DIN-20200171MO00005TE9F3

प्रधान आयुक्त, सीमा शुल्क कार्यालय

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS

सीमा शुल्क सदन, मुंद्रा पत्तन एवं एस.ई.जेड., मुंद्रा (कच्छ)-३७०४२१

CUSTOM HOUSE, MP & SEZ, MUNDRA (KACHCHH)-370421

दूरभाष न./Phone No.:02838- 271463; फैक्स/FAX – 02838- 271169/ 271475

A. File No.	:	F. No. VIII/48-48/Adj./ADC/MCH/2019-20
B. Order-in- Original No.	:	MCH/ADC/AK/103 /2019-20
C. Passed by	:	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	:	31.01.2020/31.01.2020
E. Show Cause Notice No. & Date	:	VIII/48-688/Sanjay/Adj./Gr-I/MCH/19-20 dated 27.08.2019.
F. Noticee(s)/Party/ Importer	:	M/s. Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn., Malad West, Mumbai,Maharashtra -400064

P.O(EDI)

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/48-688/Sanjay/Adj./Gr-I/MCH/19-20 dated 27.08.2019 issued to M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai, Maharashtra -400064.

BRIEF FACTS OF THE CASE

M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai-Maharashtra -400064 (hereinafter referred to as "Importer"/"Noticee" for the sake of brevity) had filed Bills of Entry No. 9877868 dated 31.01.2019, 8397685 dated 10.10.2018 and 8399930 dated 10.10.2018 (Annexure-A) through Custom Broker M/s Arihant Shipping Agencies for clearance of imported goods declared as 'Alkalised Cocoa Powder'. The goods have been shipped from Malaysia, falling under Custom Tariff Item 18050000 to the First Schedule of the Customs Tariff Act, 1975. The importer filed the Bills of Entry through the Customs Broker for clearance of the aforesaid goods by availing concessional rate of Customs duty benefit on the basis of Country of Origin certificate prescribed under Notification No. 46/2011-Cus, dated 01.06.2011, as amended. Based upon the self-assessed declarations regarding country of origin benefit made by the importer in the aforesaid Bills of Entry, the imported goods viz. Alkalised Cocoa Powder' were cleared, having gross weight 80,000 Kgs and assessable value of Rs.84,21,120/- imported vide Bill of Lading numbers and Invoices as detailed in Annexure -A

1.1 In terms of new Customs audit methodology, where "Theme Based Audit (ThBA) has been considered as an important element of entire Customs Audit system, erstwhile Central Board of Excise & Customs (CBEC) which is now Central Board of Indirect Taxes and Customs (CBIC) (herein after referred to as Board) vide letter D.O.F. No. 450/72/2016-Cus-IV dated 26.07.2018 allocated various "Audit Themes" to Audit Commissionerate for "Coordinating the audit" across India for issues arising out of such theme based audit.

1.2 One of the themes allocated to Nhava Sheva Audit Commissionerate (Mumbai Customs Zone-II) is "FTA benefit on imports of Cocoa powder from Malaysia" under Customs Notification No 46/2011-Customs, dated 01.06.2011 and Notification No. 53/2011-Customs, dated 01.07.2011.

1.3 Cocoa Powder 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.

1.4 The benefit under Notification No 46/2011-Customs is available provided the goods are 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% of the FOB value.

1.5 Similarly, benefit of the Customs Notification No 46/2011-Customs, dated 01.06.2011 and Notification No. 53/2011-Customs, dated 01.07.2011 are available 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 or produced goods from Malaysia, the qualifying value content of the goods should not be less than 35% of the FOB value.

1.6 The matter regarding verification of qualifying value content was taken up for investigation by Directorate of Revenue Intelligence, New Delhi. Based on some of the "Certificates of Origin" issued for this product, it was noticed that the goods were derived from Cocoa beans of Ghana Origin and in such cases, based on prevalent International price as well as information available on supplier's website, it appeared that the regional value addition would only be in the region of 3-17% as against minimum qualifying value of 35% of the FOB value. Accordingly, the matter was taken up by the Director ICD, of the Board with the High Commission of Malaysia in Delhi vide letter dated 10.01.2014 for verification. In response thereto, the Director, Asian Economic Corporation, Ministry of International Trade and Industry (MITI), Delhi vide letter dated 18.03.2014 informed that the "Ministry of International Trade and Industry (MITI) Malaysia" have completed a verification visit to both the factories M/S JB Cocoa and Guan Chong Cocoa to verify the information regarding raw material used in the production of cocoa powder for export to India. Based on the verification visit and internal investigation of both factories , MITI stated that the raw material used in the production of finished goods has fulfilled the 35% Regional Value Content (RVC) under the ASEAN India Free Trade Agreement (AIFTA), however they showed their inability to provide the cost structure due to data privacy.

