Bench of the Tribunal.”

Thanking you.

Yours faithfully,

For M/s. Fulchand Exports.



Partner



**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI**

CUSTOMS APPEAL NO. OF 2019

M/s. Fulchand Exports

...Appellant

Versus

The Commissioner of Customs, Tuticorin

...Respondent

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A

VAKALATNAMA

**BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, CHENNAI**

**CUSTOM APPEAL NO. OF 2019 ARISING OUT OF ORDER-IN-
ORIGINAL NO. 04/2019 DATED 28.02.2019**

M/s. Fulchand Exports,

...Appellants

Versus

The Commissioner of Customs, Tuticorin

...Respondent

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In Witness Whereof, We have set our hands to this writing this ___th day of May, 2019.

For and behalf of

M/s. Fulchand Exports

We Accept:



Basant Fulchand

Appellant

For Adv. Vikramarth S. Chand

C-1703, Lloyds Estate,

Vidyalankar College Road,

Wadala East,

Mumbai – 400 031

B

RECEIPT FOR CUSTOMS & OTHER CHARGES

No. 4016

Port: *TT*

Date: *20.6.57*

Received from *M/S. Fulchand*

Rupees [In Words] *Two lakh eight thousand*

On account of charges as shown below

Shroff *Rs. 218,473*

Customs Commissioner

PARTICULARS OF CHARGES

1. Import duty.

2. Export duty.

3. Cess.

4. Other Customs Receipts.

5. Port dues.

6. Other Non - Customs Receipts.

*Refund of
In admissible
DBK*

Corporation Bank

511465 / 17.6.57

Note : In the case of Item Nos. 1, 2, and 3 the name of the vessel should be entered

True Copy
[Signature]
Advocate

C

सीमाशुल्क DBK
ALL CUSTOMS

कुटकर प्रमार्गे का बिल

BILL FOR MISCELLANEOUS CHARGES

डू./No. Misc. - 41/05-DBK (ACC) तारीख/Dated. 08/07-2005

(1) सर्वथी
Messrs.

(2) एस. एस.
-S.S.

(3) वाबत
On account of

(4) रकम रु.
Amount Rs.

Fulchand Exports

DDNO:- 511416/10.06.05

Return of DBK

1,00,965/ (one lakhs and six hundred and fifty only)

(रुपय शब्दों में)

(Rupees in words)

कृते सहायक सीमाशुल्क समाहर्ता
For Assistant Commissioner of Customs

AIRPORT CUSTOMS, CHENNAI
AIR CARGO COMPLEX
MCO 70032
8 JUL 2005
100965/-
SIROPS, ACCT.

उक्त राशि प्राप्त की।
Received the above sum.

सीमाशुल्कालय
CUSTOMS HOUSE

200
200

MCO 70032

True Copy
Advocate

Challan of amount paid into the Indian Bank

Accounting Collectorate Coimbatore

Mapur (Code No.)

Code No. 25

Name of the Bank Branch with Code No.

Division Tirupur

Name of the Focal Point Bank Indian Bank

Code No. 251

Coimbatore (Code No.)

Range I Code No.

Name and address FULCHAND EXPORTS

of the Assessee 14 C. Angeripalayam Road

Code No. TELEPHONE-641 603.

By whom tendered

Full Particulars of the remittance and authority, if any (PLA/Tariff Item/Order No. and date etc./ Name of the commodity manufactured)	Head of Account.....038		Amount Tendered				Countersignature of the Departmental Officer (where required)
	Major Head Union Excise Duties		By Cash		By Cheque, Draft, Pay Order etc.,		
	Minor Head (Indicate below the appropriate minor head from the list on the reverse)	Accounting Code No.					
			Rs.	P.	Rs.	P.	
Noted by Excise Officer MCH	1. Basic Excise Duties						Corporate Bank 575-40 966632 dt 21/10
	2. Special Excise Duties						
	3. Additional Excise Duties in lieu of Sales Tax						
	4. Addl. Excise Duties (T. & T.A.)						
	5. Cess on						
	6. Other Receipts						
	Total						

(In words) Rupees Forty four thousand Nine hundred and five only

For Fulchand Exports

[Signature]

Partner / Manager

Signature of the Tenderer

(To be filled in by the Bank)

Received payment (In words) Rupees Forty four

thousand Nine hundred and five only

(Rs 44,905/-)

Bank's Receipt Stamp

INDIAN BANK	Date Stamp
Coimbatore Main	Signature of the authorized officer of the Bank
RECEIVED	REALISATION
Name of the Bank <u>TENDER</u>	<u>07 NOV 2005</u> <u>09 NOV 2005</u>
Manager	

Space for Focal Point Bank indicating the date, amount credited to Government Account.

True Copy
[Signature]
Advocate

F

(Treasury Rule 92)

Challan of amount paid into the Indian Bank Main
Tirupur (Code No. 0200223) Accounting Collectorate Coimbatore
 Name of the Bank Branch with Code No. Code No. 25
 Division Tirupur
 Name of the Focal Point Bank Indian Bank Code No. 2511
Coimbatore (Code No.) Range I Code No.
 Name and address PULCHAND EXPORTS
 of the Assessee 14-C. Angeripalayam Road Ph: 2477043, 2475892
TIRUPUR-641 603.
 Code No. By whom tendered.

Full Particulars of the remittance and authority, if any (PLA/Tariff Item/Order No. and date etc./ Name of the commodity manufactured)	Head of Account.....038 Major Head Union Excise Duties		Amount Tendered				Countersig- nature of the Departmental Officer (where required)
	Minor Head (Indicate below the appropriate minor head from the list on the reverse)	Accounting Code No.	By Cash		By Cheque, Draft, Pay Order etc.,		
			Rs.	P.	Rs.	P.	
Refund of excise Draw Back	1. Basic Excise Duties						Corporation Bank D.D No:- 966955 dt: 26/5/06
	2. Special Excise Duties						
	3. Additional Excise Duties in lieu of Sales Tax						
	4. Addl. Excise Duties (T. & T.A.)						
	5. Cess on						
	6. Other Receipts				29616	-	
	Total				29616	-	

words) Rupees Twenty one thousand six hundred and fifteen only

For Fulchand Exports



 Partner / Manager
 Signature of the Tenderer

(To be filled in by the Bank)

Received payment (In words) Rupees Twenty one
Thousand six hundred and fifteen only

Bank's Receipt
StampSignature of the
authorized Officer
of the BankName of the Bank 29 MAY 2006 31 MAY 2006
 Space for Focal Point Bank:
 Indicating the date, amount
 credited to Government Account.

 True Copy

 Advocate

FORM NO.CA-3

[See rule 6(1)]

*Form of Appeal to Appellate Tribunal under sub-section (1) of section 129A of Customs Act,
1962*

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**CUSTOMS APPEAL NO. OF 2019****M/s. Fulchand Exports****...Appellant****Versus****The Commissioner of Customs, Tuticorin****...Respondent**

1	Location Code	XM0602
	IEC	0389027049
	PAN or UID	AAAFF0358A
	E-mail address	basantf@gmail.com
	Phone No.	+91-421-2475892
	Fax No.	+91-421-2470073
2	The designation and address of the authority passing the order appealed against	The Commissioner of Customs, Office of the Commissioner of Customs, Custom House, New Harbour Estate, Tuticorin - 628 004
3	Number and date of the order appealed against	Order-in-Original No. 04/2019 dated 28.02.2019
4	Date of communication of a copy of the order appealed against	04.03.2019
5	State or Union territory and the Commissionerate in which the order or decision of assessment, penalty, fine was made.	Custom House, Tuticorin
6	If the order appealed against relates to more than one Commissionerate, mention the	Air Cargo Complex, Sahar, Mumbai Chennai Air Cargo

	names of all the Commissionerates, so far as it relates to the appellant.		
7	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals)	Not Applicable	
8	Address to which notices may be sent to the Appellant	14C, Angeripalayam Road, Tirupur 641603, Tamilnadu, India	
9	Address to which notices may be sent to the Respondent	Office of the Commissioner of Customs, Custom House, New Harbour Estate, Tuticorin - 628 004	
10	Whether the decision or order appealed against involves any question having a relation to the rate of duty of customs or to the value of goods for purpose of assessment.	No.	
11	Description and classification of goods	'Cotton Knitted Garments' falling under Chapter 61	
12	Period of dispute.	November 2003 - September 2004	
13 (i)	Amount of customs duty, if any, demanded for the period of dispute	INR 33,48,804/-	
13 (ii)	Amount of interest involved up to the date of the order appealed against		
13 (iii)	Amount of refund, if any, rejected or disallowed for the period of dispute	Not Applicable	
13 (iv)	Amount of fine imposed	Not Applicable	
13 (v)	Amount of penalty imposed	INR 10,00,000/-	
13 (vi)	Market value of seized goods.		
14 (i)	Amount of duty or fine or penalty or interest deposited. If so, inform the amount deposited under each head	INR 3,98,958/- has been deposited vide Challans dated 20.06.2005 (INR 2,18,473/-), 08.07.2005 (INR	

	in the box below. (A copy of the challan under which the deposit is made shall be furnished)	1,00,965/-), 07.11.2005 (INR 44,904/-), 29.05.2006 (INR 29,616/-).	
	Duty	INR 3,93,958	
	Fine	-	
	Penalty	-	
	Interest	-	
14 (ii)	If not, whether any application for dispensing with such deposit has been made?	Not Applicable	
15	Does the order appealed against also involve any central excise duty demand, and related fine or penalty, so far as the appellant is concerned?	Not Applicable	
16	Does the order appealed against also involve any service tax demand, and related penalty, so far as the appellant is concerned?	Not Applicable	
17	Subject matter of dispute in order of priority (please choose two items from the list below, under the head 'IMPORT' or 'EXPORT' or 'GENERAL', depending upon the nature of the case)	Priority 1	Priority 2
	Import (i) Classification - Chapter (ii) Valuation - GVC/SVB or Others (iii) Application of Exemption Notification No. (iv) Anti-dumping duty (v) Safeguard duty (vi) Project imports (vii) Baggage (viii) Courier		

	<p>(ix) Imports under Export Promotion Scheme</p> <p>(x) Seizure cases</p> <p>(xi) Refunds</p> <p>(xii) NTR (Non Tariff Restrictions like import license, Phyto Sanitary requirements, etc)</p> <p>(xiii) Others</p>		
	<p>Export</p> <p>(i) Classification - Srl. Nos. of Export Schedule</p> <p>(ii) Valuation</p> <p>(iii) Drawback</p> <p>(iv) Export under any Export Promotion Scheme (other than drawback)</p> <p>(v) Non-Tariff restrictions</p> <p>(vi) Others</p>	Drawback	
	<p>General</p> <p>(i) Custom House Agent Licensing Regulations, 2004</p> <p>(ii) MOT Charges</p> <p>(iii) Others</p>		Penalty
18	Central Excise Assessee Code, if registered with Central Excise.	AAAFF0358AXM001	
19	Service Tax Assessee Code, if registered with Service Tax.	AAAFF0358AST001	
20	If the appeal is against an Order-in-Appeal of Commissioner (Appeals), the number of Orders-in-Original covered by the said Order-in-Appeal	Not Applicable	
21	Whether the respondent has also filed appeal against the order against which this appeal is made?	Not Applicable	

22	If answer to serial number 21 above is 'yes', furnish the details of the appeal	Not Applicable
23	Whether the appellant wishes to be heard in person?	Yes
24	Reliefs claimed in appeal	<p>a) the Impugned Order be set aside to the extent it imposes liability on the Appellant;</p> <p>b) for such further and other reliefs as the nature and circumstances of the case may require.</p>

STATEMENT OF FACTS

1. M/s. Fulchand Exports (hereinafter referred to as the 'Appellant') are manufacturers and exporters of 'Cotton Knitted Garments' falling under Chapter 61 (hereinafter referred to as the 'said goods') of the Central Excise Tariff Act, 1985 (hereinafter referred to as the 'CETA') having their factory premise at 52/3, Site No. 3, Angeripalayam Road, Tiruppur. For the purpose of conducting their business, the Appellant have obtained Central Excise Registration Certificate No. AAAFF0358AXM001 and Import-Export Code No. 0389027049.
2. As a function of its business, Our the Appellant procures raw materials namely cotton yarn (counts of 10's to 50's), polyester filament yarn, sewing thread, lycra and other accessories like zippers, buttons etc. In addition to these, the Appellant also purchased cartons, polybags, dyes, labels etc.
3. During the period in concern, i.e. 2003-04 the Appellant procured 4,03,232.87 Kgs of indigenous yarn (i.e. cotton yarn and polyester yarn). Out of the said quantity, the Appellant purchased 3,64,502.97 Kgs (90.4%), by paying the applicable Central Excise Duty (hereinafter referred to as 'CE Duty'). The remainder 38,729.9 Kgs (9.6%) of yarn, was procured without payment of duty, in terms of the benefits as

provided under Rule 19(2) of the Central Excise Rules 2002 (hereinafter referred to as 'CER').

4. It is pertinent to note that Rule 19 of the CER provides for removal of excisable goods without payment of CE Duty when such goods are used as inputs in the manufacture of goods which are exported. The relevant portion of Rule 19 of the CER is reproduced hereunder for ready reference:

"RULE 19. Export without payment of duty. -

...

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the [Principal Commissioner or Commissioner, as the case may be]."

5. Out of the 38,729.90 Kgs of duty-free yarn procured by the Appellant under the aforesaid rule, 6772.86 Kgs of yarn was utilized in manufacture of the final products, which were subsequently exported under claim for Duty Entitlement Pass Book Scheme (hereinafter referred to as 'DEPB'). The residual 31,957.04 Kgs was also intended to be exported under DEPB scheme; however, 31,044.04 Kgs was used along with 9766.62 Kgs of duty paid yarn in manufacture of garments and exported under the drawback scheme as provided under Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 (hereinafter referred to as 'Drawback Rules'). The residual quantity, i.e. 913 Kgs of 31,957.04 Kgs duty-free yarn, represents stock fabric, issues for samples and knitting / dyeing mistakes, which were set aside.
6. The abovementioned quantities of duty-paid and duty-free yarn were processed to manufacture garments that were exported via Custom House Tuticorin, Air Cargo Complex, Sahar, Mumbai and Chennai Air Cargo during the period of dispute. The total value of exports was INR 3,45,14,181.34/- and the same were covered under various shipping bills wherein the Noticee claimed a total drawback of INR 33,48,804/-.
7. A table summarising the consumption as discussed aforesaid is provided hereinbelow:

Place of export	Quantity of duty-free yarn	Total value of exports (as per shipping bills)	Drawback Claimed

Custom House Tuticorin	18632.880	1,98,85,263.97	20,43,831
Air Cargo Complex, Sahar, Mumbai	3378.120	41,69,383.72	3,77,958
Chennai Air Cargo	9033.40	1,04,59,533.65	9,27,015
Total	31,044.04	3,45,14,181.34	33,48,804

8. Thus, as is clear from the aforesaid, the Appellant claimed drawback of INR 33,48,804 only on 7.69% i.e. 31,044.04 Kgs of a total of 4,03,232.87 Kgs of yarn purchased during the period of dispute.
9. It is pertinent to note that at the relevant time the Appellant was not aware of the Central Excise procedures and availed double benefit under CE Rules and claim of drawback. However, on being pointed out the same, the Appellant reversed the entire quantum of duty saved, i.e., INR 3,64,342/- on 38729.9 Kgs of yarn exported under the drawback scheme and 913 Kgs of yarn used as stock fabric and samples, under the cover of their letter dated 18.06.2005. An additional payment of INR 29,616/- was also made by the Appellant towards the same. The payments were made under the following documents:
 - Air Customs Chennai Misc. No. 41/05-DBK (ACC) dated 08.07.2005 - INR 1,00,965/-
 - Receipt No. 4016 dated 20.06.2005 Customs House Tutocorin - INR 2,18,473/-
 - TR6 Challan dated 09.11.2005, Indian Bank, Tiruppur - INR 44,904/-
 - TR6 Challan dated 29.05.2006, Indian Bank Tiruppur - INR 29,616/-
10. It is pertinent to note that the payment was duly accepted by the Department and no objections were raised. A copy of the said letter dated 18.06.2005, is attached herewith and marked as 'Exhibit A'.
11. For their alleged contraventions of Section 75 A(2) of the Custom Act, 1962 (hereinafter referred to as the 'CA') read with Rule 16 Drawback Rules, Show Cause Notice No 53/2006 dated 20.6.2006 (hereinafter referred to as the 'SCN') from file INV/DGCEI/CBERU/4/2005 was issued by DGCEI, Coimbatore, Tiruppur. The SCN also demanded the Appellant to show cause as to why the exported goods on which drawback was availed should not be confiscated under section 113(1) of the Customs Act 1962, penalty should not be imposed on the exported goods under Section 114(iii) of the said Act and interest under section 28AA of the said Act should

not be demanded. A copy of the aforesaid SCN is attached herewith and marked as **'Exhibit B'**.

