	OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, CUSTOM HOUSE: MUNDRA, KUTCH MUNDRA PORT & SPL ECONOMIC ZONE, MUNDRA-370421 Phone No.02838-271165/66/67/68 FAX.No.02838-271169/62	
A. File No.	:	F. No. VIII/Misc/Lykos-Theme Audit/Gr-IV/18-19
B. Order-in- Original No.	:	MCH/AC/Gr-IV/RRR/239/2020-21
C. DIN	:	**20200671MO00009XE1CC**
D. Passed by	:	Shri R. R. Rohilla Assistant Commissioner of Customs, Custom House, AP & SEZ, Mundra.
E. Date of order /Date of issue	:	24.06.2020/ 24.06.2020
F. Show Cause Notice No. & Date	:	VIII/Misc/Lykos-Theme Audit/Gr-IV/18-19 Dated 21.05.2019
G. Noticee(s)/Party/ Importer	:	M/s Lykos India Pvt Ltd, D-64 Defence Colony, New Delhi - 110024

1. यह अपील आदेश संबन्धित को नि:शुल्क प्रदान किया जाता है।
This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस अपील आदेश से असंतुष्ट है तो वह सीमा शुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमा शुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1- में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है-
Any person aggrieved by this Order - in - Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -1 to:

" सीमा शुल्क आयुक्त (अपील), कांडला
7 वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
Having his office at 7th Floor,Mridul Tower, Behind Times of India,
Ashram Road,Ahmedabad-380 009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए ।
Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must accompanied by –

(i) उक्त अपील की एक प्रति और
A copy of the appeal, and
(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं°-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए ।
This copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. अपील ज्ञापन के साथ ड्यूटि/ ब्याज/ दण्ड/ जुर्माना आदि के भुगतान का प्रमाण संलग्न किया जाना चाहिये ।
Proof of payment of duty / interest / fine / penalty etc. should be attached with the appeal memo.

6. अपील प्रस्तुत करते समय, सीमा शुल्क (अपील) नियम,1982 और सीमा शुल्क अधिनियम, 1962 के अन्य सभी प्रावधानों के तहत सभी मामलों का पालन किया जाना चाहिए ।
While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respects.

7. इस आदेश के विरुद्ध अपील हेतु जहां शुल्क या शुल्क और जुर्माना विवाद में हो, अथवा दण्ड में, जहां केवल जुर्माना विवाद में हो, Commissioner (A) के समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (A) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute.

Sub.:- Show Cause Notice F. No. VIII/Misc/Lykos-Theme Audit/Gr-IV/18-19 dated 21.05.2019 issued to M/s Lykos India Pvt Ltd, D-64 Defence Colony, New Delhi – 110024

BRIEF FACTS OF THE CASE

M/s. Lykos India Pvt. Ltd, 1 Industrial Plot No 37, Maha Gujarat Industrial Estate, Moraiya, Ahmedabad, Gujarat - 282213 *(hereinafter referred to as "Importer"/"Noticee" for sake of brevity)* had filed a Bill of Entry No. 9625639 dated 09.05.2017 through Custom Broker M/s Rishi Kiran Roadlines for clearance of imported goods declared as **'Straits Refined Tin Ingot 99.85% SN MIN Purity**.

1.1 In the present case, the following documents were produced and were examined by the Theme based Auditors during the audit. The Bill of Landing No: 0467A07377 dated 15.04.2017 issued by M/s Wan Hai Lines (M). SDN BHD. The shipper is shown as M/s Malaysia Smelting Corporation Berhad, Kuala Lumpur, Malaysia & the goods are described as "Straits Refined Tin Ingot 99.85% SN MIN PURITY, SHIPMENT FROM PENANG, MALAYSIA TO MUNDRA. INDIA", Total Net Weight = 25,000 kgs & Gross Weight is 25025 Kgs, Origin – Malaysia. The importer shown is M/s Trafigura India Pvt. Ltd, Gandhidham, Gujarat.

1.2 The Invoice No: SN099/4/17 dt. 15.04.2017 also describe the goods as straits refined Tin Ingot 99.85% SN Min - purity 25MT @ LME CSP on 24.04.2017 plus per MT is described as 19600 USD & premium price USD 280 per MT. The total price shown is 4,90,000/- USD plus USD 7,000/-. The invoice value is USD 4,97,000/-. The corresponding packing list shown the net weight as 25,000 kgs.

1.3 The importer has also submitted Asean – India Free Trade Area. Preferential Tariff, Certificate of Origin No: KL-2017-A1-21-005003 dt. 05.05.2017. The Country of Origin is stated as Malaysia. The certificate states Origin Criteria RVC Ministry (Regional Value Content). 46.96% & CTSH. The certificate has been issued by of International Trade & Industry, Malaysia.

1.4 The supplier M/s MSC (Malaysia Smelting Corporation Berhard) has also given a Certificate of Actual Analysis which shown purity of Tin Ingots is 99.873 & 99.874. The Marine Cargo Insurance Company MSIG Insurance (Malaysia) BHD has issued a Certificate No: PG-87020641 – Mar for USD 5,46,700/-.