1.7 According to Article 6(a) (ii) of Annexure-III (Operational Certification Procedures) to the Rules of Origin under the ASEAN India Free Trade Agreement, the issuing Authority shall respond to the request promptly and reply within 03 months after receipt for retroactive check. According to Rule 16 (a)(iv), the retroactive check process, including the actual process and the determination of whether the subject goods is originating or not, should be completed and the result communicated to the issuing authority within 06 months.

1.8 There is no provision in the said Rules of Origin of India ASEAN FTA for denial of cost structure on the basis of data privacy. Article 18 (b) clearly obligates information relating to the validity of the AIFTA Certificate of Origin to be furnished upon request of the importing party.

1.9 In view of the above, it was decided by the Board to deny the preferential Customs duty benefit in the said matter and accordingly Board vide letter F.NO. 456/12/2013-Cus.V dated 07.05.2014 issued necessary direction for taking necessary action.

1.10 In this regard, Hon'ble CESTAT decision in the case of M/s Alfa Traders Vs Commissioner of Customs, Cochin reported in 2007(217) ELT 437 and 2008(223)ELT 289 are squarely applicable wherein it has been held that if the certificate of origin is not correct on facts, it can be rejected for disallowing the duty exemption. Similarly, the case law in the matter of M/s Surya Lights Vs Commissioner of Customs reported in 2008 (226) ELT 74-Tribunal Bangalore is also equally relevant.

1.11 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 Bill of entry submitted for assessment of Customs duty. In view of the discussions made in the foregoing paras, it appeared that 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 Country of Origin as Malaysia imported as Cocoa Powder in the declaration in the form of Bills 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. Hence, it appeared that importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai-Maharashtra-400064 has knowingly and with intention by design taken the benefit of Notification No. 46/2011-Cus dated 01.06.2011. It appeared to be a case of wilful misstatement of actual country of origin, suppression of facts of correct qualifying Regional Value Content (RVC) and of ineligibility of said exemption Notification (Supra) due to non-fulfilment of Regional Value Content (RVC) of 35% and thus ineligibility of exemption under Notification no. 46/2011-Cus dated 01.06.2011 with intention and to evade duty of Customs. This constitutes an offence of the nature covered in section 111 (d), 111(m) and 111 (0) of the Customs Act, 1962 and the goods imported appeared liable for confiscation under section 111 (d), 111(m) and 111 (0) of the Customs Act, 1962.

1.12 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 Customs duty benefit based upon invalid document namely Country of Origin Certificate in terms of the Notification No. 46/2011 dated 01.06.2011, and thereby they have suppressed material facts from the department and produced invalid Country of Origin certificate as mentioned above for the imported goods, while filing the declaration, seeking clearance at the time of the importation of the impugned goods. Thus, the said importer also appeared liable for penal action under the provisions of Section 112(a) and / or Section 114 A of the Customs Act, 1962 for importing the impugned goods based upon invalid and improper document viz. Country of Origin certificate leading to unlawful, illegal and wrong availment of concessional Customs duty benefit under Notification No. 46/2011 dated 01.06.2011 by them. It also appeared that importer is liable for penalty under section 114 AA of the Customs Act, 1962 for knowingly and intentionally using

not allege that the issuing authority of Govt. of Malaysia , Ministry of International Trade and Industries was in collusion with any person or the certificates issued by them are not genuine and thus the same cannot be rejected and continue to be a valid document for extending the benefit of notification.

3.8 They put on records an O-in-O No.126/2016-17/CC/NS-I/JNCH dt. 31.1.2017 in the matter of Morde Foods Pvt Ltd passed by Commissioner of Customs NS-I JNCH, wherein even the certificate of JB Cocoa were held to be valid and it was held that RVS certificates by the MITI can't be rejected . In the present case there is no allegation or any oral or documentary evidence in support of the proposal to reject the RVC given in certificates and thus these orders squarely applies to the present case. Further recently the Commissioner of Customs (Appeals) JNCH also vide an order –in Appeal No. 1251 (Gr-I)/IA(/2019(JNCH)/Appeal-II dt. 9.9.2019 in the matter of Starcom Food India Ltd. also allowed benefit of notification no. 46/20111-Cus dt. 1.6.2011 and quashed similar proceedings.