12. It is imperative to notice that the claim in the SCN was made under Section 75 of the CA which pertains to drawback on imported materials used in the manufacture of goods which are exported. Whereas, in the instant case it is beyond a pale of doubt that the yarn used has been locally procured. Further, even before receiving the abovementioned SCN the Appellant in utmost good faith immediately remitted the excess drawback of INR 3,64,342/- on 31,044.04 Kgs of non-duty paid duty-free yarn.
13. Additionally, in reply to the abovementioned Show Cause Notice our client the Appellant had consistently vide various letters dated 08.07.2006, 27.07.2006, 25.07.2007 and 26.10.2007 humbly requested for appointing a single adjudicating authority, preferably in Mumbai, for hearing under section 4 of the CA. However, despite our repeated requests we received no intimation in this regard thereby only highlighting the apathy of the department towards the unfortunate situation of our the Appellant.
14. After a lapse of one and half years from submitting a request for appointing a common adjudicatory authority, the Appellant received intimation vide letter dated 23.01.08 from the Office of the Commissioner of Customs, Customs House, Tuticorin in file no. C. No. VIII/10/182/2006 of a personal hearing which was scheduled for hearing on 05.02.08 and also requesting the Appellant to furnish a reply to the SCN.
15. The Appellant filed detailed replies to the same on 12.02.2008 urging the Honourable Adjudicating Authority to drop the proceedings and pleading for a personal hearing, before the cases are adjudicated. A copy of the said reply is attached herewith and marked as **'Exhibit C'**.
16. However, after a lapse of almost 8 years from filing the replies, the Appellants received intimation vide letter dated November 28th, 2016 from The Office of The Principal Commissioner of Customs (Air Cargo), Chennai conveying that the authority to adjudicate on the SCN, now vested with the said office.
17. Subsequently, after an inordinate delay of 12 years from the issuance of the SCN, the Commissioner of Customs, Customs House, Tuticorin was appointed as the common adjudicatory authority. Aggrieved by the delay in adjudication, the Appellant in W.P. No. 25334 of 2018 and W.P.M.P. Nos 29484 and 29488 of 2018 challenged the above-mentioned notification in the Madras High Court. However, the appeals were

dismissed and remanded back for adjudication to The Commissioner of Customs, Tuticorin.

18. Thereafter, a personal hearing of the said matter was conducted at the office of the Respondent on 29.01.2019, wherein in addition to reiterating the submissions made in the reply dated 12.02.2008, the Appellant made further written submissions dated 29.01.2019. The Appellant craves leave to refer and rely on the said written submission at the time of the hearing.
19. Thereafter, the respondent confirmed the demand on the Appellant in non-consideration to the allegations raised in the SCN and the submissions made by the Appellant vide Order-in-Original No. 04/2019 dated February 28th, 2019 (hereafter referred to as 'impugned order'). A copy of the same is annexed herewith as 'Exhibit E'
20. Aggrieved by the aforesaid, the instant appeals have been filed on the following grounds raised without prejudice to each other.

GROUND OF APPEAL

Appellant is entitled to claim drawback

- A. Without prejudice to any other grounds, it is submitted that the Appellant is entitled to claim the drawback on the exported garments since the Appellant had duly reversed the benefit of the Central Excise Duty availed by it on the inputs used in the manufacture of the exported garments.
- B. It is pertinent to note that Rule 3 of the Drawback Rules provides for provisions when drawback is availed on goods wherein a portion of the inputs have not suffered duty implications. The relevant portion of the Rule 3 is reproduced here for ready reference:

"Rule 3 Drawback. -

(1) Subject to the provisions of -

(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder,

(b) the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder,

(bb) the Finance Act, 1994 (32 of 1994), and the rules made thereunder; and

(c) these rules, a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government:

Provided that where any goods are produced or manufactured from imported materials or excisable materials or by using any taxable services as input services, on some of which only the duty or tax chargeable thereon has been paid and not on the rest, or only a part of the duty or tax chargeable has been paid; or the duty or tax paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, or of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty or tax paid or the rebate, refund or credit obtained"

[Emphasis supplied]

- C. As discussed in the foregoing paragraphs, the Appellant had a total of 38,729.9 Kgs of duty free yarn under the provisions of Rule 19(2) of CER. Further, it is an undisputed fact that out of the said quantity of 38,729.9 Kgs, 6,772.85 Kgs was exported under the DEPB scheme and in as such, no benefit was claimed on said quantity under the Drawback Rules. Further, 913 Kgs of yarn was utilized as stock fabric and samples. Therefore, out of the total quantity of yarn procured under Rule 19(2) of CER, only 31,044.04 Kgs of yarn was exported under the Drawback Rules.
- D. It is not disputed that the Appellant has duly reversed the benefit availed by it on 31,044.04 Kgs of yarn used as inputs in the exported garments and on 913 Kgs of yarn used as stock fabric and samples.
- E. Therefore, in terms of Rule 3 of Drawback Rules, the Appellant is duly entitled to the avall benefit of drawback on the exported garments since the said benefit was reduced taking into account the lesser duty paid by the Appellant.
- F. Reliance is placed on the judgment of Madhya Pradesh High Court in the case of Sterling Agro Industries Ltd. Vs. UOI reported in 2014 (302) ELT 353 (MP), wherein, while deciding on a very similar set of facts, the Hon'ble High Court observed as under:

"16. It is further pleaded by the department in the return that the petitioner had agreed to deposit the duty foregone on the inputs i.e. packing materials in question and deposited Rs. 22,06,762/- on duty and Rs. 2,57,385/- on interest on 28-4-2009. The argument of the department is that there is no provisions under the Statute for reversal of duty foregone. The revisional authority also observed that because the petitioner availed the facility of Rule 19(2) of the Rules of 2002,

hence, he is not eligible to receive the benefit of drawback. However, proviso to Rule 3(1) of the Rules of 1995 prescribes that if the goods are produced or manufactured from imported materials or excisable materials on some of which only, duty chargeable thereon had been paid and not on the rest, the drawback admissible on the said goods be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained. In the present case, the petitioner used packing material to manufacture and export of skimmed milk powder, full cream milk powder, butter oil etc. The aforesaid packing material was imported by the petitioner. The petitioner deposited the CENVAT credit and excise duty on the aforesaid material. In such circumstances, in our opinion, the petitioner is eligible to receive benefits of drawback in terms of proviso to Rule 3(1) of the Rules of 1995."

- G. Therefore, in light of the above submissions and law settled in this regards, the Appellant is duly entitled to avail the benefit of the drawback on the exported garments and the impugned order should be set aside on this ground alone.

Show Cause Notice is bad in law

- H. At the outset it is submitted that the entire demand proposed to be recovered by the proceedings initiate by the SCN is bad in law is as much as the SCN proposes to recover the drawback claimed by the Appellant under the provisions of Section 75 of the CA for goods procured locally.

- I. As discussed in the foregoing paragraphs, the SCN had called upon the Appellant to show cause as to why the amount of drawback in respect of exports made by the Appellant should not be wholly denied for contravention Rule 16 of the Drawback Rules read with Section 75 of the CA. The relevant portion of the SCN is reproduced hereunder for ready reference:

"10.2. From the acts of omission and commission of F&S, it appears that they are liable for penal action under Section 114(iii) of Customs Act, 1962 and the ineligible duty Drawback claimed by them is demandable under Rule 16 of the Customs and Central Excise Duty Drawback Rule, 1995 read with Section 75 of the Customs Act." [Emphasis supplied]

- J. It is submitted that Rule 16 of the DDR provides for the procedure for repayment of drawback which has been claimed erroneously, i.e., in the event the drawback has been claimed in contravention of specific provisions, the Department may invoke

the said rule for recovering such amounts along with applicable interest. Rule 16 of the DDR is reproduced hereunder for ready reference:

"Rule 16. Repayment of erroneous or excess payment of drawback and interest.

Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of section 142 of the Customs Act, 1962 (52 of 1962)."

K. As can be seen from the aforesaid extract of the SCN, the recovery under Rule 16 of the DDR has been invoked by reading the same with the provisions of Section 75 of the CA. It is pertinent to note that Section 75 of the CA deals with 'Drawback on imported materials used in the manufacture of goods which are exported'. In the present case, it is not in dispute that all the materials used in the manufacture of the exported goods, i.e. the duty paid and the non-duty paid yarn were procured locally.

L. Further, it is pertinent to note that Section 75 of the CA provides only for drawback of the duties of customs chargeable under the CA and not for duties of excise chargeable under the Central Excise Act, 1944. In the present case, nowhere does the SCN or the impugned order alleged short-payment / non-payment of any duties of customs so as to invoke the provisions of Section 75 of CA. The relevant portion of Section 75 of the CA is reproduced hereunder for ready reference:

"75. Drawback on imported materials used in the manufacture of goods which are exported:

1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer, or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods." [Emphasis supplied]

M. As can be seen from the aforesaid, the present case neither involved any import of materials nor does the demand pertain to recovery of customs duty. Therefore, it is submitted that the SCN is bad in law in as much as it has been issued by invoking

provisions of the CA which are inapplicable to the facts and circumstances of the present case since the demand does not relate to the claim of drawback on imported materials.

- N. In fact, as discussed in later paragraphs, the Respondent has erroneously confirmed the duty by invoking other provisions of law not mentioned in the SCN since the provisions relied upon by the SCN are completely inapplicable in the present case. This clearly shows that the demand raised by the SCN is not sustainable under Section 75 of the CA.
- O. In light of the aforesaid submissions, the SCN is bad in law and the impugned order confirming the demand pertaining to proceedings initiated vide the SCN, is liable to be set aside on this ground alone.

SCN is not issued by the 'proper officer'

- P. Without prejudice to the above, it is submitted that the present proceedings have been initiated vide the SCN issued by the Directorate of Central Excise Intelligence (hereinafter referred to as the 'DGCEI'). It is submitted that the issue whether the DGCEI has the jurisdiction to issue show cause notices for the period prior to 08.04.2011 was taken up in the matter of **Mangali Impex Ltd. v. Union Of India [2016 (335) E.L.T. 605 (Del.)]**, wherein the Hon'ble Delhi High Court had categorically held that the department cannot seek to rely upon amended provisions of Section 28(11) of Customs Act, 1962 as authorising the officers of the Customs, DRI, the DGCEI, etc., to exercise powers in relation to non-levy, short-levy or erroneous refund for a period prior to 08.04.2011 if, there was no proper assigning of the functions of reassessment or assessment in favour of such officers who issued such SCNs since they were not 'proper officers' for the purposes of Section 2(34) of the Act and further because Explanation 2 to Section 28 as presently enacted makes it explicit that such non-levy, short-levy or erroneous refund prior to 08.04.2011 would continue to be governed only by Section 28 as it stood prior to that date and not the newly re-cast Section 28 (11) of the Act.
- Q. The said judgement of the Hon'ble Delhi High Court was challenged by the Department before the Hon'ble Supreme Court. The Hon'ble Supreme Court admitted the appeal filed by the Department in **[2017 (349) ELT A98 (SC)]** & **[2016 (339) E.L.T. A49 (S.C.)]** and granted stay of operation of the judgment and order dated 03.05.2016 passed by the High Court of Delhi in *Mangali Impex (supra)*.

R. However, in view of the pendency of the decision before the Hon'ble Supreme Court, this Hon'ble Central Excise and Service Tax Appellate Tribunal (hereinafter referred to as the 'Hon'ble CESTAT') has been consistently taking a view that the matters arising out of SCN's issued by DRI before 2011 should be remanded back to the adjudicating authority with a direction to pass fresh orders after the Hon'ble Supreme Court decides the issue pending in Mangali Impex case. While remanding the matter back the Hon'ble CESTAT has kept all issues open. Some of the orders passed by this Hon'ble CESTAT are as under:

- i. M/s Punjab State Container & Warehousing Corpn. Ltd. Versus Commissioner of Customs (Imp), Nhava Sheva - 2018 (1) TMI 382 - CESTAT MUMBAI
- ii. Supro Overseas Pvt Ltd & Others v. Commissioner of Customs Mumbai [2017-TIOL-2619-CESTAT-MUM]
- iii. M/s Jindal Steel And Power Ltd. Versus Commissioner of Customs (Import) , Mumbai - 2017 (12) TMI 244 - CESTAT MUMBAI
- iv. Peak Agencies And Others Versus Commissioner of Customs (Preventive) , Mumbai - 2017 (12) TMI 1110 - CESTAT MUMBAI
- v. Shri Arjun Kr. Santhalia, Shri Bipin Kr. Vohra, M/s SPS Metal Cast & Alloys Pvt. Ltd, M/s SPS Steel Rolling Mills v. CCE, Bolpur - 2017 (12) TMI 381 - CESTAT KOLKATA
- vi. M/s. Fashion House Versus Commissioner of Customs, Tuticorin - 2017 (11) TMI 664 - CESTAT CHENNAI
- vii. Rahul Arora Versus CC, New Delhi - 2017 (5) TMI 1436 - CESTAT NEW DELHI
- viii. Amrut Traders v. CC (Export Promotion) Mumbai - Order No. A/89688-89691/17/CB dated 13.09.2017
- ix. SujayUday Desai v. C.C.-Kandla - Order No. A/12594-12605/2017 dated 15.09.2017
- x. M/s. Alumeco India Extrusion Ltd. v. CCE, Customs & ST, Hyderabad - I - Order dated 23.02.2017
- xi. M/s National Aviation Company & Others Versus CC, Hyderabad - 2017 (7) TMI 234 - CESTAT HYDERABAD
- xii. Vijay Silk House Pvt Ltd Versus Commissioner of Customs and Service Tax Bangalore-Cus - 2017 (5) TMI 1231 - CESTAT BANGALORE
- xiii. Pramod Agencies Versus Commissioner of Central Excise, Kanpur - 2016 (9) TMI 928 - CESTAT ALLAHABAD

- S. It is evident from the above that the Hon'ble CESTAT, has been taking a consistent view of remanding similar matters as stated above. Further, the aforesaid stand of the Hon'ble Tribunal is due to the fact that the issue of jurisdiction goes to the root of the matter and it is a settled law that issue of maintainability and Jurisdiction has to be decided first.
- T. Keeping the aforesaid in mind, the Department has also issued Circular F. No. 276/104/2016-CX. 8A (Pt.), dated 28th December, 2016 wherein it was clarified that "all the Show Cause Notices issued by DRI, DGCEI, SIIB, Preventive and other similarly placed officers and pending adjudication, where duty demand pertains to the period prior to 8-4-2011, should be transferred to the Call Book, irrespective of the fact whether the SCN is issued prior to or post 6-7-2011 by such officers, till the Department's SLP is finally disposed by the Supreme Court."
- U. In light of the aforesaid circular and judgments, it is submitted that till the issue of jurisdiction of DGCEI officer to issue show cause notice has not been settled by the Hon'ble Supreme Court, no demand can be confirmed on Appellant.