1.5 In record is also a letter dated 28.04.2017 from M/s Lykos India Pvt. Ltd addressed to The Assistant Commissioner, Custom House, Mundra, which state that they confirm having sold the import consignment of Tin Ingots covered under Bill of Landing No: 0467A07377 dt. 15.04.2017 M.V. Wan Hai 315, Quantity 25 Mts to M/s Trafigura India Pvt. Ltd., Survey No : 236/1,237, Ware house No : K-05, & K-06 (B), Village Mithi

Rohar, Gandhidham Kutch on High Seal Sale Agreement basis. This letter appear wrongly worded as the High Sea Sale Agreement shown M/s Trafigura India Pvt. Ltd. The consideration is only CIF + 2%.

The said goods have been cleared, having Gross weight 25025.000 kgs and assessable value of Rs. 33331811.94 imported vide Bill of Lading No 0467A07377 dated 15.04.2017 and Invoice No SN099/04/17 dated 15.04.2017. Country of Origin reference no KL-2017-AI-21-005003 dated 05.05.2017 issued by Ministry of International Trade and Industry and Certificate of Actual Analysis issued by Malaysia Smelting Corporation Berhad along with High Sea Sales Agreement as per the notification of import & export policy in the name of M/s Trafigura India Pvt. Ltd, Gandhidham hereinafter referred to as "Sellers" agree to sell to M/s Lykos India Pvt Ltd., imported and goods sold "Tin Ingot" Quantity 25.000 MTS, supplier by Malaysia Smelting Corporation Berhad, B-15-11, Block B, 15th , 11, Megan Avenue 11, 12 Jalan Yap Kwan Seng, 50450 Kuala Lumpur, Malaysia, Total consideration CIF + 2%.

The goods have been shipped from Penang, Malaysia, and are covered under Customs Tariff Item 80011090 to the First Schedule of the Customs Tariff Act, 1975, by availing benefit of Country of Origin Notification No. 46/2011 -Cus, dated 01.06.2011, as amended.

2. In terms of new Customs audit methodology, where "Theme Based Audit (ThBA) has been considered as an important element of entire Customs Audit system, Board vide letter D.O.F. No. 450/725/72/2016-Cus-IV dated 26.07.2018 allocated various "Audit Themes" to Audit Commissionerates for "co-ordinating the audit" across India for issues arising out of such ThBA.

3. One of the themes allocated to Nhava Sheva Audit Commissionerate (Mumbai Customs Zone – II) is "correctness of availment of FTA benefit on imports of 'Tin Ingots' from Malaysia under Notification No 46/2011-Customs, dated 01.06.2011 and 53/2011-cus dated 01.07.2011.

4. 'Tin Ingots' is regularly being imported from Malaysia under Free Trade Agreement (FTA) by Importers from various ports by availing the benefit of duty exemption under aforesaid Notifications.

5. The benefit under Notification No 46/2011-Customs is available to the goods of Malaysian Origin in accordance with provision of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (ASEAN) and the Republic of India Rules, 2009, published vide Notification No. 189/2009-Customs (N.T.) dated 31.12.2009. As per the aforesaid Rules, the "Certificate of Origin" is required to be issued by the designated authority and in case of goods not wholly produced or obtained products in Malaysia, the AIFTA (Asean-India Free Trade Area) content should not be less than 35% FOB value.

6. Similarly, benefit of the Notification No 53/2011-Cus is available to the importer provided the goods are of Malaysian origin in accordance with provisions of the Customs

Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and Malaysia) Rules, 2011, published Notification No. 43/2011-Customs (N.T.). As per the aforesaid rules, in case of goods not wholly obtained of produced goods from Malaysia, the qualifying value content of the goods should not be less than 35% of the FOB value.

7. In order to verify the value content as per origin rules, verification visit was conducted by officials of Directorate of Revenue Intelligence (DRI), an arm of CBIC, at the premises of the exporter M/s Malaysia Smelting Corporation (MSC), Kuala Lumpur, Malaysia. During the course of verification visit, it was noted by the officers that a cost sheet depicting cost incurred in production / manufacture of tin ingots has been used by MSC to obtain Country of Origin certificate over a long period of time Manufacture of Tin Ingots during July-Sept., 2013, was used by aforesaid exporter to obtain Country of Origin Certificate. However, the aforesaid cost sheet reflects a particular source mixing for a specified period. This sheet could not have been used to compute the (Regional Value Content) for prospective period. It was also found by the officers during visit that Tin Ingots were being exported to Indian importers on the basis of job work / works contracts basis by MSC, on behalf of other Traders / suppliers. In such cases, MSC raised invoice only for smelting charges. The conversion charges alone cannot fulfill the required minimum value addition of 35% under AIFA.

8. In view of the above, it appeared that the cost sheet submitted by MSC is not relevant for subsequent imports and the regional value addition in the Tin Ingots imported in India was not in accordance with the originating criteria mandated under the origin rules, therefore, a Country of Origin submitted by is not MSC acceptable in terms of Notification No: 53/2011-Cus read with Notn. No: 43/2011-Cus (N.T).

9. In this regard, a copy of letter dated 12th July 2018 issued by CBIC to Ministry of International Trade & Industry (MITI), Malaysia is referred to & relied upon in Para 2 gives detailed reason and basis for denying the FTA benefit.

(a) "Validity period for Regional Value Content (RVC) costing is discussed below:

(i) The application process of the Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member State of the Association of Southeast Asian Nations (ASEAN) and the Republic of India Rules, 2009 (AIFTA) mandates every exporter / producer of the goods satisfying the criteria of preferential tariff treatment to submit a written application to the relevant Issuing Authorities with appropriate supporting documents / evidences proving that the goods to be exported qualify for issuance of a certificate of origin along with description quantity and weight of the goods, marks and number of packages for the goods to be exported. Also the Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Republic of India and Malaysia Rules, 2011 prescribes the same application procedure for issuance of Certificate of Origin.