3.9 The issuance of SCN under the provisions of section 28 (4) read with section 124 of the Customs Act, 1962 is totally in excess of jurisdiction as the issue involved is required to be settled / decided strictly as per the Article 18 and Article 24 of the FTA wherein it is laid down that any dispute concerning the interpretation, implementation or application of this Agreement shall be out in the ASEAN-India DSM Agreement.

3.10 It is put on record that in any case, if the authenticity of the COO is in doubt or the importing country having a reasonable doubt about the same then as per Article 16 of the Operational Certification Procedures, the verification and retroactive checks and verification visits are required to be carried out as per Article 16 & 17 and if the dispute is not settled even under Article 16 or 17 then the aggrieved party must necessarily resort to Article 24 of the AIFTA Rules of origin and if no mutually satisfactory solution is reached under Article 24 then the party concerned , in this case the Government of India, was under obligation to invoke the Dispute Settlement Mechanism under the ASEAN India DSM Agreement. Thus the provisions of Customs Act, or in particular the demand under section 28 (4) is totally illegal as the proceedings under the Treaty and under the Customs Act are mutually exclusive and thus the Government of India is bound by the AIFTA agreement. In this regard reliance is placed on the following judgments of the Hon'ble Supreme Court -

Govardhandas Bhanji -1952(AIR-16)(SC), Rao Shiv Bahadur Singh v. State of Vindhya Pradesh reported as AIR 1954 SC 322, State of U.P. Vs. Singhara Singh, reported as AIR 1964 SC 35, Babu Verghese Vs. Bar Council of Kerala reported as (1999) 3 SCC 422, Hussein Ghadially Vs. State of Gujarat, reported as (2014) 8 SCC 425, Saral Wire Craft (P) Ltd. Vs. Comm. of Customs, Central Excise & Service Tax reported as (2015) 14 SCC 523,Commissioner of Customs (I), Chennai vs. Do Best infoway-2016(336) ELT 156 (T)

3.11 They have made the declaration under Section 46(4) on the basis of the documents received from the supplier such as invoice, bill of Lading and the country of origin certificate

issued by the Government of the exporting country and they have made the said declaration under the bonafide and reasonable belief that the said documents contain true and correct particulars. More so that the documents such as Country of Origin certificate was issued by a sovereign Nation as the Treaty entered with the Republic of India.

3.12 All the Bs/E mentioned in annexure to the SCN were assessed finally under section 17 (2) of the Customs act, 1962 by the proper officer and in respect of many Bs/E the value was also loaded and thus all the B/E were assessed by the proper officer after due application of mind and satisfaction. Each and every AIFTA certificate in respect of each B/E was verified by the proper officer and after due satisfaction the same was debited by making an endorsement on each of the certificates and thus the assessments were made after verification of all material particulars as declared in the Bs/E and also after verification of all requisite documents which were submitted along with the B/E including the AIFTA certificates and it is not the case of the department any documents or information was withheld by the importers and / or any document which was requisitioned was not submitted. Reliance in this regard is placed on the judgment of Priya Blue Industries – 2004 (172) ELT 145 (SC), 2000 (120) ELT 285 (SC) Flock India Ltd, Lord Shiva Overseas -2005(181)ELT 213 (Tri.-Mumbai) and Paras Electrical – 2009 (246) ELT 231 (T) .

3.13 The importers had imported consignments of Cocoa Powder from M/s. K.L. Kris Food Products SDN and the goods covered by their invoices were shipped directly from Malaysia and were manufactured / produced by M/s. K.L. Kris Food Products SDN . Each of the consignments was accompanied with a certificate of origin issued by Ministry of International Trade and Industry (MITI) and was signed by Secretary General of the MITI Malaysia and the said certificates were issued as per ASEAN India Free Trade Area Preferential Tariff and was certifying the origin criteria as per Note- 3 (a) of the overleaf notes of the certificate of origin. All the certificates of origin were duly verified in respect of signatures and other material particulars, including the origin criteria as mentioned in column 8 of the certificate read with note -3 of the overleaf notes and was accepted by the proper officer at the time of assessment of the B/E under section 17 of the Customs Act, 1962 and thereafter at the time of examination of the goods and at the time of passing orders of clearance for home consumption under section 47 of the Customs Act, 1962.

3.14 They have imported the goods in the normal course and all requisite precautions were taken and all the goods were imported as per the Treaty entered by India with Malaysia and AIFTA and as per Rule of origin and in terms of the notifications no. 46/2011 . They have taken all requisite documents from the supplier / and manufacturer and all the documents were duly issued by the competent authorities i.e. Ministry of Trade and Industry (MITI) and no evidence is brought on record that we have not followed the laid down procedure as per the Rules of Origin or the Treaty or the Notification.