No intention to evade duty

- V. Without prejudice to the above, it is submitted that the SCN has alleged that the Appellant had not declared the true and correct information in the shipping bills at the time of export with an intention to evade duty.
- W. In this regard it is submitted that the same was caused due to an inadvertent clerical error on part of the Appellant. On being pointed out by the Department of the alleged violation of law by it, the Appellant immediately deposited the self-assessed Central Excise duty on the goods procured under Rule 19 of the CER. The same was deposited under a cover of the letter explaining in detail that the Appellant was reversing the benefit of non-duty paid inputs procured by it.
- X. Further, considering the volume of export documentation that is processed and the fact that the duty-free yarn constituted only 9.6% of the voluminous amounts of the Appellant's total export. The Appellant committed a bonafide mistake in availing the drawback amount on the duty-free yarn. Furthermore, the Appellant had been consistently filing Exhibit- II monthly reports and ARE 1/ARE 2 reports to the

central excise department and no inaccuracies had been reported for the same. Hence, considering the consistent adherence of the Appellant to the law in place and the subsisting cooperation that the Appellant has displayed with the authorities, ipso facto there was a bonafide mistake committed by the Appellant in availing drawback on the duty-free yarn and no wilful suppression of facts or misrepresentation was attempted to be undertaken to gain any undue economic benefit arising from such an act.

- Y. It is not in dispute that the said deposit, under the cover of the letter was accepted was the Department. However, the impugned order has proposed to confirm the demand by stating that there is no provision in law to reverse such a benefit. It is settled law that the Department cannot collect any amount without the authority of law. In the present case, since the amount equivalent to the central excise duty leviable on the inputs were accepted by the Department, it cannot be said now that such payment was made without any authority in law. Reliance in place in **Omkar Textile Mills vs. CCE [2014 (311) ELT 587 (Tri-Ahmd.)]**, wherein it was held as under:

"7. The quantum of reversal of Cenvat credit was never questioned by the Revenue. Once appellants declared the quantum of Cenvat credit reversed on the query of field formations, it cannot be held that there was any suppression on the part of the appellants with an intention to evade duty attracting extended period under proviso to Section 11A of the Central Excise Act, 1944."

- Z. In light of the aforesaid, it is submitted that not only did the Appellant had no intention of availing double benefit, but also the drawback claim of the Appellant has to be allowed since the benefit taken under Rule 19 of the CER was duly reversed by the Appellant before the issuance of the SCN.
- AA. Therefore, since the Appellant reversed the benefit taken under the CER, the drawback claim of the Appellant is valid in law and the present demand is not sustainable. In view of the same, the impugned order needs to be set aside on this ground alone.

Limitation

- BB. The present demand arises out of the SCN issued in June, 2006 for a period of April 2003 to July 2004 by applying the larger period of limitation of 5 years. As submitted above, the Appellant had no intention of evading duty and reversed the benefit taken under the CER Rules when the same was pointed out. Further, the Department duty

accepted the payment made by the Appellant along with the detailed letter submitted by it.

CC. In light of the aforesaid, it cannot be said that the Appellant had suppressed any information from the Department with an intention to evade duty. It is well settled law that in the absence of an intent to evade payment of duty, the mere failure to pay duty would not amount to suppression so as to warrant the invocation of the longer period of limitation.

DD. In the facts of the present case, there could not be a presumption of any intent to evade duty and therefore the longer period of limitation could not be invoked. The entire demand raised is barred by limitation.

Interest

EE. In view of the above since no demand can be confirmed against the Appellant, question of imposing any interest does not arise.

Penalty & Confiscation

FF. As discussed hereinabove, the Appellant had no intention to suppress any information from the Department and in fact reversed the benefit availed by it under the CER. Therefore, in absence of any mala fide intent on part of the Appellant, penalty & confiscation cannot be imposed and the impugned order is liable to be set aside.

GG. The Appellant craves leave to add, alter, amend or delete all or any of the submission made herein.

PRAYERS

The Appellant, therefore, pray that:

- a) the Impugned Order be set aside to the extent it imposes liability on the Appellant;
- b) for such further and other reliefs as the nature and circumstances of the case may require.

For and on behalf

M/s. Fulchand Exports



Basant Fulchand

APPELLANT

VERIFICATION

I, _____, the _____ of the Appellant above named,
do hereby declare that what is stated hereinabove is true to the best of my
information and belief.

Place:

Verified today this day of May, 2019

For and on behalf



M/s. Fulchand Exports

Basant Fulchand

APPELLANT

Exhibit - A

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FULCHAND EXPORTS

Office : 14-C, ANGERIPALAYAM ROAD, TIRUPUR. / Factory : No.3, SASTHRI NAGAR, ANGERIPALAYAM ROAD, TIRUPUR - 641 603
PHONE : +91 - 421 - 2471892 2475892, FAX : + 91- 421 - 2470073 E-MAIL : fulchand@vsnl.com

To
The Senior Intelligence Officer
Directorate General of Central Excise Intelligence
Regional Unit
Coimbatore - 45.

[Handwritten signature]
11-11-08
S. R. Srinivasan

Dear Sir,

Sub: Refund of Inadmissible DrawBack - REG

We are manufacturers and exporters of ready made knitted garments and also a recognized One Star Trading Export House. After the imposition of Excise Duty on readymade garments during the Budget 2003, we registered with Central Excise Authorities, Tirupur Division and obtained Central Excise Registration No. AAAPF0358AXM001. We are registered with DGFT and our Importer-Exporter Code No. is 0388047861. The raw materials used for final production of our products are cotton yarn of various counts (10's to 50's), polyester filament yarn, lycra, sewing thread, Buttons, Zipper etc. The packing materials such as Cardboard carton, polybags, labels etc are also purchased. During the period 2003-04 financial year (year in which we entered into central excise bracket) we have purchased in total 403232.870 kgs of Cotton yarn and Polyester yarn. Out of which 364502.97 kgs were purchased on payment of duty and 38729.900 kgs were purchased without payment of duty under Rule 19 (2) of Central Excise Rules 1944. (Statement A and Statement B enclosed) The other materials such as dyes for dyeing, lycra for knitting, sewing thread, Carton, Polybag, labels etc were procured indigenously without availing any benefits under Rule 19 (2) of Central Excise Rules, 1944. The total quantity of yarn purchased during the period referred above under Rule 19 (2) is 38729.900 Kgs. As per the conditions stipulated under Rule 19(2) the materials received without payment of excise duty must be used in the manufacturing of the goods exported. Since we are exporting our entire products and there are no domestic sales involved, the entire quantity of yarn (38729.900 kgs) purchased without payment of duty has been fully utilised for the manufacture of garments and which have been exported out of India to various customers abroad.

We have made our exports under claim for DEPB as well as claim for Draw Back. During the material time when we have obtained duty free yarn under Rule 19(2), we have also used duty paid yarn and other duty paid materials in the manufacture of garments along with non-duty paid materials. Out of the total quantity of yarn of 38729.900 kgs purchased under Rule 19 (2) of Central Excise Rules, 1944, 6772.860 kgs were exported under claim for DEPB. Out of the remaining 31957.040 kgs, 31044.040 kgs of yarn along with 9766.62 kgs of duty paid yarn were used in the manufacture of garments and exported under the claim for Draw Back (detailed work sheet attached- Statement-C) Remaining 913.000 kgs of yarn represents stock fabric, issues for samples and mistake knitting/dyeing.

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FULCHAND EXPORTS

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Since the general notes to Drawback Notification No.26/ Customs (NT) dated 01.04.2003 as amended only places restrictions for not availing all Industry rates if the product or commodity exported are manufactured out of non-duty paid materials. In our case since we have used partly non-duty paid cotton yarn and duty paid cotton yarn along with other duty paid materials procured indigenously without availing any duty exemption, we rightly availed the all Industry rate. Since the all Industry rate for such product is available to us as per Notification 43/2001 Central Excise dated 26.06.01 read with customs clarificatory circular No.MF (DR) circular No.19/2005 Cus., dated 21.03.2005, we claimed drawback on the exports of the commodity wherein non-duty paid yarn also used.

In the Notification No.43/2001 dt.26.06.2001 (Para 3) the words " the exporter can claim drawback in the case of any inputs have been obtained without payment of duty except to the extent and in the manner explicitly permitted under Customs & Central Excise Duties, Drawback Rules 1995" which means as per proviso 1 to Rule (3)(1) if any duty paid inputs have been used in the export of goods drawback is admissible on the same goods. Only condition is that Drawback shall be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained. (Circular enclosed)

The circular No.19/2005 Cus., dated 21.03.2005, a clarificatory circular issued by the Ministry also clearly emphasize in unequivocal terms that the All Industry Rates of Drawback cannot be denied or reduced on export goods using inputs some of which are non-duty paid. (Circular enclosed)

However, we inadvertently claimed full rate of Drawback mentioned in the all Industry rate for the goods manufactured and exported in which non-duty paid yarn procured under Rule 19 (2) has also been used. At the time of export we failed to reduce the duty portion on the non-duty paid quantity of yarn used in the garments.

As per proviso 1 of Rule.3 (1) we should have reduced in such situation the excise duty from the drawback claimed. Now we have been apprised that the equivalent amount of Central Excise Duty from the total amount of Drawback claimed on the goods exported wherein non-duty paid yarn also used. From the consolidated work sheet (Refer to Statement C) attached it is clear that 31957.040 kgs minus 913.000 kgs (Yarn used for samples, stock fabric and mistakes) of non-duty paid yarn along with 9766.62 kgs of duty paid yarn and other duty paid materials have been used in the manufacture of 28655.300 Kgs of garments exported under various shipping bills through various ports. (Details given in Annexure - C) The total assessable value of yarn purchased for 38729.900 kgs is Rs. 4762013.88. Out of which 6772.860 kgs, yarn amounting to Rs.848055.83 has been used in the manufacturing of garments and exported under claim for DEPB which is permissible. (Statement D) The remaining 31957.040 kgs minus 913.000 kgs of yarn used in the manufacturing of garments along with other duty paid

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yarn and other materials have been exported under various shipping bills though various ports as mentioned in the Annexure for which full All Industry rate has been claimed.

The excise duty on assessable value for balance 31044.040 kgs of yarn used for export of 28881.600 kgs portwise works out to be Rs.355942/- (Basic Excise Duty 8% Additional Excise Duty 15% on BED i.e. 9.20%) Port-wise despatch schedule with respective shipping bill details, weight enclosed. The excise duty of 9.20% on assessable value for remaining 913.000 kgs of yarn used for samples, stock fabric and mistakes works out to be Rs.8400

Since we have failed to show the excise duty portion separately of non-duty yarn paid yarn received under Rule 19 (2) in the shipping bills, we are surrendering the inadmissible drawback portwise with respective TR6 Challans. The abstract of worksheet for arriving at the figures portwise are as under. (Refer Statement C).

ABSTRACT:

FULCHAND EXPORTS	Export Weight Kgs	Yarn with outduty Kgs	yarn with duty Kgs	Value of yarn (Without duty) Kgs	Duty Saved 9.2%
CHENNAI PORT	11088.100	9033.040	5217.960	1,097,436.33	100,965.00 (Fully on shipment)
MUMBAI PORT	3835.000	3376.120	396.200	396,782.57	36,504.00
TUTICORIN PORT	13732.200	18632.880	4152.480	2374899.70	218473.00
			TOTAL	3,868,918.59	355,942.00
Samples, stock and Mistakes (Tirupur)		913.000		91,300.00	8,400.00

364342

Hope above descriptions are for your satisfaction.

Thanking You,
 Yours Faithfully

Mahendra Fulchand

PARTNER

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Exhibit B

**OFFICE OF THE DEPUTY DIRECTOR
DIRECTORATE GENERAL OF CENTRAL EXCISE INTELLIGENCE
REGIONAL UNIT, 386 A PANKAJA MILL ROAD, FIRST FLOOR
RAMANATHAPURAM, COIMBATORE-641045
PH.2320091, 2322852**

=====

F.No.INV/DGCEI/CBERU/4/2005
SCN No. 53 /06
OR No. 24/2005

Dated:20.6.2006

SHOW CAUSE NOTICE

M/s Fulchand Exports (herein after referred to as FE) are manufacturers and exporters of cotton knitted garments falling under Chapter 61 of the Central Excise Tariff Act, 1985 having their factory premises at 3, Shastri Nagar, Angeripalayam Road, Tiruppur. Consequent to the levy of Central Excise Duty on knitted garments from April 2003, FE got themselves registered with the Office of the Deputy Commissioner of Central Excise, Tiruppur Division and were assigned Central Excise Registration Certificate No. AAFF0358AXM001. The Import-Export (I.E) code number of FE is 0389027049.

2. On the basis of specific Intelligence gathered by the officers of DGCEI that FE procured yarn without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 and used the same in the manufacture of knitted garments which were exported under Duty Drawback scheme (All Industry Rates) in contravention of proviso II of Rule 3(1) of the Customs and Central Excise Duties Drawback Rules, 1995, investigation was initiated. In this connection, summons under section 108 of the Customs Act, 1962 was issued on 02/03/2005 to FE to furnish the details of raw materials procured without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 during the period from April 2003 to July 2004 and the connected shipping bills/ARE1s under which the garments were exported, utilizing the Duty free material. FE vide letter dated 02/03/2005 had furnished the following documents (Annexure A-1)

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- a) Export Invoices and Shipping bills under which garments were exported using non-duty paid yarn (Annexure A-2)
 - b) Computerised Statement furnishing details of yarn utilisation purchased without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 (Annexure A-3)
 - c) Order wise yarn issue chart (Bill of Material (B.O.M) relating to the consumption of non-duty paid yarn) (Annexure A-4)

The Deputy Commissioner of Central Excise, Tiruppur vide letter dated 28/12/2005 furnished copies of 11 Annexure-I s' issued to FE based on which a total quantity of 38729.90 kgs of cotton and blended yarn were purchased by FE without payment of Central Excise Duty.

3. Scrutiny of the records furnished by FE revealed that they have manufactured garments out of the duty-paid yarn and non-Duty paid yarn, which were exported under Duty Drawback scheme wherein both the Customs and Central Excise component of Duty Drawback have been claimed and received by the exporter.