Therefore, it implies that for each Form AI (COO) Certificate the exporter has to submit separate application with evidences proving the country of origin of that particular consignment to be exported.

(ii) In the instant case, the COOs were not issued on the basis of RVC costing of each consignment of goods exported to India as stipulated in the above said Rules. The issuance of COOs were based on cost sheet reflecting cost incurred in production / manufacture of tin ingots during a three month period of 2013 (July – September) for the subsequent period. It is highly unlikely that the RVC arrived on the basis of cost incurred in July-September 2013 would reflect the actual / correct RVC of the goods exported in a subsequent period. Accordingly, the said appears to be wrong.

(iii) It has been mentioned that "the domestic application procedure for issuance of COOs for Malaysia allows RVC costing to be applied for 2 years", however, there are no such provisions allowing RVC costing to be applied for a prolonged period of time or allowing a single RVC costing to be applied for a prolonged period of time or allowing a single RVC and FOB of exported Tin ingots as per the Rules of Origin for AIFTA.

(b) : RVC for work Contract :

(i) The Agreement between some of the traders and the exporter (MSC) revealed that the products exported to India were manufactured by MSC on job work / work contract basis wherein, as per the Smelting contracts with some of the traders, the major raw material i.e. Tin-Ore (procured from Non-AIFTA countries) were supplied free of cost basis on a nominal conversion charge basis. Even the dross generated during the said conversion was also required to be sent back to the traders. Therefore, it is obvious that the value addition in Malaysia was only to the extent of smelting charges paid by the traders to MSC which was found to be quite less than specified RVC criteria for issuance of COOs.

As an illustration, consider Certificate of Origin PP-2014-AI-21-001628 dated 05.08.2014. The goods are consigned from MSC to Trafigura India Pvt. Ltd., Mumbai. In this case, source of origin of the material is the **Democratic Republic of Congo.** The FOB value of the goods is 1,120,8000.00 and Treatment Charge is $30,104.52. It may be noted that in this case, the Treatment Charge of $30,104.52 appears to be the regional value content added by MSC in Malaysia. If this is to assumed to be the regional value content added by MSC, using the Direct Method in accordance with 5(2)(i) of the AIFTA Rules, AIFTA content = 30,104.52 / 1,120,800.00 = 2.68%.

Thus, it is evident that the smelting charges received by MSC from the traders does not satisfy the minimum RVC (35%) required for issuance of COOs for export of Tin Ingots as per the originating criteria mandated under the Rules of Origin for AIFTA.

(ii) As for the contention of the exporter that metal produced cannot be segregated according to the source of feed material, be that as it may for the purpose of obtaining the Certificate of Origin, it is imperative that the exporter make a distinction and differentiate between ore that was procured from within the ASEAN region and ore that was procured

from outside the ASEAN region. Chemical processes cannot be cited as an excuse for accounting practices that violate international agreements.

Rule 12 " Identical and Interchangeable Materials" of India – ASEAN FTA, states that "for the purposes of establishing if a product is originating when it is manufactured utilizing both originating and non-originating materials, mixed or physically combined the origin of such materials can be determined by generally accepted accounting principles of stock control applicable / inventory management practiced in the exporting Party. Hence, it appears from the above that M/s Malaysia Smelting Corporation has not followed the procedures laid down in the India – ASEAN FTA.

In view of the foregoing, the justifications provided by the exporter i.e. M/s MSC does not appear to be cogent and reasonable and therefore, appears to be not acceptable.

Thus, the preferential benefit needs to be denied in subject case. It is opined that when the producer / Exporter has not provided the accurate and correct information based on which the COOs were issued by the issuing authority., hence this communication may be considered as the final written determination for denial of preferential benefit in terms of Article 17(d) of OCP for Rules of Origin for AIFTA in respect of COOs issued to the exporter M/s Malaysia Smelting Corporation.

10. In this regard, Hon'ble CESTAT decision in the case of M/s Alfa Trader Vs Commissioner of Customs, Cochin reported at [2007(2317) ELT 289] are squarely applicable vide which it was held that if the certificate of origin is not correct on facts, it can be rejected and may be basis for disallowing the duty exemption. Similarly, the case law in the matter of M/s Surya Lights Vs. Commissioner of Customs reported at [2008 (226) ELT 74-Tribunal Bangalore] is relevant.

11. In terms of Section 46 (4) of Customs Act, 1962, the importer is required to make a declaration as regards the truth of the contents of the bills of entry submitted for assessment of Customs duty. The said noticee have wrongly taken benefit of Notification No 46/2011-Customs dated 01.06.2011. Thus it appeared that the said noticee has contravened the provisions of sub section (4) of Section 46 of the Customs Act, 1962, in as much as, they had mis-declared the description of goods imported as 'Straits Refined Tin Ingot 99.85% SN MIN Purity' in the declaration in form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 to avail the country of origin benefit to evade the customs duty. This constitutes an offence of the nature covered in Section 111(m) of the Customs Act, 1962 and the goods imported appear liable for confiscation under section 111 (m) of the Customs Act, 1962.

12. In view of the facts discussed in the foregoing paras and material evidences available on record, it appeared that the importer has contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they had intentionally taken a wrong benefit of the notification no. 46/2011 dated 01.06.2011, thereby suppressing the correct documents of the imported goods, while filing the declaration, seeking clearance at the time of the

importation of the impugned goods, therefore, the said importer also appeared liable to penalty under the provisions of Section 112(a) of the Customs Act, 1962 for importing such wrongly taken a benefit of the country of origin to clear the said imported goods.

13. The said importer has paid total duty amount of Rs.57,96,402/- at the time of assessment of the goods in respect of Bill of Entry No. 9625639 dated 09.05.2017.

14. In view of the above, a SCN F.No. VIII/MISC/Lykos-Theme Audit/r-IV/18-19 dated 21.05.2019 was issued to the importer M/s. Lykos India Pvt. Ltd, 1 Industrial Plot No 37, Maha Gujarat Industrial Estate, Moraiya, Ahmedabad, Gujarat - 282213 (IEC 0514017007), whereby they were called upon to show cause to the Commissioner of Customs, having his office at, Port User Building, Mundra Port, Mundra, Kutch, Gujarat as to why:-

(i) The 25.00MTS of goods declared as "Straits Refined Tin Ingot 99.85% SN MIN Purity" imported vide Bill of Entry No 9625639 dated 09.05.2017 and having assessable value of Rs. **3,33,31,811.94** should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 for mis-declaring the description and also for attempting to take the benefit of Notification No 46/2011 dated 01.06.2011 wrongly.

(ii) The total Customs duty leviable on the said goods amounting to **Rs.62,48,381/-** should not be demanded and recovered from the importer by re-assessing the said Bill of Entry after amendment under Section 149 of the Customs Act, 1962 and as the importer has already paid an amount of **Rs.57,96,402**/-, they are further required to show cause as to why the same should not be appropriated towards **differential duty amounting of Rs. 4,51,979.46** demanded and recovered from them in terms of section 28(4) of the Customs Act, 1962, along with applicable interest thereon under section 28AA of the Customs Act,1962;

(iii) Penalty should not be imposed on them under section 112(a) &112(b) and / 114A of Customs Act, 1962.

PERSONAL HEARING

16. The personal hearing in the case matter was granted on dated 18.11.2019 and further on dated 28.11.2019. In response to the intimation letter for personal hearing on 28.11.2019, the Noticee vide their letter dated 26.11.2019, received to the department via email, submitted, that the advocate appointed to appear in the captioned matter has to travel from Mumbai. However, on the scheduled date of hearing he is preoccupied in a part heard hearing before the High Court of Mumbai and therefore it would not be possible for him to appear on the said date and they requested to grant them two weeks time to file the reply to the show cause and thereafter a personal hearing may be granted in the captioned matter. They vide their aforesaid e-mail denied each and every allegation made in the show cause notice and would like to be personally heard before any decision adverse to them is taken in the above matter. Thereafter, the personal hearing was granted on 18.12.2019 &

further on dated 25.02.2020. However, again no body appeared for the same on scheduled dates and time.

DEFENCE SUBMISSION

17. The Noticee vide their letter dated 26.11.2019, received to the department via email, had requested for grant of 02 weeks time to file the reply to the Show Cause Notice, however, they did not file any reply in their defence.

DISCUSSION AND FINDINGS

18. I have carefully gone through the Show Cause Notice dated 21.05.2019 and the entire available records of the case. I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

(i) Whether the 25.00 MTS of goods declared as "Straits Refined Tin Ingot 99.85% SN MIN Purity" imported vide Bill of Entry No 9625639 dated 09.05.2017 and having assessable value of Rs. **3,33,31,811.94/-** are liable for confiscation under Section 111 (m) of the Customs Act, 1962.

(ii) Whether the total Customs duty leviable on the said goods amounting to **Rs.62,48,381/-** is required to be demanded and recovered from the importer by re-assessing the said Bill of Entry after amendment under Section 149 of the Customs Act, 1962 and as the importer has already paid an amount of **Rs.57,96,402**/-, whether the same are required to be appropriated towards duty demanded and whether **differential duty amounting to Rs. 4,51,979.46/- is** required to be demanded and recovered from them in terms of section 28(4) of the Customs Act, 1962, along with applicable interest thereon under section 28AA of the Customs Act,1962;

(iii) Whether the importer is liable for Penalty under section 112(a) &112(b) and / 114A of Customs Act, 1962.

18.1 The SCN has proposed for demand and recovery of customs duty in terms of section 28(4) of the Customs Act, 1962, along with applicable interest thereon under section 28AA of the Customs Act,1962. In this regard, I find that the importer M/s Lykos India Pvt. Ltd. had filed a Bill of Entry No.9625639 dated 09.05.2017 for clearance of 25000Kgs of imported goods declared as **'Straits Refined Tin Ingot 99.85% SN MIN Purity' [CTH 80011090]** with availing the benefit of duty exemption under Notification No. 46/2011-Customs dated 01.06.2011 and Notification No. 53/2011-Customs dated 01.07.2011**.** The said goods were supplied by **the supplier M/s Malaysia Smelting Corporation Berhad,** B-15-11, Block B, 15th , 11, Megan Avenue 11, 12 Jalan Yap Kwan Seng, 50450, Kuala Lumpur, Malaysia. The said goods having Gross weight 25025.000 kgs and assessable value of Rs. 33331811.94, imported under cover of Bill of Lading No 0467A07377 dated 15.04.2017, Invoice No SN099/04/17 dated 15.04.2017, and Certificate of Country of Origin bearing reference no KL-2017-AI-21-005003 dated 05.05.2017 issued by Ministry of International Trade and