4. Notification no.26/2003 Cus (N.T) dated 01/04/2003 as amended by Notification no.12/2004 Cus (N.T) dated 29/01/2004 prescribe the rates of Duty Drawback and is specified in the Drawback schedule. The specified Drawback rates can be availed subject to the conditions specified in the General note to the said notification. General Note 2 (f) to the said notification states that the rates of Drawback specified in the said table shall not be applicable to export if such commodity or product is inter-alia manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules 2002. In terms of the condition prescribed in the notification, it appears that Rule 19(2) of the Central Excise Rules, 2002 and Duty Drawback (All Industry Rates) are mutually exclusive. In other words when an exporter avails the facility under Rule 19(2) of Central Excise Rules, 2002, general note 2(f) to the said notification places an embargo on the exporter to claim Duty Drawback under All Industry Rates. Further, in terms of second proviso (ii) to Rule 3(1) of the Customs and Central Excise Duties

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Drawback Rules, 1995 no Drawback shall be allowed if the said goods are manufactured or produced, using imported materials or excisable materials in respect of which duties have not been paid. In this connection, further summons under section 108 of the Customs Act was issued to FE on 03/04/2006. FE vide letter dated 24/10/2005 authorized Shri Ramesh F. Sundesha to furnish statement. (Annexure A-5)

STATEMENT OF SHRI RAMESH F SUNDESHA, S/O FATECHAND, 47 YEARS, GENERAL MANAGER, M/S FULCHAND EXPORTS, TIRUPPUR DATED 03/04/2006 (Annexure A-6)

Shri Ramesh F Sundesha in his statement dated 03/04/2006 inter-alia deposed that

- a) M/s Fulchand Exports are the manufacturer-exporters of Ready Made Knitted garments and a recognized star trading export House. The Company is in the business of Garment Export for the past 15 years.
- b) When Central Excise duty was levied on knitted garments in the budget 2003, they obtained Central Excise Registration Certificate from Tiruppur Division.
- c) During the financial year 2003-2004 based on the Annexures issued by the Deputy Commissioner of Central Excise, Tiruppur Division they have purchased 38729.9 kgs of cotton yarn and blended yarn valued at Rs.47,62,013.88 without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 from different suppliers. Copies of the purchase invoices (Annexure A-7) are furnished along with the Annexure.
- d) M/s Fulchand Exports does not have any local sale of garments. The entire quantity of yarn procured without payment of duty has been used in the manufacture of garments, which were ultimately exported. During the financial year 2003-2004, M/s Fulchand Exports purchased a total quantity of 4,03,232.87 kgs of Cotton, Polyester and blended yarn. Out of this quantity 364502.97 kgs of yarn were purchased on payment of Central Excise duty and 38,729.90 kgs of cotton yarn and blended yarn valued at Rs.47,62,013.88

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without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002. Regarding the utilization of the yarn, they have used both duty paid and non-duty paid yarn in the manufacture of garments, which were ultimately exported. The detailed worksheet relating to the utilization of duty paid and non-duty paid yarn are furnished (Annexure A-8)

e) They have purchased a total quantity of 38,729.90 kgs of yarn without payment of duty under Rule 19 (2) of Central Excise Rules, 2002. Out of this, 6772.86 kgs of yarn were used in the garments, which were exported under DEPB Scheme. Out of the remaining 31,957.04 kgs of yarn, 31,044.04 kgs of yarn were used along with 9766.62 kgs of duty paid yarn in the manufacture of garments that were exported under Duty Drawback Scheme (All Industry rates). The remaining 913 kgs of yarn represents stock fabric, issues for samples etc. The detailed worksheet relating to the consumption of non-duty paid yarn along with duty paid yarn are furnished (Annexure A-8)

f) They intended to export garments only under DEPB Scheme. For certain category of garments, the DEPB was not available, hence they exported the garments under duty drawback (AIR) in which non-duty paid yarn along with the duty paid yarn were used. That they had inadvertently claimed duty drawback (AIR) for the goods manufactured and exported in which non-duty paid yarn under Rule 19(2) of CER has also been used. At the time of export, they had failed to declare that non-duty paid yarn was also used in the manufacture of exported garments. Subsequent to the investigation initiated by DGCEI, they paid back the Central Excise Duty on the non-duty paid yarn contained in the garments, which were exported under Duty Drawback Scheme (AIR). The payments were made under the following documents

	Amount
a) Air Customs Chennai Misc no.41/05-DBK(ACC) dated 08/07/2005	Rs. 100965
b) Receipt no. 4016 dated 20/06/2005 Custom House Tuticorin	Rs. 218473
c) Tr6 challan no. Nil dated 09/11/2005, Indian Bank, Tiruppur	Rs. 44904

	Rs. 364342

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g) The above payments relate to the Central Excise Duty on 31044.04 kgs of yarn received without payment of duty valued at Rs.38, 68,919 and Central Excise duty on 913 kgs of yarn which were not used in the export of garments

h) They have not availed Cenvat Credit on the duty paid inputs.

i) Since they were new to Central Excise, they were not aware of Central Excise Rules and procedures. Hence, they have not filed ARE1s/ARE2s for the exports made. Since they have paid the Central Excise duty on the yarn, which were purchased under Rule 19(2) Of CER 2002 they feel that their claim of drawback is in order.

j) They have received the Bank realization certificate for the exports made and they will furnish the same.

5. Out of the total quantity of 38729.90 kgs of yarn purchased under Rule 19(2) of Central Excise Rules, 2002, 31,044.04 kgs of yarn were used along with 9766.62 kgs of duty paid yarn in the manufacture and export of 28655.300 kgs of garments under Duty Drawback Scheme (All Industry Rates). 6772.86 kgs of non-duty paid yarn was used along with 1760.400 kgs of duty paid yarn in the manufacture of 4773.35 kgs of garments, which were exported under DEPB scheme. 913 kgs of non-duty paid yarn were not used in the manufacture of export garments.

6. Perusal of the documents furnished by FE revealed that

i) The exporter has purchased 38729.90 kgs of yarn without payment of Central Excise duty under 13 invoices

ii) In each such purchase invoice, an internal order no (IO No) is specifically assigned for the purpose of correlation.

iii) The I.O.Nos indicate the issues of yarn for executing a particular export order

iv) The I.O Nos appearing in the invoices is recorded in the Bill of material

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v) the bill of material contains the details of I.O. No, Style no, the quantity of yarn issued, the count of the yarn and the export invoice no and date under which the goods were exported.

Scrutiny and correlation of the above documents indicate that 28655.300 kgs of garments were manufactured and exported out of 40810.66 kgs of yarn (comprising of 31,044.04 kgs of yarn procured without payment of Duty under Rule 19(2) of Central Excise Rules, 2002 and 9766.62 kgs of duty paid yarn). 57 Shipping Bills (Annexure A-2) for the said exports were filed under Duty Drawback (All Industry Rate) Scheme. FE have claimed and received an amount of Rs.33,48,804 as Duty Drawback for the garments exported under 57 Shipping bills which appear to be not in order in as much as the said garments were manufactured out of both duty paid and non-duty paid yarn. A detailed worksheet containing the details of export invoice number, shipping bill no, FOB Value, IO No, quantity of consumption of non-duty paid yarn and duty paid yarn, drawback claimed, port of shipment etc based on which the ineligible duty drawback claimed by the FE is quantified and duly certified by the exporter is placed as Annexure-8 to this notice.

7. FE have intimated vide their letter dated 11/11/2005 (Annexure A-9) that they have paid the Central Excise Duty of Rs.364342 on 913 kgs of yarn not used in export garments and 31,044.04 Kgs of non-duty paid yarn consumed along with duty paid yarn in the manufacture of 28655.300 kgs of garments which were exported under Duty Drawback Scheme. There appears to be no provision either in the Central Excise Act, 1944 or the Customs Act, 1962 and the rules made there under to repay the Central Excise Duty on the inputs received without payment of Duty under Rule 19(2) of Central Excise Rules, 2002 and after utilizing such inputs in the manufacture of goods which were exported under Duty Drawback scheme. Hence, the garments exported under the 57 shipping bills which were manufactured out of non-duty paid and Duty paid yarn used along with non-duty paid yarn against which Duty Drawback claimed and received by the exporter appears to infringe the second proviso(ii) to Rule 3(1) of the Customs and Central Excise Duty Drawback rules (which reads as " If the goods are produced or manufactured, using

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Imported materials or excisable materials in respect of which duties have not been paid") read with Notification no.26/2003 Cus (N.T.) dated 01.04.2003 as amended by notification no.12/2004 Cus (N.T.) dated 29/01/2004. Against this backdrop, it appears that the input used for the manufacture of goods exported under the 57 Shipping bills as on relevant date and the duty drawback claimed and received in respect of the 57 Shipping bills appears to be against the spirit of provisions contained in Customs and Central Excise Duty Drawback Rules, 1995.

8.SUMMARY

From the foregoing, it appears that:-

- (i) FE have procured non-Duty paid yarn and used the same in the manufacture and export of garments under 57 shipping Bills mentioned above and have claimed and received Drawback to the extent of Rs.33,48,804/- (Rupees Thirty-three lakhs forty-eight thousand eight hundred and four only)
- (ii) Shri Ramesh F Sundesha in his statement dated 03/04/2006 recorded under section 108 of Customs Act has admitted to use 31,044.04 kgs of non-duty paid yarn along with 9766.62 kgs of duty paid yarn in the manufacture of garments that were exported under duty drawback scheme.
- (iii) There is no provision either in the Central Excise Act 1944 or in the Customs Act, 1962 providing for discharging of duty liability at a later date in respect of yarn procured without payment of duty so as to justify their action of obtaining drawback on garments exported which were manufactured out of such yarn procured without payment of duty. It appears that FE with the intention of not repaying the ineligible duty drawback already claimed and received by them, have paid certain amount as representing Central Excise Duty on such non-duty paid yarn claiming that amount alone is not eligible for drawback, after investigations were initiated by the Department against them

9. QUANTIFICATION OF INELIGIBLE DRAWBACK CLAIMED AND RECEIVED:

FE have exported cotton knitted garments covered under fifty-seven numbers of shipping bills during the period 2003-04 & 2004-2005 and have claimed and received both Central Excise and Customs component of the Duty Drawback which were manufactured out of non-Duty paid inputs procured under Rule 19(2) of Central Excise Rules, 2002. The export goods, which were manufactured out of non-Duty paid inputs are not eligible for a claim under All Industry Rate of Duty Drawback as per the exclusion clause contained in general note 2(f) of notification no.26/2003 cus dated 01/04/2003 as amended by notification no.12/2004 Cus (N.T) dated 29/01/2004. It appears that FE by deliberately not filing ARE1/ARE 2 in respect of exports made by them wherein the details of procurement of inputs without payment of Duty are required to be furnished, have intentionally claimed and received Drawback for the garments manufactured out of non-Duty paid yarn in respect of fifty-seven shipping bills which were exported through different ports. Thus the claim of Duty Drawback amounting to Rs.33,48,804/- in respect of the said 57 shipments appears to be improper. The details of the said 57 shipments made through different ports are furnished below.

TABLE I

CUSTOM HOUSE TUTICORIN

S.NO	INV.NO/DT	SB.NO/DT	NET.WT	SB FOB VALUE	DBK RECEIVED
1	2243/08.02.04	1261258/17.02.04	885.80	1014258.00	107611.00
2	2235/02.02.04	1257834/10.02.04	86.40	107625.00	11408.00
3	2313/08.03.04	1271534/08.03.04	230.80	190823.60	18111.00
4	2322/12.03.04	1274416/16.03.04	184.70	301379.40	30740.00
5	2334/17.03.04	1276711/22.03.04	1517.05	1368338.16	142181.00
6	2281/26.02.04	1267621/01.03.04	328.00	492881.42	50301.00
7	2385/19.04.04	1288863/26.04.04	228.40	441604.38	44224.00
8	2293/01.03.04	1270788/08.03.04	801.00	544088.00	57671.00
9	2282/01.03.04	1268312/03.03.04	688.00	654156.09	66858.00
10	2383/30.03.04	1282286/05.04.04	288.50	309833.19	32842.00
11	2370/08.04.04	1284003/10.04.04	628.20	826221.00	83675.00
12	2304/08.08.04	1279813/08.03.04	298.85	262395.00	27289.00

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S.NO	INV.NO/DT	SB.NO/DT	NET.WT	SB FOB VALUE	DBK RECEIVED
13	2388/02.04.04	1282288/08.04.04	678.90	632527.20	64816.00
14	2283/14.01.04	1281854/17.02.04	493.40	368000.00	38796.00
15	2387/19.04.04	1288881/26.04.04	748.68	928533.20	93016.00
16	2384/19.04.04	1288881/26.04.04	1230.76	1275874.40	127516.00
17	2404/27.04.04	1281381/04.05.04	318.00	342112.08	34120.00
18	2382/17.04.04	1288882/26.04.04	482.20	600794.84	61417.00
19	2382/30.03.04	1282278/06.04.04	898.30	416675.70	42501.00
20	2384/07.04.04	1284474/12.04.04	2522.60	2118785.58	214856.00
21	2348/24.03.04	1279800/29.03.04	472.00	490772.73	52022.00
22	2412/07.05.04	1283878/11.05.04	267.00	226126.00	23490.00
23	2403/27.04.04	1281818/04.05.04	498.70	467658.85	46779.00
24	2438/27.05.04	1307412/07.06.04	2312.40	2101795.30	218181.00
25	2532/07.08.04	1339188/09.08.04	810.76	679610.25	70598.00
26	2267/12.02.04	1281844/17.02.04	188.40	157828.88	16708.00
27	2270/20.02.04	1283984/23.02.04	189.70	279890.00	29085.00
28	2203/23.01.04	1280892/28.01.04	810.70	477603.00	54445.00
29	2488/09.07.04	1325507/12.07.04	3267.45	2108496.15	213094.00
			13732.20	19885263.97	2043831.00

TABLE II

AIR CARGO COMPLEX SAHAR MUMBAI

S.NO	INV.NO/DT	SB.NO/DT	NET.WT	SB FOB VALUE	DBK RECEIVED
1	2268/12.02.04	5253170/20.02.04	208.00	177710.40	18837.00
2	2249/09.02.04	5249062/18.02.04	148.00	133076.16	14106.00
3	2238A/06.02.04	5253188/20.02.04	67.00	93447.20	8906.00
4	2286/27.02.04	5265089/06.03.04	30.00	25841.70	2739.00
5	2261/12.02.04	5265089/06.03.04	602.00	518834.00	54785.00
6	2328/13.03.04	5275837/17.03.04	189.00	227891.14	24157.00
7	2371/12.04.04	5302844/16.04.04	39.00	88630.88	9183.00
8	2373/12.04.04	5302842/16.04.04	32.00	51584.88	5458.00
9	2064/27.08.03	5120385/30.08.03	150.00	204725.63	20473.00
10	2386/24.04.04	5311733/28.04.04	380.00	530820.83	56235.00
11	2211/24.01.04	5238738/04.02.04	226.00	174161.60	20027.00
12	2213/24.01.04	5237388/03.02.04	330.00	325492.44	28070.00
13	2226/02.02.04	5243318/09.02.04	357.00	334894.58	10382.00
14	2460/17.06.04	5375678/09.07.04	1218.00	1286582.30	103590.00
			3835.00	4169383.72	377958.00

TABLE III

CHENNAI AIR GARGO

S.NO	INV.NO/DT	SB.NO/DT	NET.WT	SB FOB VALUE	DBK RECEIVED
1	2143/06.12.03	2889829/09.12.03	3146.00	1955439.50	78218.00

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S.NO	INV.NO/DT	SB.NO/DT	NET.WT	SB FOB VALUE	DBK RECEIVED
2	2312/06.03.04	2750486/05.04.04	14.50	13452.00	1426.00
3	2423/17.05.04	2772404/20.05.04	385.00	220095.00	22863.00
4	2488/27.04.04	2767412/11.05.04	209.00	123280.00	13068.00
5	2333/17.03.04	2748519/26.03.04	383.00	454510.98	14090.00
6	2341/23.03.04	2748978/27.03.04	24.00	777015.58	80700.00
7	2456/11.06.04	2789856/22.06.04	485.20	342471.38	36302.00
8	2457/11.06.04	2789855/22.06.04	816.60	946302.78	100202.00
9	2489/17.06.04	2789844/22.06.04	332.80	267864.75	28394.00
10	2478/02.07.04	2786297/07.07.04	136.00	150773.00	15343.00
11	2448/31.05.04	2787659/18.06.04	981.00	933702.00	98993.00
12	2170/29.12.04	2761306/12.01.04	408.00	457877.98	18315.00
13	2182/02.01.04	2704919/12.01.04	2226.00	1906388.69	218391.00
14	2349/27.03.04	2748168/31.03.04	1583.00	1912359.75	202710.00
			11088.10	10459533.65	927015.00

10. . CONTRAVENTIONS INVOLVED:

10.1. In view of the foregoing discussions it appears that FE have received Ineligible Duty Drawback amounting to Rs.33,48,804/- by suppressing the fact of utilizing non-duty paid inputs in the garments covered under fifty seven shipping bills and there by contravened the provisions of: -

(i) Section 50(2) of Customs Act, in as much as the exporter, while presenting the shipping bills for export, have failed to make a true declaration regarding the utilization of non-Duty paid inputs in their export goods.