Industry, Malaysia were cleared by Customs from Mundra Port. I find that the benefit under Notification No 46/2011-Customs is available to the goods of Malaysian Origin in accordance with provision of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of the Association of Southeast Asian Nations (ASEAN) and the Republic of India Rules, 2009, published vide Notification No. 189/2009-Customs (N.T.) dated 31.12.2009. As per the aforesaid Rules, the "Certificate of Origin" is required to be issued by the designated authority and in case of goods not wholly produced or obtained products in Malaysia, the AIFTA (Asean-India Free Trade Area) content should not be less than 35% FOB value. Similarly, benefit of the Notification No 53/2011-Cus is available to the importer provided the goods are of Malaysian origin in accordance with provisions of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and Malaysia) Rules, 2011, published Notification No. 43/2011-Customs (N.T.). As per the aforesaid rules, in case of goods not wholly obtained of produced goods from Malaysia, the qualifying value content of the goods should not be less than 35% of the FOB value. I find that in order to verify the value content as per origin rules, a verification visit was conducted by officials of Directorate of Revenue Intelligence (DRI), at the premises of the exporter M/s Malaysia Smelting Corporation (MSC), Kuala Lumpur, Malaysia, during which it was noted by the officers that a cost sheet depicting cost incurred in production / manufacture of tin ingots were used by MSC to obtain Country of Origin certificate over a long period of time manufacture of Tin Ingots during July-Sept., 2013. However, the aforesaid cost sheet reflects a particular source mixing for a specified period. This sheet could not have been used to compute the (Regional Value Content) for prospective period. It was also found by the officers during visit that Tin Ingots were being exported to Indian importers on the basis of job work / works contracts basis by MSC, on behalf of other Traders / suppliers. In such cases, MSC raised invoice only for smelting charges and the conversion charges alone cannot fulfill the required minimum value addition of 35% under AIFA. In view of the above, it was observed that the cost sheet submitted by MSC is not relevant for subsequent imports and the regional value addition in the Tin Ingots imported in India was not in accordance with the originating criteria mandated under the origin rules, therefore, a Country of Origin submitted by is not MSC acceptable in terms of Notification No: 53/2011-Cus read with Notn. No: 43/2011-Cus (N.T). In this regard, a copy of letter dated 12th July 2018 issued by CBIC to Ministry of International Trade & Industry (MITI), Malaysia is referred to & relied upon in Para 2 gives detailed reason and basis for denying the FTA benefit wherein it is specifically mentioned that application procedure for issuance of Certificate of Origin implies that for each Form AI (COO) Certificate the exporter has to submit separate application with evidences proving the country of origin of that particular consignment to be exported. In the instant case, the COOs were not issued on the basis of RVC costing of each consignment of goods exported to India as stipulated in the above said Rules. The issuance of COOs were based on cost sheet reflecting cost incurred in

production / manufacture of tin ingots during a three month period of 2013 (July – September) for the subsequent period. It is highly unlikely that the RVC arrived on the basis of cost incurred in July-September 2013 would reflect the actual / correct RVC of the goods exported in a subsequent period. Accordingly, the said appears to be wrong. It has also been mentioned that "the domestic application procedure for issuance of COOs for Malaysia allows RVC costing to be applied for 2 years", however, there are no such provisions allowing RVC costing to be applied for a prolonged period of time or allowing a single RVC costing to be applied for a prolonged period of time or allowing a single RVC and FOB of exported Tin ingots as per the Rules of Origin for AIFTA. In case of RVC for work Contract, it is mentioned that the agreement between some of the traders and the exporter (MSC) revealed that the products exported to India were manufactured by MSC on job work / work contract basis wherein, as per the Smelting contracts with some of the traders, the major raw material i.e. Tin-Ore (procured from Non-AIFTA countries) were supplied free of cost basis on a nominal conversion charge basis. Even the dross generated during the said conversion was also required to be sent back to the traders. Therefore, it is obvious that the value addition in Malaysia was only to the extent of smelting charges paid by the traders to MSC which was found to be quite less than specified RVC criteria for issuance of COOs. It is evident that the smelting charges received by MSC from the traders does not satisfy the minimum RVC (35%) required for issuance of COOs for export of Tin Ingots as per the originating criteria mandated under the Rules of Origin for AIFTA. I find that Rule 12 "Identical and Interchangeable Materials" of India – ASEAN FTA, states that "for the purposes of establishing if a product is originating when it is manufactured utilizing both originating and non-originating materials, mixed or physically combined the origin of such materials can be determined by generally accepted accounting principles of stock control applicable / inventory management practiced in the exporting Party. Hence, it is observed from the above that M/s Malaysia Smelting Corporation has not followed the procedures laid down in the India – ASEAN FTA. In view of the foregoing, the justifications provided by the exporter i.e. M/s MSC does not appear to be cogent and reasonable and therefore, appears to be not acceptable. Thus, the preferential benefit needs to be denied in subject case. It is opined that when the producer / Exporter has not provided the accurate and correct information based on which the COOs were issued by the issuing authority, hence this communication may be considered as the final written determination for denial of preferential benefit in terms of Article 17(d) of OCP for Rules of Origin for AIFTA in respect of COOs issued to the exporter M/s Malaysia Smelting Corporation. Accordingly, I find that the Noticee have wrongly availed concessional rate of Customs duty and have taken benefit of Notification No. 46/2011-Customs dated 01.06.2011 and Notification No. 53/2011-Customs dated 01.07.2011. The Noticee had also contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as, they have mis-declared the description of goods imported as 'Straits Refined Tin Ingot 99.85% SN MIN Purity' in the declaration in form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 and thereby they

wrongly availed the country of origin benefit to evade the customs duty. Also, it is a case of wilful mis-statement and suppression of facts of correct qualifying Regional Value Content (RVC) of 35% as in the instant case, the COOs were not issued on the basis of RVC costing of each consignment of goods exported to India as stipulated in the above said Rules. The issuance of COOs were based on cost sheet reflecting cost incurred in production / manufacture of tin ingots during a three month period of 2013 (July – September) for the subsequent period. It is highly unlikely that the RVC arrived on the basis of cost incurred in July-September 2013 would reflect the actual / correct RVC of the goods exported in a subsequent period. Accordingly, the Noticee is ineligible for availing exemption under Notification No. 46/2011-Customs dated 01.06.2011 & Notification No. 53/2011-Customs dated 01.07.2011. I rely upon decision in the case of ALFA TRADERS Versus COMMISSIONER OF CUSTOMS, COCHIN - 2008 (223) E.L.T. 289 (Tri. - Banglore), wherein it was held that *"No case law can be catapulted to level of universal theorem to be applied blindly ignoring facts of case"*. Further, in the matter of M/s SURYA LIGHT *Vs.* COMMISSIONER OF CUSTOMS, BANGALORE [2008 (226) E.L.T. 74 (Tri. - Bangalore)] it was held:

> *"7.3 The investigations have clearly revealed that the goods are of Chinese origin. Further, the Commissioner has clearly given a finding that in terms of the Origin Rules issued by the Government of India, the goods will not be entitled for the benefit of the exemption under the ISFTA. In view of this, the demand of duty on the impugned item is in order. The appellant is also liable for payment of Anti-Dumping duty and also the CG Duty. Hence, we confirm demand of duty to the tune of .....With these modifications, we dispose of the appeal."*

In this regard, I also rely in the decision of Commissioner of Central Excise, Belgaum Ltd. Versus Commissioner of C.E., Chandigarh-II [2001 (135) E.L.T. 1106 (Tri. – Del.)], wherein it was held that:

> *"9. The material on record would clearly show that there is suppression of fact as it clear from the order passed by the adjudicating authority and the appellate authority that there was no manufacturing activity involved in refurbishing and modification of the 3 washing machines, despite the same, Cenvat credit was claimed and though duty of Rs. 2,61,760/- was collected, the said fact was suppressed and therefore availed extended period of limitation. In view of the decision of the Hon'ble Supreme Court in Mysore Rolling Mills Private Limited v. Collector of Central Excise, Belgaum - , wherein it has been clearly held* ***that non-disclosure of receipt of such amount at the time of assessment extended period of 5 years applicable*** *and Rule 10(1)(C) of the Central Excise Rules, 1944, corresponding to Section 11A of the Central Excises and Salt Act, 1944. Thus extended period was applicable. Hence, the Show Cause Notice issued after one year was not barred by limitation under Central Excises*

and Salt Rules wherein provision is identical to the provisions under the Central Excise Act."

In view of above discussion and judicial pronouncement, I find that extended period under proviso to Section 28(4) of the Customs Act, 1962 is rightly invokable in the instant case. Accordingly, the total Customs duty leviable on the said goods is amounting to Rs. 62,48,381/- in respect of Bill of Entry as detailed in Annexure to the Show Cause Notice without allowing concessional rate of Customs duty benefit based on Country of Origin. I, further, find that the Noticee have already paid an amount of Rs. 57,96,402/- towards Customs duty for the clearance of the imported goods by availing concessional rate of Customs duty based on Country of origin benefit which they are not entitled to based upon the facts as discussed in Paras supra and accordingly the said amount of Rs. 57,96,402/- is required to be appropriated towards duty demanded from the importer M/s. Lykos India Pvt. Ltd.. Thus, differential Customs duty of Rs. 4,51,979/- (Rupees Four Lakh Fifty One Thousand Nine Hundred Seventy Nine only) is recoverable in terms of Section 28 (4) of the Customs Act, 1962 by denying concessional rate of customs duty benefit based upon the country of origin of imported goods. In context of demand and recovery of Interest at appropriate rate under provision of Section 28AA of the Customs Act, 1962, I find that it is quite clear from wordings of Section 28AA of the Customs Act, 1962, that when the said importer is liable to pay duty in accordance with the provisions of Section 28 ibid, they in addition to such duty are also liable to pay interest as well. The said Section provides for payment of interest automatically along with the duty. As I have already held that differential Customs duty of Rs.4,51,979/-is required to be recovered from them, in view of this, I hold that the importer is also liable to pay interest at appropriate rate on the said amount of Rs.4,51,979/-under the provisions of Section 28AA of the Customs Act,1962.