(ii) Section 113(II) of Customs Act, 1962 in as much as the goods were exported claiming Duty Drawback utilizing the non-Duty paid yarn in the export product and suppressing the said fact to the department

10.2. From the acts of omission and commission of FE, it appears that they are liable for penal action under section 114(III) of Customs Act, 1962 and the Ineligible Drawback amount claimed by them appears to be demandable under Rule 16 of Customs and Central Excise Duty Drawback Rule 1995 read with section 75 of Customs Act. Further, the goods exported are liable for confiscation under Section 113(I) of the Customs Act, 1962. As the goods are not available, having already been exported, they are liable to be

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held as confiscated and FE are liable to pay a fine in lieu of confiscation under section 125 of the Customs Act, 1962.

11.1 Now therefore, FE are hereby called upon to show cause to the Deputy Commissioner / Assistant Commissioner of Customs, Custom House Tuticorin, within 30 (thirty) days from the date of receipt of this notice, as to why:

(I) the ineligible Drawback received by them amounting to **Rs.20,43,831/- (Rupees Twenty lakhs forty three thousand eight hundred and thirty one only)** involved on the export of cotton knitted garments under 29 shipping bills, as detailed in Table I of para 9 supra, made through Custom House, Tuticorin should not be demanded from them under Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995

(II) The goods exported valued at **Rs. 1,98,85,263.97 (FOB Value)** on which drawback was claimed erroneously and received should not be held to be confiscated under section 113(I) of the Customs Act, 1962

(III) Penalty should not be imposed on them under Section 114(III) of the Customs Act, 1962, for the violations discussed supra.

(IV) Interest (at the rate specified under Section 28 AA of the Customs Act, 1962) should not be demanded on the ineligible Drawback received by them amounting to **Rs.20,43,831/- (Rupees Twenty lakhs forty three thousand eight hundred and thirty one only)** under Section 75 A(2) of the Customs Act, 1962 read with Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995

11.2 Now therefore, FE are hereby called upon to show cause to the Deputy Commissioner / Assistant Commissioner of Customs, Air Cargo Complex Mumbai within 30 (thirty) days from the date of receipt of this notice, as to why

(I) the ineligible Drawback received by them amounting to **Rs.3,77,958/- (Rupees Three lakhs seventy seven thousand nine hundred and fifty-eight only)** involved on the export of cotton knitted

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garments under 14 shipping bills, as detailed in Table II of para 9 supra, made through Air Cargo Complex, Mumbai, should not be demanded from them under Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995.

(II) The goods exported valued at Rs. 41,69,383.72 (FOB Value) on which drawback was claimed erroneously and received should not be held to be confiscated under section 113(I) of the Customs Act, 1962

(III) Penalty should not be imposed on them under Section 114(III) of the Customs Act, 1962, for the violations discussed supra.

(IV) Interest (at the rate specified under Section 28 AA of the Customs Act, 1962) should not be demanded on the ineligible Drawback received by them amounting to Rs. 3,77,958/- (Rupees Three lakhs seventy seven thousand nine hundred and fifty-eight only) under Section 75 A(2) of the Customs Act, 1962 read with Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995

11.3 Now therefore, FE are hereby called upon to show cause to the Deputy Commissioner / Assistant Commissioner of Customs, Air Cargo Complex, Chennai respectively, within 30 (thirty) days from the date of receipt of this notice, as to why

(I) ~~the ineligible Drawback received by them amounting to Rs. 9,27,015/- (Rupees Nine lakh twenty seven thousand and fifteen only)~~ Involved on the export of cotton knitted garments under 14 shipping bills, as detailed in Table III of para 9 supra, made through Chennai Air cargo Complex, should not be demanded from them under Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995

(II) The goods exported valued at Rs. 1,04,59,533.65 (FOB Value) on which drawback was claimed erroneously and received should not be held to be confiscated under section 113(I) of the Customs Act, 1962

(III) Penalty should not be imposed on them under Section 114(III) of the Customs Act, 1962, for the violations discussed supra.

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(iv) Interest (at the rate specified under Section 28 AA of the Customs Act, 1962) should not be demanded on the Ineligible Drawback received by them amounting to Rs.9,27,015/- (Rupees Nine lakh twenty seven thousand and fifteen only) under Section 75 A(2) of the Customs Act, 1962 read with Rule 16 of the Customs and Central Excise Duties Drawback Rules, 1995

12. The noticees are hereby required to produce all the evidences upon which they intend to rely in support of their defence in their written reply to the Show Cause Notice to the respective adjudicating authorities. They are also required to state in their written explanation whether they wish to be heard in person before the case is adjudicated.

13. If they do not reply to the show cause notice within the stipulated period, or if they fail to appear for personal hearing, when the case is posted for personal hearing before the respective adjudicating authority, it would be presumed that the noticee do not wish to be heard in person. Further they are informed that if no reply is received within 30 days from the date of receipt of this notice or in case they do not appear before the respective Adjudicating authority at the time and venue the case is posted for personal hearing, the case would be decided ex-parte based on evidences available on record.

14. The allegations leveled in this notice to show cause are based on the documents, statements of Authorized Signatory listed in Annexure A (Relied upon documents/ Materials) enclosed to this notice and the same may be treated as integral part of this show cause notice. Photocopies of all the relied upon documents as listed in Annexure A are enclosed to this notice.


(K. DURAIRAJ)
DEPUTY DIRECTOR

To
✓ M/s Fulchand Exports,
3, Shastri Nagar
Angeripalayam Road, Tiruppur

Copy submitted to:

2. The Director General of Central Excise Intelligence, New Delhi-66.
3. The Additional Director General of Central Excise Intelligence, Chennai
4. The Commissioner of Customs, Custom House, Tuticorin
5. The Commissioner of Customs, Air Cargo Complex, Mumbai
6. The Commissioner of Customs, Air Cargo Complex, Chennai

Copy to :

7. The Deputy Commissioner of Customs, Custom House Tuticorin
8. The Deputy Commissioner of Customs, Air Cargo Complex, Mumbai
9. The Deputy Commissioner of Customs, Air Cargo Complex, Chennai

} For Adjudic

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ANNEXURE- A RELIED UPON DOCUMENTS

**M/s Fulchand Exports,
3, Shastri Nagar
Angeripalayam Road, Tiruppur**

SL.No.	Description of records	Numbered as
1	Letter of FE dated 02/03/2005	A-1
2	57 shipping bills along with export Invoices as listed in table I to VI in the show cause notice,	A-2
3	Computerized statement furnishing details of yarn utilization purchased under Rule 19(2) along with purchase Invoices	A-3
4	Orderwise yarn issue chart (bill of material showing IO No. export Invoice number and date) IO number wise as listed in col.9 of Annexure A-8	A-4
5.	Authorisation letter dated 24/10/2005 of FE	A-5
6.	Statement of Shri Ramesh F.Sundesha	A-6
7	Purchase Invoices furnished along with the statement	A-7
8.	Worksheet relating to utilization of duty paid yarn and non-duty paid yarn and exports where both Central Excise and Customs portion of drawback has been claimed duly certified by FE	A-8
9.	Letter of M/s Fulchand Exports dated 11/11/2005 intimating payment.	A-9

Exhibit - C

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⑨ 12/02/2008

From
M/s. Fulchand Exports
Factory: No.3, Sasthi Nagar,
Angeripalayam road,
Tirupur-641603

Date: 12.02.08

To
The Commissioner of Customs
Custom House
New Harbour Estate, Tuticorin-4

Sir,

Sub : Reply to the Show Cause Notice - Personal Hearing - Reg.
Ref : Commissioner-Tuticorin C.No.VIII/10/181/2006 Adjn dtd. 23-01-08.

Please refer to the Show Cause Notice (SCN) issued to us, in F.No. INV / DGCEI / CBERU / 4 / 2005 dated 20.6.06 and bearing SCN sl. No. 53/06 and OR no. 24-/ 2005. This SCN was received by us on 22-6-06.

As per the Para 11.1 to Para 11.6 of the above said SCN, we are required to be answerable, to 3 Adjudication authorities i.e. The Deputy Commissioner / Assistant Commissioner of Customs at Tuticorin, Chennai (Air Cargo), and Mumbai (Sahar Air Cargo Complex) for the export consignments sent by us, through these respective ports. The total amount of drawback demanded from us vide this SCN is Rs.33,48,804/-.

Additionally, another SCN dated 20.6.06 had also been issued to our sister concern M/s. Fulchand Sons. This was received by the said Unit on 22-6-06. The very same investigation agency i.e. DGCEI had issued the said SCN in their file no. INV / DGCEI / CBERU / 7 / 2005, for a duty demand of Rs.33,63,681/- on the said M/s. Fulchand Sons. This SCN was made answerable to 6 Adjudication authorities i.e. the Deputy Commissioner / Assistant Commissioner of Customs at Tuticorin, Cochin, Chennai (Air Cargo), Chennai (Sea Cargo), Mumbai (Sahar Air Cargo Complex) and Tirupur (ICD/CPS).

Since the above mentioned two SCN's (having a common investigation agency, common issue and same evidence) were made answerable to a host of Adjudicating authorities, it would definitely stretch our limited resources of effort, time and money.

We therefore made a representation to the Chairman, Central Board of Excise and Customs, New Delhi vide our letter dated 8-7-06, wherein we had requested for a single Commissioner of Customs (under Section 4 of the Customs Act 1962), to commonly adjudicate both the issued SCN's. We had also indicated our choice of location to be either Coimbatore or Mumbai since our manufacturing facilities and offices are present in these two locations and thereby it would not stretch our resources. Further it was also informed (in the same letter) that we would be submitting our reply to the SCN, on receipt of the intimation regarding the Chairman's decision to appoint a common Adjudicating authority for both the SCN's. This request was made by us in the interests of justice, uniformity and to avoid wastage of resources, if a common Adjudicating authority was designated for both these SCN's.

Subsequently, in the same month we again sent a letter dated 27-7-06, to the Chairman, CBBC (Central Board of Excise and Customs), New Delhi for considering the appointment of the Commissioner of Customs at Mumbai, as the common Adjudicating authority, due to the fact and easy service that could be provided because of our Head office being located at Mumbai. Moreover, because our Head Office had engaged an advocate from Mumbai, to represent us in the further proceedings, we once again informed the CBBC vide this said letter that we would submit our reply to the SCN, on receipt of the intimation regarding appointment of the common Adjudicating authority.

Since our request for a common Adjudicating authority, is not a routine day-to-day occurrence in the Department, we waited for the CBBC to study the request and to give us a favourable disposal for this reasonable request. However no correspondence was received from the CBBC.

After a gap of one year, we addressed a letter to the Secretary - CBBC, on July 25th 2007, reminding them about our long pending request for appointing a common Adjudicating authority, at Mumbai. Till date we have not received any formal intimation, regarding our request with the CBBC.

Despite our repeated requests, for a common Adjudicating authority, we had not received any communication from the CBBC, in this regard. So, we again reminded the Secretary, CBBC vide our letter dated 26.10.07 that our request for a common Adjudicating authority at Mumbai, was pending from July 2006. No reply has been received from the CBBC.

However, on 26-01-08, we have suddenly received an intimation of Personal Hearing dated 23-01-08, from the Office of the Commissioner of Customs, Customs House, Tunicorn in this no. C.No. VIII/104182/2006 Adm. This Personal Hearing was scheduled for 05-02-08. This intimation of Personal Hearing also requested us to furnish the reply to the SCN at the earliest.

This Personal Hearing intimation did not mention anything about a common Adjudicating authority having been appointed or that the Commissioner of Customs-Tunicorn had been appointed as the common Adjudicating authority. Neither did this intimation of Personal Hearing or any other correspondence from the Department, give any clue about the fate of our request for a common Adjudicating authority for both our companies i.e. Polished Saws and Polished Exports. Hence we wish to bring to your attention that throughout this entire episode, we have not been given any clarification regarding the status of our request for a common Adjudicating authority in respect of all the various matters relating to a common Adjudicating authority for the issues pertaining to both our companies i.e. Polished Saws and S/A, Polished Exports.

As we did not have sufficient time to prepare our reply to the SCN, we were unable to attend the first Personal Hearing scheduled for 05-02-08, at Tunicorn.

Since we wanted to prepare our reply and defence, based on the outcome of our requests to the CBBC, as it would entail a lot of difficulty and effort, we were caught unaware by this sudden intimation of the above said Personal Hearing. The absence of the communication from the CBBC is the prime cause for our delay in submitting the reply to the Show Cause Notice and in appearing for the Personal Hearing.

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It is very likely that since we have been receiving correspondences from the Department in a mechanical fashion, without taking into account our requests, we sense that we may not be given any further reasonable time period to defend ourselves. Therefore, even in the absence of any clarification from the CBEC, we have decided to submit our reply to the SCN, before the Commissioner of Customs - Tuticorin, assuming that the said Adjudicating authority is the designated common Adjudicating authority for all the involved ports and both our companies.

As on date of this reply, no communication regarding our request for a suitable date i.e. on or after the 12th of February 2008, in respect of the schedule Personal Hearing for our sister concern M/s. Fulchand Sons, has been received. Therefore after taking the above facts into consideration and for the sake of uniformity, we request that a common date for Personal Hearing may be fixed on the 21st of February or later, so that our consultant / advocate can attend to both the issues on a common date.

We therefore request you to give us a Personal Hearing on or after 21.2.08, for both the SCN's i.e. in respect of us and M/s. Fulchand Sons.

REPLY TO THE SHOW CAUSE NOTICE

We are submitting our reply to the SCN, issued to us in DGCEI's File F.No. INV / DGCEI / CBERU / 47/2005 dated 20.6.06 and bearing SCN-sl. No. 53/06 and OR no. 24 / 2005.

The facts of the Case are as follows:

1. We, M/s. Fulchand Exports are manufacturing and exporting knitted garments of cotton, classified under Chapter 61 of the Central Excise Tariff Act. Our factory premises is situated at 3, Shastri Nagar, Angeripalayam road, Tirupur. We registered with the Central Excise Department (Tirupur Division) consequent to the levy of Central Excise duty on garments, from April 2003. We possess the Central Excise registration no. AAAFF0358AXM001. Our Import-Export Code no. is 0389027049. We are also a holder of the One Star Trading House status.
2. We procure our raw materials namely Cotton yarn (counts of 10's to 50's), Polyester Filament yarn, Sewing Thread, Lycra and other accessories like Zippers, buttons etc. These are procured on payment of applicable duty or duty free. In addition to these, we also purchase cartons, polybags, dyes, labels etc.
3. We had submitted a worksheet for the period 2003-04 (and upto July '04), wherein we had quantified the purchase of 4,03,232.87 kgs. of indigenous yarn (i.e. Cotton yarn and Polyester yarn). Out of this total quantity we had purchased yarn on payment of duty (i.e. 3,64,502.97 kgs.) and without payment of duty (i.e. 38,729.90 kgs. under CT2 facility) for the purpose of exporting readymade garments. The CT2 facility, for procuring inputs duty-free for export, was availed under Rule 19(2) of the Central Excise Rules 2002. Thus out of the total quantum of yarn purchased i.e. 4,03,232.87 kgs., the duty-paid yarn constituted 90.40% whereas duty-free yarn accounted for 9.6%, in the whole year. In respect of the final garments that were exported, using the above mentioned quantities, we had purchased the accessories and dyes for these exported goods, only on payment of duty.

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4. Since Rule 19(2) of the Central Excise Rules 2002 stipulates that the materials received without payment of duty, under this scheme, are to be used in the manufacture of goods that are fully exported, we have not sold domestically, any of the garments that were manufactured using the 38,729.90 kgs of yarn (procured under CT2).

5. It is also informed that we had provided the figures to prove that from the 38,729.90 kgs. of non-duty paid yarn, 6772.86 kgs. of yarn (in the final product) were exported under claim for DEPB benefit. The exports under claim for DEPB benefit were made under 14 nos. of Shipping bills.