18.2 The Show cause Notice has further proposed for confiscation of imported goods under Section 111(m) of the Customs Act, 1962. In this context, the relevant parts of Section 111(m) of the Customs Act, 1962 are reproduced as under:

"Section 111. Confiscation of improperly imported goods, etc. – The following goods brought from place outside India shall be liable to confiscation:

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;

From the relevant statutory provisions as reproduced above, I find that in terms of Section 46 (4) of the Customs Act, 1962, the importer was required to make declaration as regards the truth of contents of the Bills of Entry submitted for assessment of Customs duty but they have contravened the provision of Section 46(4) of the Customs Act, 1962 in as much as they have wrongly taken benefit of Notification No 46/2011-Customs dated

01.06.2011 and have mis-declared the description of goods imported as 'Straits Refined Tin Ingot 99.85% SN MIN Purity' in the declaration in form of Bill of Entry filed under the provisions of Section 46(4) of the Customs Act 1962 to wrongly avail the country of origin benefit to evade the customs duty. All these acts on the part of the Noticee constitutes an offence of the nature covered in Section 111(m) of the Customs Act, 1962 and the imported goods covered in the Show Cause Notice liable for confiscation under section 111 (m) of the Customs Act, 1962.

18.3 As the impugned goods are found to be liable for confiscation under Section 111 (m) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125 (1) of the Customs Act, 1962, is liable to be imposed in lieu of confiscation in respect of the imported goods covered in the Show Cause Notice, which are not physically available for confiscation. The Section 125 (1) *ibid* reads as under:

> ***"Section 125**. Option to pay fine in lieu of confiscation. — (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit."*
>
> A plain reading of the above provision shows that imposition of redemption fine is an option in lieu of confiscation. It provides for an opportunity to owner of confiscated goods for release of confiscated goods, by paying redemption fine. In the matter of Commissioner of Customs (Imp.), Nhava Sheva *Vs.* S.B. Impex [2017 (358) E.L.T.358 (Tri. Mumbai)], it was held:
>
> *"6. It is noticed that the goods on which the Revenue has sought imposition of redemption fine were cleared and disposed of by the appellant. The said goods are not available for confiscation. The said goods were also not seized and released under any bond or undertaking. In these circumstances, the same cannot be confiscated and therefore, no redemption fine could have been imposed".*
>
> Further, in the matter of Weston Components Ltd. Vs. Commissioner of Customs, New Delhi [2000 (115) E.L.T. 278 (SC)], it was held by the Hon'ble Supreme Court that:
>
> *"It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being*

executed, would not take away the power of the customs authorities to levy redemption fine".

The above judgment was delivered on specific issue and facts of the case were not discussed in detail in the said judgment. The above judgment was delivered by the Hon'ble Supreme Court in Civil Appeal No. 7144 of 1999, filed against the order of Hon'ble Tribunal reported at 1999 (84) ECR 259 (Tri Delhi). In the said order, Hon'ble Tribunal discussed the issue in brief wherein it is also mentioned that the goods involved in that case were provisionally released. Therefore, it emerges from the said judicial pronouncements that redemption fine can be imposed against those goods also which are not physically available but were provisionally released against bond.

Further, in the matter of Lubrizol Advanced materials India Pvt. Ltd. *Vs.* C.C.E. Vadodara-I [2013 (290) E.L.T. 453 (Tri.-Ahmd.)], it was held by the Hon'ble Tribunal that:

"Moreover, in the case of Weston Components reported in[2000 (115) E.L.T. 278 (SC)], *the goods had been released provisionally under a bond and it is nobody's case in this case that goods were seized and released provisionally under a bond. In the absence of seizure, the decision of the Hon'ble Supreme Court in the case of Weston Components cannot be applied".*

In the matter of Commissioner of Central Excise, Surat-II *Vs.* Citizen Synthesis [2010 (261) E.L.T. 843 (Tri. Ahmd.)], it was held by the Hon'ble Tribunal that:

"Learned SDR on behalf of the Revenue submits that Revenue is in appeal against the conclusion of Commissioner that clandestinely cleared goods which are not available for confiscation, cannot be confiscated and setting aside redemption fine of Rs. 50,000/- imposed. He relies on the decision of Hon'ble Supreme Court in the case of M/s. Weston Components as reported in [2000 (115) E.L.T. 278 (SC)], *in support of his contention that redemption fine is imposable even when the goods are not available for confiscation. I find that the decision of Hon'ble Supreme Court in the case of M/s. Weston Components was rendered wherein the goods had been released to the appellant after execution of bond. Obviously, it was the case of provisional release. Learned SDR fairly admitted that in this case, the goods had not been provisionally released, but removed clandestinely. Therefore, the judgment cited by the learned SDR is not relevant.*

In the matter of Commissioner of Central Excise, Surat *Vs.* Gunjan Exports [2013 (295) E.L.T. 733 (Tri. Ahmd.)], it was held that:

"5. I have considered the submissions and I find myself unable to appreciate the submissions. The Hon'ble Supreme Court had clearly held in the case of Weston Components Limited that when the goods are released provisionally on execution of bond, confiscation can be affected even if the goods are not available. The natural conclusion is that the goods should have been released on bond which would mean

that the goods have been taken possession of by way of seizure and subsequently released on execution of bond. Admittedly that is not the situation in this case also. In this case, respondents themselves have diverted the goods and after diversion, proceedings have been initiated. There is no seizure of the diverted goods and release of the same provisionally on execution of bond. Therefore, the issue is covered by the decision of the Hon'ble Supreme Court and in the absence of release on the basis of execution of a bond, goods could not have been confiscated. The decision of the Larger Bench of the Tribunal relied upon by the learned Commissioner is also applicable since in this case also there is no bond with a security is available. The B-17 Bond is a general purpose bond undertaking to fulfill the conditions of notification and other requirements and does not help the Revenue to confiscate the goods not available and impose the redemption fine in lieu of confiscation. Further, the confiscation always presumes availability of goods and presumption normally is that goods have been seized and thereafter the proceedings would culminate into confiscation or release. Confiscation would mean that seized goods become the property of the Government and the party to whom it is ordered to be released on payment of fine, will have to pay fine and redeem the goods. When the goods have been diverted and not released on execution of bond with conditions, the question of confiscation of the same does not arise since goods have already become someone else's property. Under these circumstances, I find no merits in the appeal filed by the Revenue and accordingly, reject the same".