6. From the remaining quantity of 31,957.04 kgs. of non-duty paid yarn, a quantum of 31,044.04 kgs. of non-duty paid yarn were exported under claim for duty-Drawback benefit. The residual quantity of 913 kgs. of yarn, represents the stock fabric, issues for samples and knitting / dyeing mistakes. This remaining quantity has been generated out of the combined quantum of 38,729.90 kgs. These exports were made under claim for Drawback, through 57 shipping bills.

7. The above mentioned quantities of duty-paid and non duty-paid yarn were used to manufacture garments that were exported through the ports located at Chennai, Mumbai, Tuticorin during the period mentioned in the SCN i.e. April 2003 to July 2004. Cenvat credit was not availed by us on any of the duty paid inputs.

8. The above said paragraph 6, in respect of the Drawback claimed quantity, can be tabulated as follows:

Drawback Quantity:

Port	Non duty paid Yarn (in kgs.)	Value of all S.Bill's (FOB in Rs.)	Drawback Received
Tuticorin	18652.88	18835263.67	2043831
Chennai	9033.04	10439533.83	927015
Mumbai	1378.12	4169383.72	377958
Total	31964.04	34514181.24	3348804
Samples Issues	913	0.00	0.00
Grand total	31957.04	34514181.24	3348804.00

9. We made our claim for Drawback at the said various Ports of export and received Drawback amounting to Rs.33,48,804/- for the 57 drawback shipping bills.

10. The allegations in the Show Cause Notice are as follows :

- General Note 2(i) of the Notification 26/2003 Customs (NT) dated 01.4.03 as amended by Notification no.12/2004 Customs (NT) dated 29.1.04 states that the rates of drawback specified in the Drawback Schedule shall not be applicable to export if such commodity or product is interalia manufactured or exported in terms of Rule 19(2) of the Central Excise Rules 2002.
- In terms of second proviso (ii) to rule 3(1) of the Customs and Central Excise Drawback Rules 1995, no drawback shall be allowed if the said goods are manufactured or produced using imported materials or excisable materials in respect of which duties have not been paid.

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- c. There is no provision in the Central Excise Act 1944 or the Customs Act 1962 for the discharge of duty liability at a later date in respect of yarn procured without payment of duty so as to justify the action of obtaining drawback on garments exported which were manufactured out of such yarn procured without payment of duty.
 - d. The ARE-1 and ARE-2 forms have not been deliberately filed in respect of such exports, where the exporter is expected to provide the details of the procurement of inputs without payment of duty and thereby drawback was received for the garments manufactured out of non-duty paid yarn, in respect of 57 shipping bills.

Our answer to the above allegations (as substantiated by the law and our records submitted to the Department), are as follows:

Answer to allegation (a) and (b): General Note 2(f) of the Notification 26/2003 Customs (NYT) dated 01.4.03 as amended, states *"The rates of drawback specified in the said table shall not be applicable to the export of a commodity or a product if such product or commodity is manufactured or exported in terms of Rule 19(2) of the Central Excise Rules 2002"*.

Rule 19(2) of the Central Excise Rules 2002 states that *"Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises for use in the manufacturing or processing of goods which are exported"*.

Rule 19(2) therefore perfectly describes the CT2 procedure which was followed by us, wherein we received the materials without payment of duty, for further process / manufacture in order to export the garments. We had obtained the materials under CT 2 procedure as well as on payment of duty as explained in paras 3,4,5 and 6 of the earlier pages.

Coming to the General note 2(f), it only reiterates that the materials were received / purchased by us under CT2 procedure i.e. without payment of duty, are not eligible for the rates of drawback as specified in the Schedule containing the All Industry Rates of Drawback. From the records available, it is clear that we have only received the admissible drawback on the garments exported by us.

Going as per the Department's interpretation in the SCN i.e. since the final product (i.e. exported garments) contained both duty-paid and non duty-paid yarn, the entire quantum of exported goods, are wholly ineligible for drawback. This is the unsubstantiated interpretation of the Department, as evidenced from the SCN. This interpretation would be patently wrong, because in a situation involving the export of an item containing excisable goods, then this logic goes against the Rule 3 of the Customs & Central Excise Duties Drawback Rules 1995.

W2

As per the provision of the said Rule 3 of the Customs & Central Excise Duties Drawback Rules 1995, it states that where imported / excisable materials are used in exported product and only a portion of these materials have suffered duty or duty has been rebated or refunded in whole or in part or given as credit, the drawback admissible on the said goods shall be reduced, taking into account the lesser duty or tax paid or the rebate, refund or credit obtained. Here in our case, the term "lesser duty" alone, is applicable since we have not paid any tax or obtained rebate, refund / credit. Therefore this term 'lesser duty' (i.e. lesser of duty) can only refer to the nil duty or the excise duty saved on the duty-free inputs, simply because these inputs were obtained without the payment of duty.

This is the same inference as our interpretation and the practice followed by us, wherein the drawback amount has been reduced after taking into account the lesser duty i.e. in our case, the duty saved on the non-duty paid portion of the materials used as inputs.

Thus, applying this rule to our situation, it is clear that our drawback has been reduced by the quantum of duty on the materials obtained under CT2, for which we had inadvertently claimed the drawback. To explain this, we describe it as follows.

Total quantum of yarn purchased under CT2 : 38,729.90 kgs.
Total quantum of yarn purchased on payment of duty : 9766.62 kgs.
Total purchase of yarn, therefore is : 48,496.52 kgs.
Weight of the garments exported with this yarn : 28,655.300 Kgs. under Drawback + 4,773.350 Kgs. under DEPB.
Total weight of all garments exported out of 48,496.52 kgs. of yarn : 33,428.65 Kgs.
Un-exported residual quantity in the yarn purchase of 48,496.52 kgs. : 913 kgs.

Hence from the above it is seen that out of disputed portion of total yarn purchases of 48,496.52 kgs., an unused quantity of 913 kgs. is left behind. From the remaining quantity of 47,583.52 kgs. of yarn (i.e. duty paid and non-duty paid), we have manufactured garments totally weighing 33,428.65 kgs. These garments were exported under Drawback scheme (i.e. 28,655.30 kgs.) as well as under the DEPB scheme (i.e. 4,773.35 kgs.).

Since we are eligible for drawback on the exported garment, as a whole, we have to take recourse to the Rule 3 of the Customs & Central Excise Duties Drawback Rules 1995, because of the fact that our export product i.e. garment, contains both duty-paid and non-duty paid yarn. Therefore the admissible drawback, as per Rule 3 of the Customs & Central Excise Duties Drawback Rules 1995, is to be calculated as follows:

[Total Drawback on the garments minus the duty/duty saved on the non-duty paid yarn].

Going as per Rule 3 of the Customs & Central Excise Duties Drawback Rules 1995, the Drawback was claimed by us (for the garments manufactured out of 31,044.04 kgs. of yarn) i.e. Rs.33,48,804. Since Rule 3 of the Customs & Central Excise Duties Drawback Rules specifically dictates, that the duty portion of inputs obtained duty-free are to be deducted from the admissible drawback, the excise duty saved on 31,044.04 kgs. of yarn amounting to Rs.3,64,342/- (which were obtained under CT2 facility and for which we had claimed drawback), is to be reduced from the total drawback amount of Rs.33,48,804/- claimed by us. The admissible drawback therefore would be Rs.29,84,462/-.

As we are concerned with the ineligible amount of drawback only, the DEPB scheme does not figure, in these calculations.

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- c. Last but not the least, the Department has alleged suppression on the grounds that we have not declared / intimated the existence of non-duty-paid inputs, in the export product. As mentioned by us earlier, we reiterate that it was a genuine mistake and not a willful act.
- d. We have filed the necessary ARE1's / ARE2's, where required.
- e. The issue involves a technical interpretation and does not have anything to do with deliberate offences like evasion or undervaluation etc. So, we request that due consideration may be given to the fact that we are a One Star Trading House and have been exporting for many years now, without any blemish on our manner of operations.

In view of the absence of suppression, the proposal to impose penalty or to charge interest, are without any grounds whatsoever.

Therefore there cannot be any substance to the Department's allegation that we have contravened the provisions of Section 50(2) and Section 113(ii) of the Customs Act 1962. The imposing of penalty is also not attracted under Section 114 (iii) of the Customs Act 1962.

Confiscation: Confiscation under Section 113 of the Customs Act 1962 and redemption fine under Section 125 of the Customs Act 1962 have also been proposed, in the SCN.

We state that as per Section 113 of the Customs Act 1962, the goods exported under claim for drawback can be seized only in cases where the value and the material particulars, at the time of export, in relation to the fixation of rate of drawback, do not correspond. This is not applicable in our situation because there is no dispute regarding the rate of drawback for our garments, exported under Drawback scheme. The dispute is only with regard to an omission in respect of information pertaining to the presence of CT2 inputs in the drawback claim. Since there is no dispute regarding the rate of drawback, there cannot be any confiscation of goods and there is no possibility of demanding redemption fine for goods that have not been confiscated.

We request that the combined Personal Hearing may be fixed for the requested date or later than that, since we would like to make vital and additional submissions including the case laws, in support of our case. We require this interregnum to undertake the same and to enable our Advocate to attend the Personal Hearing.

In view of the above, we pray the Honourable Adjudicating Authority to drop the proceedings, based on the facts mentioned above. We may be heard in person on or later than 21.2.08, in respect of both the SCNs (including that of our sister concern), before the cases are adjudicated.

Thanking you
Yours Faithfully

For Fulchand Exports


Partner / Manager



Government of India

OFFICE OF THE COMMISSIONER OF CUSTOMS

CUSTOM HOUSE : NEW HARBOUR ESTATE : TUTICORIN - 628 004

Phone : 0461-2352964, 2352633 Fax : 0461 - 2352019

C.No.VIII/10/181/2006- Adjn

Date :23-01-2008

INTIMATION FOR PERSONAL HEARING

Gentlemen,

Sub : Export of Cotton Knitted Garments by M/s Fulchand &
Exports, Tirupur availment of ineligible duty drawback -
Reg.

Ref.: Show Cause Notice No.INV/DGCEI/CBERU/4/2005
dt. 22-06-2006 Issued by DGCEI, Coimbatore

With reference to the above, you are requested to furnish the
reply to the Show Cause Notice dated 22-06-2006 at the earliest.

I am directed by the Commissioner of Customs, Custom House,
Tuticorin to inform you that the case is posted for personal hearing at
1500 hrs on 05-02-2008 and request you to appear with all original
documents upon which you place reliance.

Yours faithfully,


J. A. SAKUMAR
SUPERINTENDENT (ADJN)

To

✓ M/s. Fulchand Exports,
3, Shastri Nagar,
Angeripalayam Road,
TIRUPPUR.

(BY R.P.A.D.)

Recd on 28/01/08

ATTN: MR. Prabhu

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NEW 10-2-08

F. No. 609/20/2008-DBK
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
Drawback Directorate

New Delhi, dated 06.02.2008

To

The Commissioner of Customs
Custom House, New Harbour Estate
TUTICORIN
638 004

Subject : Export of Cotton Knitted Garments by M/s. Fulchand Exports, Mumbai availment of ineligible duty drawback-Reg.

Sir,

Please find enclosed the representation dated 08.01.2008 received from M/s. Fulchand Export, Mumbai on the above mentioned subject.

2. In this regard the undersigned is directed to request you to kindly have the matter examined at your end and furnish a factual report to the Board on PRIORITY.

Yours faithfully,


(Sanjay Kumar Roy)
Technical Officer (DBK)
Tele. 011 233141480

✓ Copy to M/s. Fulchand Exports, 206/207, Creative Industrial Centre, 72, NM Joshi Marg, Mumbai 400 011.

FROM : FULCHAND EXPORT

Att - MASH32

PRX NO. : 91 22 23016950

Feb. 21 2008 12:47PM P1

FULCHAND EXPORTS

COTTON KNIPTWEAR APPS. & EXPORTERS

(A GOVT. RECOGNISED EXPORT HOUSE)

204 / 207, Creative Industrial Centre, 72, N. M. Joshi Marg,
Mumbai - 400 011, INDIA
Phone : +91-22-2308 4219, 2309 4812, 2306 7261
Fax : +91-22-2306 1439
Email : fulchandise@rediffmail.com • fulchandise@rediffmail.com

KINDATTU! SKT. AK. JAIN

January 08th, 2008

The Hon. Chairman
Central Board of Excise and Customs
Department of Revenue
Ministry of Finance
New Delhi 110001

Subj: Export of Cotton Knitted Garments by M/s. Fulchand Exports, Tirupur
Availability of duty drawback

Ref: Show Cause Notice E. No. INV/DGCE/CBERU/4/2005 SCN No. 53/06 OR
No. 24/2005, dated 21/06/2006 issued by the Deputy Director, Directorate
General of Central Excise Intelligence, Coimbatore to M/s. Fulchand Exports

Dear Sir,

With reference to the above captioned subject we request your good self to kindly take up our case for hearing along with M/s. FULCHAND & SONS as being the sister concern of the same. We have attached the copy of Intimation for Personal Hearing dttd. 07.12.2007, bearing C.No. VII/10/182/2006 Adjn, received by M/S. FULCHAND & SONS issued by Customs Office, Tuticorin, Chennai for your reference.

Also, we would like to highlight that the subject matter of the case of both the firms is same hence, it will be convenient and easier to expedite. Hence, we request you to issue a notice to take up the matter immediately.

Thanking you and obligec.

Yours Truly,

For Fulchand Exports

Basant Fulchand

Partner

Encl: 1. Copy of Intimation for Personal Hearing for M/s. FULCHAND & SONS
2. Copy of Letter requesting extension of hearing.

①

For M/s. Fulchand Exports, 204 / 207, Creative Industrial Centre, 72, N. M. Joshi Marg, Mumbai - 400 011, INDIA
Phone : +91-22-2308 4219, 2309 4812, 2306 7261 • Fax : +91-22-2306 1439 • Email : fulchandise@rediffmail.com • fulchandise@rediffmail.com

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ATTN: BASANT BHAI



FULCHAND EXPORTS

COTTON KINTWEAR WEBS & EXPORTERS
(A GOVT RECOGNISED EXPORT HOUSE)

204/207, Creative Industrial Centre, 72, N. M. Joshi Marg,
Mumbai - 400 011-8000
Phone: +91-22-2306 6219, 2309 6882, 2306 7261
Fax: +91-22-2306 1639
E-mail: fulchand@rediffmail.com • fulchand@vsnl.com

REMINDER NO.11

July 25, 2007

The Secretary
Central Board of Excise and Customs
Department of Revenue
Ministry of Finance
New Delhi

Sub: Show Cause Notice F.No. INV/DGCI/TH/TH/194/2005 S.C.N. 33-06
OR No.24/2005 dated 20/6/06 issued by the Deputy Director, Directorate
General of Central Excise Intelligence, Coimbatore to M/s. Fulchand
Exports-Appointing common Adjudicating Authority - Reg

Our letter dated 08.07.2006 requesting your good office to appoint
Single commissioner of customs - REG

This is in continuation of our reminder letter dated 27.7.2006 requesting your good office
to appoint a single commissioner of customs at MUMBAI itself. We have not received
any orders for the above from your office so far. As the matter is pending for more than 1
year, we request you to kindly expedite the matter.

Yours faithfully,
For M/s. Fulchand Exports

PARTNER

CC to:-
Chief Commissioner of Customs (Preventive) Chennai
Chief Commissioner of Customs, Chennai
Chief Commissioner of Customs Zone II, Mumbai
Deputy Commissioner of Customs, Tuticorin, Air cargo complex.
Member of Customs Council, Chennai

FOR POST OFFICE 000010
RECORDED 744821N
Stamp: 22/08/2007 18:11

→ FULCHAND EXPORT

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FULCHAND EXPORTS

Office : 14-C, ANGERIPALAYAM ROAD, TIRUPUR. / Factory : No.3, SASTHRI NAGAR, ANGERIPALAYAM ROAD, TIRUPUR - 641 603
PHONE : +91 - 421 - 2471892-2475892; FAX : + 91- 421 - 2470073 E-MAIL : fulchand@vsnl.com

The Hon. Chairman
Central Board of Excise and Customs
Department of Revenue
Ministry of Finance
New Delhi 1

July 27, 2006

Ref: Our letter dated 8th July 2006 to your Show Cause Notice F.No INV/DGCHI/CBERU/4/2005 SCN 53/06 OR No.24/2005 dated 20/6/06 issued by the Deputy Director, Directorate General of Central Excise Intelligence, Coimbatore to M/s.Fulchand Exports: Request for appointing single commissioner under Section 4 of the Customs Act 1962 for adjudication - regarding

"We have received Show Cause Notice from Directorate General of Central Excise Intelligence, Coimbatore demanding ineligible drawback of Rs.33,48,404 on export of cotton knitted garments. Please refer to our letter dated 8th July 2006 wherein we have requested to adjudicate single commissioner of customs either at Coimbatore or Mumbai. Since our Head office is in Mumbai and we have appointed an advocate from Mumbai itself to represent us in further proceedings, we humbly request your good office to appoint single commissioner of customs at MUMBAI itself. Inconvenience caused in this regard is deeply regretted.

Yours faithfully
For M/s.FULCHAND EXPORTS
Basant Fulchand

Encls/s

- Cc: For information and recommending appointment of Single Commissioner at MUMBAI for adjudication.
- Cc: Chief Commissioner of Customs (Preventive) Chennai
- Cc: Chief Commissioner of Customs, Chennai
- Cc: Chief Commissioner of Customs Zone II, Mumbai
- Cc: To Deputy/Asst Commissioner of Customs, Tuticorin; Air Cargo complex, Mumbai; Air Cargo Complex, Chennai

We will submit reply to the showcause notice after receipt of decision of Hon chairman CBEC regarding appointment of single commissioner for adjudication of the Show Cause Notice

204, CREATIVE INDUSTRIAL ESTATE, 72, N.M. JOSHI MARG, MUMBAI - 400 011, INDIA
PHONE : +91 - 22 - 2308 6219 2309 6882. 2306 7261 FAX : + 91 - 22-2308 04 33- 2301 69 80.
E-MAIL : NJ@vsnl.com

FROM : FULCHAND EXPORT

FAK NO. : 91 22 23816998

Jul. 13 2006 03:07PM P1

FULCHAND EXPORTS

COTTON KNITWEAR ARTS. & IMPORTERS
(A GOVT. RECOGNISED EXPORT HOUSE)

206 / 207, Coastline Industrial Centre, 77, H. M. Joshi Marg.
Mumbai - 400 011, INDIA
Phone: +91-22-2306 2219, 2306 6882, 2306 7261
Fax: +91-22-2306 1652
E-mail: fulchand@fulchand.com • fulchand@rediffmail.com

8th July 2006.

**The Hon. Chairman
Central Board of Excise And Customs
Department of Revenue
Ministry of Finance
North Block
New Delhi 1.**

**Sub: Show Cause Notice F.No. INV/DGCEI/CBERU/7/2005 SSNM
52/06 FOR No. 137/2005 dated 20/6/06 issued by the
Deputy Director, Directorate General of Central Excise
Intelligence, Coimbatore to M/s. Fulchand & Sons. Request for
appointing single Commissioner under Section 4 of the
Customs Act 1962 for adjudication - regarding.**

Sir,

1. We have been issued the above referred Show Cause Notice by the Deputy Director, Directorate General of Central Excise, Intelligence demanding illegal drawback on Export of cotton knitted garments. The same Show Cause Notice is answerable to different adjudicating authorities as under:

- (i) Deputy/Asst. Commissioner of Customs, Custom House, Cochin.
- (ii) Deputy/Asst. Commissioner of Customs, Custom House, Tuticorin.
- (iii) Deputy/Asst. Commissioner of Customs, Air cargo Complex, Mumbai.
- (iv) Deputy/Asst. Commissioner of Customs, Custom House, Chennai.
- (v) Deputy/Asst. Commissioner of Customs, Air Cargo Complex, Chennai.
- (vi) Deputy/Asst. Commissioner of Customs ICD/CFS, Tiruppur.

Page: 2 of 2, Pg No. 2, Appendixes Noted, Page: 441 003, 004
Phone: +91-22-2306 2219, 2306 6882, 2306 7261 • Fax: +91-22-2306 1652 • E-mail: fulchand@fulchand.com • Website: www.fulchand.com

2. Single Show Cause Notice is issued asking us to show cause for these adjudicating authorities at different places. This Show Cause Notice is based on the same investigation and the same evidence and the issue involved is the same. Therefore for purpose of uniformity and in the interest of justice we request Your Honour to appoint one adjudicating authority to act as Deputy/Asst. Commissioner of Customs of different ports/ICD/CPS for the purpose of adjudicating matters relating to the Show Cause notice issued to us. Since the amount of drawback involved is Rs. 55,48,004/- and allegations are suppression of facts in utilizing non duty paid inputs in garment, Your Honour is requested to appoint single Commissioner of Customs to adjudicate the Show Cause notice preferably either at Coimbatore or Mumbai as our manufacturing activities are in Coimbatore and our office is also at Mumbai.

3. Another Show Cause Notice dated 20/6/06 under F. No. INV/05CEI/5820/06 ICD/CPS is issued to our sister concern M/s. Fulchand & Sons, Commission of Customs at Tuticorin, Cochin, Air Cargo Complex Chennai and Air Cargo Complex Mumbai, ICD/CPS, Tirupur, to Deputy Director DG of Central Excise and Customs, Coimbatore and evidence is common and they are also representing to your Honour for appointing single Commissioner for adjudicating the Show Cause Notice issued to them. Drawback amount involved is Rs. 88,65,661/- (copy of S.C.N. is enclosed).

4. Therefore your Honour is requested to appoint a single Commissioner for adjudicating both the Show Cause Notices issued to us and to M/s. Fulchand & Sons in interest of uniformity and justice.

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WORLD EXPORT

PRK NO. : 91 22 23016950

Jul. 13 2005 03:05PM P3

Yours faithfully,
for M/S. FULCHAND EXPORTS



End:a/a.

- cc: For information and recommending appointment of Single Commissioner for adjudicating.
- cc: Chief Commissioner of Customs (Preventive) Chennai.
- cc: Chief Commissioner of Customs, Chennai.
- cc: Chief Commissioner of Customs Zone II, Mumbai.
- cc: To Deputy/Asst. Commissioner of Customs, Tuticorin, Air Cargo Complex Mumbai, Air Cargo Complex, Chennai.

We will submit reply to the Show Cause notice after receipt of decision of Hon. Chairman, CBEC regarding appointment of single Commissioner for adjudicating of the Show Cause notice.

FOR M/S. FULCHAND EXPORTS



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M/s. Fulchand Exports (hereinafter referred to as FE) are manufacturers and exporters of 'Cotton Knitted Garments' falling under Chapter 61 of the Central Excise Tariff Act, 1985 having their factory premise at 3, Shastri Nagar, Angeripalayam Road, Tirupur. Consequent to the levy of Central Excise duty on knitted garments from April, 2003, FE got themselves registered with the office of the Deputy Commissioner of Central Excise, Tirupur Division and were assigned Central Excise Registration Certificate No.AAAFF0358AXM001. The Import-Export Code(IE code) number of FE is 0389027049.

2. M/s.Fulchand Exports of Tirupur are alleged to have contravened the provision ii of Rule 3(1) of the Customs and Central Excise Duties and Drawback Rules, 1995 (hereinafter referred as the Drawback Rules,1995) read with Rule 19(2) of Central Excise Rules, 2002 (herein after referred as CER, 2002) in as much as they have claimed drawback under the Duty Drawback Scheme (All Industry Rate) for the non-duty paid cotton yarn procured and utilized in the manufacture of 'Cotton Knitted Garments' exported by them. The total drawback, thus, claimed and received by them is Rs.33,48,804/-(Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Four only).

Brief Facts of the case:

3. For their alleged contraventions of Rule 19(2) of CER, 2002 read with Notification No 26/2003 Cus (NT) dated 1.4.2003 as amended, proviso (ii) to Rule 3(1) of Drawback Rules, 1995 and Section 50(2) of the Customs Act,1962. Show Cause Notice No 53/2006 dated 20.6.2006 from file INV/DGCEI/CBERU/4/2005 was issued by DGCEI, Coimbatore, answerable to the Deputy/Assistant Commissioner of Customs, Custom House at Tuticorin, Air Cargo Complexes at Mumbai and Chennai. However, subsequently, a corrigendum dated 8.11.2006, was issued by the Deputy Director, DGCEI, Coimbatore making the said notice answerable to the respective Commissioners of Customs, wherein FE were called upon to explain as to why the ineligible drawback received by them from the respective Commissioners should not be demanded from them with interest under Rule 16 of the Drawback Rules, 1995 and Section 75A(2) of the Customs Act, 1962 read with Section 28AA of the Customs Act, 1962 respectively. Vide Notification No.37/2018-Customs (N.T.) dated 11.05.2018 Commissioner of Customs, Custom House, Tuticorin has been appointed as the Common Adjudicating Authority for the aforesaid Show Cause Notice. M/s.FE filed W.P.No.25334 of 2018 and W.M.P.Nos 29484 and 29488 of 2018 challenging the above notification before the Honourable Madras High Court and vide order dated 27.09.2018 the Honourable Madras High Court found the writ petition is not maintainable as it is for the petitioner to face the adjudication proceedings before the officer appointed through the impugned notification by raising all the contentions on the merits of the matter. Accordingly, the writ petition was dismissed. In the light of the above, the adjudication of the above said notice has been taken up.

4. For their alleged acts of violations and suppressions, confiscation of the subject exported goods and penalty under Sections 113(i) and 114(iii) of the Customs Act, 1962 respectively were invoked in the notice.

5. FE have filed their reply dated 12.02.2008 to the notice. Pursuant to the nomination and since the writ petition challenging the fixing of Common Adjudicating Authority was dismissed, a personnel hearing was fixed on 29.01.2019. Shri.BasantFulchand, Partner and Shri.Vikramarth.S.Chand, Advocate of FE, appeared for the Personal Hearing. They submitted a written reply during Personal Hearing in addition to the reply submitted by them on 12.02.2008 to the adjudicating authority and pleaded to drop the SCN.

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6. In their written submission dated 12.02.2008 and in the written submission on 29.01.2019, the following points on the alleged contraventions and suppression are put forth by them.

(i) General Note 2(f) to Notification 26/2003 Cus(NT) dated 1.4.2003, only reiterates that whatever materials that have been received/purchased by them without payment of duty are not eligible for drawback incentive. It is patently wrong to deny drawback for the entire quantum of exported goods, while the export garments partially contained the non-duty paid yarn purchased under CT2 procedure and this logic and interpretation of the Department goes against the Rule 3 of Drawback Rules, 1995.

(ii) As per rule 3 of the Drawback Rules, 1995, where imported/excisable materials are used in exported product and only a portion of these materials have suffered duty or duty has been rebated or refunded in whole or in part or given as credit, the drawback admissible on the said goods shall be reduced, taking into account the lesser duty or tax paid or the rebate, refund or credit obtained. Here in their case, the term 'lesser duty' can only refer to the excise duty saved by them on the inputs, which were obtained without payment of duty. Going by the said Rule 3, the admissible drawback, after reducing the 'lesser duty (excise duty saved) Rs.3,64,342/- from the drawback already received by them Rs.33,48,804/-, would be Rs.29,84,462/- which is rightfully due to them as they have already paid back the ineligible amount of drawback (lesser duty) Rs.3,64,342/- paid by them on various dates. Hence, the avallment of drawback for the 57 shipping bills is in order.

(iii) As per many case laws, paying back or the return of in-eligible benefit, voluntarily by the beneficiary, is equivalent to not availing the benefit. (However, no citation was made).

(iv) Since, the re-payment of the ineligible drawback amount has been done before the issue of the demand on them, they requested that the adjudicating authority to consider the omission as a genuine mistake only.

(v) On the allegation of suppression of facts in the notice, FE have stated that the non-duty paid inputs in the exported garment formed only 9.60% of their total exports. Considering the volume of export documentation and the fact that they were new to the Central Excise requirements, there is every reason to believe that there was no suppression involved.

(vi) they have been filing regular Annexure-II monthly reports to the Department and no defects have been pointed out.

(vii) they have not declared/intimated the existence of non-duty paid inputs in the export product. They have missed out the fact that they had to indicate the existence of non-duty paid inputs in the export product or that they have to deduct the duty on the non-duty paid inputs while claiming drawback.

(viii) The issue involved is a technical interpretation and does not have anything to do with deliberate offences or undervaluation etc. Hence, it is a genuine mistake and not a willful act.

(ix) no suppression of facts on their part and hence, there is no ground for the alleged contravention of the provisions of Sections 50(2), 113(ii)

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and 114(iii) of the Customs Act, 1962 and to impose penalty and demand interest.

- (x) The exported goods could be confiscated and redeemed under Sections 113 and 125 of the Customs Act, 1962 only in cases, where the goods exported under claim for drawback were seized at the time of export on the grounds of a dispute with respect to the rate of drawback.
- (xi) As per Board's Instruction F.No.276/104/2016-cx.8A (Pt.) dated 28.12.2016, Show Cause Notices issued by DRI, DGCEI, SIIB, Preventive pertaining to the period prior to 08.04.2011 should be transferred to the Call Book.
- (xi) FE finally prayed the adjudicating authority to drop the proceedings based on the facts and considering the facts that they are one star trading house and exporting for so many years without any blemish in their manner of operations.

FINDINGS

7. I have carefully gone through the records of the case, written submissions and also submissions made at the time of personal hearing held on 29.01.2019. In the instant case, the Commissioner of Customs, Custom House, Tuticorin has been nominated as the common adjudicating authority under Notification No.37/2018-Cus(NT) dated 11.05.2018 and Writ Appeal filed by the party against this notification has been dismissed. Accordingly, I take up this case for adjudication.

8. It is alleged in the Show Cause Notice dated 20.06.2006 that FE, have used duty paid yarn and non-duty paid yarn procured under Rule 19(2) of CER, 2002, in the manufacture of "Cotton knitted garments" falling under Chapter 61 of the Central Excise Tariff Act, 1975 and exported the same under duty drawback scheme and thereby, received Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Thousand Eight Hundred and Eighty Four only) as drawback amount in terms of Chapter X of the Customs Act, 1962. Further, it is also alleged that FE have contravened the provisions of Rule 19(2) of CER, 2002 read with Notification No 26/2003 Cus (NT) dated 01.04.2003 as amended and thereto, FE have failed to declare the correct information in the shipping bills as contemplated under Section 50 of the Customs Act, 1962 and thereby, deliberately suppressed the fact of non-duty paid yarn used, which was procured under Rule 19(2) of CER, 2002; resulted in claiming ineligible drawback of Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Eighty Four only) on the exported garments manufactured out of both duty paid and non-duty paid yarn and exclusively used non-duty paid yarn as well. Accordingly, proposed confiscation of exported goods under Section 113(i) of the Customs Act, 1962 and imposition of penalty under Section 114(iii) of the Customs Act, 1962.

9. Further, on perusal of the records and the show cause notice dated 20.06.2006, I find that the investigating agency has issued the subject show cause notice demanding of Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Eighty Four only) as ineligible drawback by relying the second proviso to Rule 3(1) of Drawback Rules, 1995 read with Rule 19(2) of CER, 2002.