From the above cited judgments/orders, I find that redemption fine can be imposed in those cases where goods are either available or the goods have been released provisionally under Section 110A of the Customs Act, 1962 against appropriate bond binding concerned party in respect of recovery of amount of redemption fine as may be determined in the adjudication proceedings. In the instant case, the impugned goods in respect of the Bills of Entry as detailed in Annexure to the Show Cause Notice were neither seized, nor released provisionally. Hence neither the goods are physically available nor bond for provisional release under Section 110A *ibid* covering recovery of redemption fine is available. I, therefore, find that redemption fine cannot be imposed in respect of imported goods pertaining to Bill of Entry as detailed in Annexure to the Show Cause Notice.

18.4 Now, I proceed to consider the proposal of penalty under Section 114A of the Customs Act, 1962 against the importer. I find that demand of differential Customs duty total amounting to Rs. 4,51,979/-, has been made under Section 28 (4) of the Customs Act, 1962, which provides for demand of duty not levied or short levied by reason of collusion or willful mis-statement or suppression of facts. Hence as a natural corollary penalty is imposable on the Noticee under Section 114A of the Customs Act, 1962, which provides for penalty equal to duty plus interest in cases *where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or*

interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts. In the instant case, the ingredient of wilful mis-statement or suppression of facts by the importer has been clearly established as discussed in the foregoing paras and hence, I find that this is a fit case for imposition of quantum of penalty equal to the amount of duty plus interest in terms of Section 114A *ibid.*

18.5 Further, penalty has also been proposed on the Noticee under Section 112 (a) & 112(b) of the Customs Act, 1962. In this regard, I find that fifth proviso to Section 114 A stipulates that *"where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114."* Hence, I refrain from imposing penalty on the importer/Noticee under Section 112 (a) and 112(b) of the Customs Act, 1962.

19. In view of the forgoing discussion and findings, I pass the following order:-

ORDER

(i) I confirm and order to recover the balance duty of Rs.4,51,979/- (Four Lakh Fifty One Thousand Nine Hundred and Seventy Nine only)under proviso to section 28(4)of the Customs Act,1962 since importer, M/S Lykos India Pvt.Ltd has already paid Rs 57,96,402/- towards their duty liability,.

(ii) I order to charge and recover interest from the importer M/s. Lykos India Pvt. Ltd., on the confirmed duty at Sr. No. (i) above under section 28AA of the Customs Act, 1962.

(iii) I hold the imported goods i.e. "Straits Refined Tin Ingot 99.85% SN MIN Purity", totally weighing 25.00 MTS covered under Bill of Entry No. 9625639 dated 09.05.2017 liable for confiscation under Section 111(m) of the Customs Act, 1962. Since, the imported goods are not physically available; I refrain from imposing any redemption fine in lieu of confiscation.

(iv) I impose penalty of Rs. 4,51,979/- (Rupees Four Lakh Fifty One Thousand Nine Hundred Seventy Nine only) on the importer M/s. Lykos India Pvt. Ltd., under Section 114A of the Customs Act, 1962. However, I give an option, under proviso to Section 114A, to the Noticee, to pay 25% of the amount of total penalty imposed at (iv) above, subject to payment of total amount of duty and interest confirmed at (i) and (ii) above, and the amount of 25% of penalty imposed at (iv) above within 30 days of receipt of this order.

(v) I refrain from imposing penalty on the importer M/s. Lykos India Pvt. Ltd. under Section 112 (a) and 112(b) of the Customs Act, 1962.

20. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under provisions of the Customs Act,

1962 and rules/regulations framed thereunder or any other law for the time being in force in the Republic of India.

24/6/2020

(R. R. Rohilla)
Assistant Commissioner
Custom House, Mundra

F. No. VIII/MISC/Lykos-Theme Audit/Gr-IV/18-19

Date: 24.06.2020

BY SPEED POST

To
M/s. Lykos India Pvt. Ltd,
1 Industrial Plot No 37,
Maha Gujarat Industrial Estate,
Moraiya, Ahmedabad,
Gujarat - 282213

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
3700
24 JUN 2020
INWARD SECTION
Custom House, Mundra

P.O(EDI)

New address
M/s Lykos India Pvt. Ltd,
D-64, Defence Colony,
New Delhi-110024

Copy to:

1. The Commissioner of Customs, Custom House, Mundra.
2. The Deputy/Assistant Commissioner (RRA), Custom House, Mundra.
3. The Deputy/Assistant Commissioner (TRC), Custom House, Mundra.
4. The Deputy/Assistant Commissioner (EDI), Custom House, Mundra.
5. The Deputy/Assistant Commissioner (Audit), Custom House, Mundra.
6. Guard File