10. Further also, I carefully examine the issue with the provisions of the Customs Act, 1962, the Drawback Rules, 1995 and the CER, 2002 read with Notification No. 26/2003-Cus (N.T) dated 01-04-2003 as amended. Accordingly, the moot point to be decided in the instant case is as to whether (i) the drawback allowed on the goods "cotton knitted garments" manufactured and exported using both duty paid yarn and non-duty paid yarn and also

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manufactured and exported by using 100% non-duty paid yarn, is in order in terms of Rule 3(1) of the Drawback Rules, 1995; (ii) whether the demand raised in the Show cause Notice in terms of second proviso to Rule 3(1) of the Drawback Rules, 1995 is maintainable read with first proviso to Rule 3(1) ibid and (iii) whether the confiscation of exported goods/ imposition of penalty proposed under Sections 113(i) and 114(iii) of the Customs Act, 1962 respectively is sustainable.

11. In their reply they stated that, as per Board's Instruction F.No.276/104/2016-cx.8A (Pt.) dated 28.12.2016, Show Cause Notices issued by DRI, DGCEI, SIIB, Preventive pertaining to the period prior to 08.04.2011 should be transferred to the Call Book. But, the aforesaid instruction was withdrawn vide F.No.276/104/2016-cx.8A (Pt.) dated 03.01.2017.

12. I find that in the instant case, on record, FE have used both duty paid and non-duty paid yarn and also exclusively used non-duty paid yarn for the exported goods manufactured, whereon they have claimed and received full drawback amount of Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Eighty Four only) (Vide Annexure-8 to the notice).

13. For better appreciation I reproduce the following legal provision:

- (i) Rule 19(2) of the CER, 2002 says that any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.
- (ii) Notification No 26/2003- Cus (N.T) dated 01-04-2003 as amended by Notification No 12/2004 prescribes the all industries drawback rate. As delineated in General Note 2(i) of the Notification, the drawback rates so specified therein in the said notification could be availed subject to the conditions specified therein in the notification that the rates of Drawback specified in the said table shall not be applicable to export if such commodity or product is inter-alia manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules 2002

14. From the above, I find that the above two pieces of legislation are mutually exclusive in that claiming duty exemption to the inputs procured under rule 19(2) of the CER, 2002 and also availing of duty drawback to the exported garments manufactured out of the non-duty paid yarn is forbidden.

15. In the instant case, I notice that purchase bills of non-duty paid yarn, BOM (Bill of Material) charts, export invoices, shipping bills of FE (vide Annexures-2, 4 and 7 to the notice) show that they have procured their input (yarn) without payment of duty and received duty drawback on the exported goods manufactured out of the non-duty paid yarn as well.

16. The above facts of non-duty paid yarn used in the manufacture of exported goods are confessed, inter alia, by Shri. Rameah F Sundesha, the General Manager of FE in his statement dated 3.4.2006, and also in their reply dated 12.02.2008 and 29.01.2019 (reiterated the same reply as given earlier in their letter dated 12.02.2008), wherein they also claimed that their drawback has to be reduced by the quantum of duty on the material obtained under CT2, which they had inadvertently claimed as drawback, citing first proviso to Rule 3(1) ibid and also stated that they had paid Rs.3,64,342/- as excise duty saved on 31,044.04kgs of yarn purchased under CT2 and the same had been used for manufacture of exported goods. Accordingly, I find that as a token of accepting their alleged acts, FE had already paid Rs.3,64,342/- the duty

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saved/foregone by them on the non-duty paid inputs procured by them. From the above, I find that the violations alleged in the notice against FE is established beyond doubt and that FE have availed ineligible drawback. Thus, now, the issue rests in determining the quantum of the ineligible drawback received by FE out of the total drawback amount of Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Eighty Four only) received by them.

17. FE, in their reply letters dated 12.02.2008 and 29.01.2019, have questioned the logic and interpretation of the Department in denying the drawback for the entire quantum of exported goods, while the export garments have contained partial quantity of non-duty paid yarn purchased under CT2 procedure. Taking cue from the first proviso to the Rule 3 of the Drawback Rules, 1995, it is contended by them that the admissible drawback, after reducing the 'lesser duty' (excise duty saved @ 9.2%) Rs.3,64,342/- from the drawback already received by them Rs.33,48,804/-, would be Rs.29,84,462/-. FE are of the view that as they have already paid back the ineligible amount of drawback (lesser duty) Rs.3,64,342/- as required under the said first proviso to Rule 3(1) *ibid*, they are rightfully due to the admissible drawback of Rs.29,84,462/-. Instead, the notice proposed to disallow the whole amount of drawback received by FE by applying the second proviso to Rule 3(1) of the Drawback Rules 1995.

18. DAs per General Note 2(f) to the Notification No. 26/2003-Cus(NT) dated 01.04.2003 as amended by the Notification No. 12/2004-Cus(NT) dated 29.01.2004, Rule 19(2) of the Central Excise Rules, 2002 and second proviso to the Rule 3(1) of the Customs & Central Excise Duties Drawback Rules, 1995, drawback shall not be applicable to export of commodity or product if such commodity or product is manufactured or exported in terms of sub rule (2) of Rule 19 of Central Excise Rules 2002.

19. Board vide Circular No.19/2005-Cus dated 21.03.2005 clearly stated that the first proviso to Rule 3 of Drawback Rules, 1995 is meant for the Ministry and it essentially provides a guideline as to how the duty drawback rates are to be determined in certain situation and is not intended for the field formation to use this rule for arbitrarily altering All Industry Rates of duty drawback in the case of individual exporters for individual consignments.

20. Hence, I found that the entire duty Drawback of Rs.33,48,804/- (Rupees Thirty Three Lakhs Forty Eight Thousand Eight Hundred and Four only) is demandable along with interest under Rule 16 of the Drawback Rules, 1995 and Section 75A(2) of the Customs Act, 1962 read with Section 28AA *ibid* respectively.

21. In the instant case, I find that FE have already received ineligible drawback amount by misrepresenting/deliberately suppressing the fact of exported goods manufactured out of both duty paid and non-duty paid yarn and also exclusively used non-duty paid yarn. Moreover, as the ineligible drawback amount already received and availed by FE, the same has to be repaid along with appropriate interest as specified under Section 28AA of the Customs Act, 1962 read with Section 75A (2) *ibid*. Accordingly, I hold that the interest demanded on the ineligible drawback amount payable under Section 28AA of the Customs Act, 1962 read with Section 75A (2) *ibid* is proper and just.

22. The argument of FE that they are rightfully due to the drawback of Rs.33,48,804/-, as they have paid back the ineligible amount of drawback received by them Rs.3,64,342/- (lesser duty paid by them), is not legally tenable as there is no provision either under the Central Excise Act, 1944 or under the

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Customs Act, 1962 and the rules made there under to repay the Central Excise duty later on the inputs procured under rule 19(2) of CER, 2002. Therefore, I hold that the said repayment cannot be taken into account as the 'lesser duty paid by them' in determining the admissible drawback under the first proviso to Rule 3 of the Drawback Rules, 1995.

23. FE have contested the allegation of suppression of facts invoked in the notice on the grounds, inter alia, that they have not suppressed any fact, as the non-duty paid inputs that had been exported form only 9.60% of their total export of the year; that they have filed regular Annexure II monthly reports with Central Excise; that they filed the necessary ARE 1/ARE2, where required; that the issue involved is a technical interpretation and does not have anything to do with deliberate offences or undervaluation etc and that they were new to the Central Excise requirements and the non-declaration of the existence of the non-duty paid inputs was a genuine mistake and not a willful act.

24. The above argument of FE is *abinitio* void, in as much as, at the time of filing the shipping bills under Section 50 of the Customs Act, 1962, FE should have declared the use of duty paid and non-duty paid yarn for the purpose of claiming their legitimate amount of drawback, instead, in the instant case, the exporter has deliberately suppressed the fact of using non-duty paid yarn obtained under Rule 19(2) of the CER, 2002 with the mala fide intention to avail more drawback amount. I also notice that the above mistake is not a technical lapse, in as much as, while purchasing the yarn under Rule 19(2) of CER, 2002, the exporter was very well aware that no drawback is permissible on the exported goods manufactured out of non-duty paid materials. So, it is apparent on the part of the exporter that they have knowingly claimed the excess drawback by deliberately suppressing the facts before the Department. Had the above discussed violation is gone unnoticed by the investigating agency, the public money would have been at stake. Thus, I find that the ground put forth by them is *in limine* unacceptable. *Ipsa facto*, I hold that the suppression of facts invoked in the notice is maintainable.

25. The General Manager of FE Shri-Rameah F Sundesha in his statement dated 3.4.2006 has, inter alia, stated that they intended to export garments only under DEPB Scheme and as for certain category of garments, DEPB was not available, they exported the garments under drawback scheme in which non-duty paid yarn along with the duty paid yarn were used had inadvertently claimed drawback for the goods manufactured out of non-duty paid yarn procured under Rule 19(2) of CER, 2002 at the time of export without declaring that non-duty paid yarn was also used in the manufacture of export garments and without filing ARE 1/ARE 2. The above argument of the exporter shows their attempt to cover up their deliberate violation committed for availing higher drawback amount and thereby, the ground leveled by them is not efficacious.

26. As regards confiscation of exported goods under Section 113(i) of the Customs Act, 1962 as proposed in the notice, I find that in the instant case, the exported goods were manufactured out of both duty paid and non-duty paid yarn and also exclusively used non-duty paid yarn as well. Whereon, the exporter claimed high duty drawback by deliberately suppressing the fact of using non-duty paid yarn received under Rule 19(2) of CER, 2002. This action of the exporter resulted in sanction of ineligible draw back to them and thereby, it also resulted in loss of revenue to the Government exchequer. Accordingly, the goods exported by misrepresenting the fact before the Customs Department in order to avail ineligible drawback amounts to improper export under Section 113 of the Customs Act, 1962 and thereby, I hold that the same are liable for confiscation under Section 113(i) of the Customs Act, 1962.

27. As regards imposition of penalty under Section 114(iii) of the Customs Act, 1962 as proposed in the notice, I find that in the instant case, the exported goods were manufactured out of both duty paid and non-duty paid yarn and also exclusively used non-duty paid yarn as well. Whereon, the exporter claimed duty drawback by deliberately suppressing the fact of using non-duty paid yarn received under Rule 19(2) of CER, 2002. This action of the exporter resulted in sanction of ineligible draw back to them and thereby, it also resulted in loss of revenue to the government exchequer. Accordingly, the goods exported by misrepresenting the fact before the Customs department in order to avail ineligible drawback amounts to improper export under Section 113 of the Customs Act, 1962 and thereby, the goods exported are liable for confiscation under Section 113(i) of the Customs Act, 1962. So, as the goods exported are liable for confiscation as improper export under Section 113 of the Customs Act, 1962, for the act of commission of offence committed, the exporter is liable for penalty under Section 114 (iii) of the Customs Act, 1962. Accordingly, I hold that the penal provisions invoked under Section 114(iii) of the Customs Act, 1962 is maintainable.

28. I notice that FE have already paid an amount of Rs.3,64,342/- (Rupees Three Lakh Sixty Four Thousand Three Hundred and Forty Two only) as the lesser duty/duty saved on the inputs procured by them under Rule 19(2) of CER, 2002. I hold that the said amount already paid is liable for appropriation towards the ineligible drawback to be payable by FE.

29. Accordingly, I pass the following order.

ORDER

I) IN RESPECT OF CUSTOM HOUSE, TUTICORIN

- a) I hold that Rs.20,43,831/- (Rupees Twenty Lakh Forty Three Thousand Eight Hundred and Thirty One only) as ineligible drawback by applying the respective first proviso of Rule 3(1) of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and accordingly, I order M/s. Fulchand Exports, Tiruppur to pay the same along with appropriate interest under Rule 16 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and Section 75A(2) of the Customs Act, 1962 read with Section 28AA of the Customs Act, 1962 respectively.
- b) I hold that the goods manufactured and exported valued at Rs.1,98,85,264/- (Rupees One Crore Ninety Eight Lakhs Eighty Five Thousand Two Hundred and Sixty Four Only) under 29 shipping bills as mentioned in Table I out of both duty-paid and non-duty paid yarn, are liable for confiscation under Section 113(i) of the Customs Act, 1962. However, as the goods are not readily available, I refrain from confiscating the subject goods.
- c) I impose a penalty of Rs.6,00,000/- (Rupees Six lakhs only) on M/s. Fulchand Exports, Tiruppur under Section 114(iii) of the Customs Act, 1962.

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II) IN RESPECT OF AIR CARGO COMPLEX, MUMBAI

- a) I hold that Rs.3,77,958/- (Rupees Three Lakh Seventy Seven Thousand Nine Hundred and Fifty Eight only) as ineligible drawback by applying the respective first proviso of Rule 3(1) of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and accordingly, I order M/s.Fulchand Exports, Tiruppur to pay the same along with appropriate interest under Rule 16 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and Section 75A(2) of the Customs Act, 1962 read with Section 28AA of the Customs Act, 1962 respectively.
- b) I hold that the goods manufactured and exported valued at Rs.41,69,384/- (Rupees Forty One Lakhs Sixty Nine Thousand Three Hundred and Eighty Four only) under 14 shipping bills as mentioned in Table-II out of both duty-paid and non-duty paid yarn, are liable for confiscation under Section 113(i) of the Customs Act, 1962. However, as the goods are not readily available, I refrain from confiscating the subject goods.
- c) I impose a penalty of Rs.1,00,000/- (Rupees One lakh only) on M/s. Fulchand Exports, Tiruppur under Section 114(iii) of the Customs Act, 1962.

III) IN RESPECT OF CHENNAI AIR CARGO

- a) I hold that Rs.9,27,015/- (Rupees Nine Lakh Twenty Seven Thousand and Fifteen only) as ineligible drawback by applying the respective first proviso of Rule 3(1) of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and accordingly, I order M/s.Fulchand Exports, Tiruppur to pay the same along with appropriate interest under Rule 16 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 and Section 75A(2) of the Customs Act, 1962 read with Section 28AA of the Customs Act, 1962 respectively.
- b) I hold that the goods manufactured and exported valued at Rs.1,04,59,534/- (Rupees One Crore Four Lakhs Fifty Nine Thousand Five Hundred and Thirty Four only) under 14 shipping bills as mentioned in Table-III out of both duty-paid and non-duty paid yarn, are liable for confiscation under Section 113(i) of the Customs Act, 1962. However, as the goods are not readily available, I refrain from confiscating the subject goods.
- c) I impose a penalty of Rs.3,00,000/- (Rupees Three lakhs only) on M/s. Fulchand Exports, Tiruppur under Section 114(iii) of the Customs Act, 1962.

I appropriate the amount of Rs.3,64,342/- (Rupees Three Lakh Sixty Four Thousand Three Hundred and Forty Two only) already paid by FE, towards the ineligible drawback amount ordered to be paid by FE as per para II(a) above.

K. V. V. G. Diwakar

के.वी.वी.जी.दिवाकर (K.V.V.G. DIWAKAR)

आयुक्त COMMISSIONER

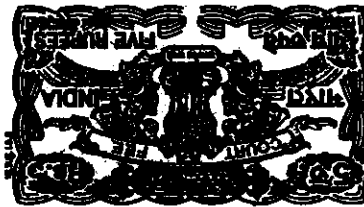
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To
M/s. Pulchand Exports, ✓
52/3, Site No:3,
Angeripalayam Road, Tiruppur.

Copy Submitted to:
The Chief Commissioner of Customs (Preventive) Trichy.

Copy to:

1. The Additional Director General of Central Excise Intelligence, Coimbatore.
2. The Commissioner of Customs, Air Cargo Complex, Mumbai.
3. The Commissioner of Customs, Air Cargo Complex, Chennai.
4. The Deputy / Assistant Commissioner of Customs, Arrears/Legal/Disposal/Review, Customs House, Tuticorin.
5. Copy to Master file/ Spare.



Attested
True Copy

Advocate