3.15 It is a matter of record that neither the supplier is our agent or employee and thus the provisions of section 28 (4) cannot be invoked on the basis of any allegations acts or omissions committed by the supplier and thus no demand of duty can be made from the importer under the provisions of section 28 (4) of the Customs Act, 1962. They place reliance on the judgment of the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture - 2017 (216) ELT 177 (SC) wherein it is held the mere omission to give correct information cannot be called to be a suppression or willful mis-statement and in the matter of – CC Mumbai A.S. Muloobhoy & Sons reported in 2015 (318) E.L.T. 576 (S.C.) wherein it has held that once the department is in the knowledge of things the extended period cannot be invoked.

3.16 As regards extended period u/s 28 and ingredient of section 28 regarding collusion, mis-statement and suppression are concerned, they shall also be placing reliance on following judgments:-

a)2001 (135) E.L.T. 1085 (Tri.-Mumbai)- Scientific Pharmacy Vs. Commissioner of Cus., ACC, Mumbai.

b) Hico Enterprises - 2005 (189) ELT 135 (CESTAT-LB) [upheld by the Hon'ble Supreme Court in 2008 (228) ELT 161 (S.C.)]

(d) Leader Valves Ltd. – 2007 (218) ELT 349 (P&H) 1995 (76) ELT 497 (SC)HMM Limited vs. Collector of Central Excise

e) 1995 (75) E.L.T. 721 (SC) Cosmic Dye Chemicals Vs. Collector of Central Excise,Bombay.

g) 1995(78) E.L.T. 401 (SC)Pushpam Pharmaceutical Company Vs. Collector of Central Excise.

h) 1994(73) E.L.T. 257 (SC) Lubrichem Industries Ltd., Vs. Collector of Central Excise

i) 1989 (40) E.L.T. 385 (T) Kiran Spinning Mills Vs. Collector of Central Excise.

j) 1989 (40) E.L.T.276 (SC) Chemphar Drugs & Liniments Vs.Collector of Central Excise

k) 1989 (43) E.L.T. 195 (SC) Padmini Products Vs.Collector of Central Excise (CCE)

l) 1995 (78) E.L.T. 401 (SC) Pushpam Pharmaceuticals Vs CCE

3.17 The goods are not rendered liable to confiscation because of the failure to carry out due diligence or because of the alleged violation of Rules of Origin by MITI or MSC and the very basis of the SCN proposing invalid extended period under section 28 or 111 or 112 or 114A, 114AA of the Customs Act, 1962. Thus the SCN is otherwise totally erroneous and is required to be quashed Reliance, in this regard rely on the following judgments: -

i) Bearrau Veritas -2003 (156) ELT 688 (T) as affirmed by SC in 2005 (181) ELT 3 (SC)

ii) 1996 (83) E.L.T. 557 (Tribunal) Sanco Trans Limited

iii) 1991 (52) E.L.T. 557 (Tri.) Shri Khuller

iv) Trade wings limited - 2009 (243) ELT 439 (T)

iv) K. Ramanna 38) ELT 620 (T)

3.18 The SCN also invokes penal provisions under section 111, 112A 114A 114AA of the Custom Act, 1962 and in this regard it is submitted that it is settled law that when the demand of duty on any ground including limitation is not sustainable, no penal action can be taken and thus no penalty can be imposed under the provisions of Customs Act, 1962 . Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the matter of HMM ltd.

3.19 All material particulars including value were correctly declared in the B/E and thus the goods cannot be held liable to confiscation under section 111 (m) of the Custom Act, 1962 and further the SCN does not specifically brings on record as to which particular was wrongly mentioned in the B/E and all particulars i.e each and every entry made in each and every column of the B/E was true and correct and was verified by the proper officer and thus the allegation is totally false and is unsubstantiated and thus the goods cannot be held liable to confiscation under section 111 (m) of the Customs Act, 1962. It is also put on record that there was no post import condition imposed in respect of the goods and thus there was no observance of any of the condition subject to which the exemption from duty was granted and thus the goods cannot be and are not liable to confiscation under the provisions of section 111 (o) of the Customs Act, 1962 and the provisions have been invoked without any supporting evidences.

3.20 The kind attention is invited to the SCN and in a particular to Para 12,13,14 & 17 and it may please be appreciated that there is not even an averment that they have committed any acts or omissions and / or aided or abetted in omission or commission of any acts which have allegedly rendered the goods liable to confiscation under section 111 of the Customs Act, 1962 and thus the provisions of section 112 has been wrongly invoked and thus no penalty is imposable on us under section 112 of the Customs Act, 1962.

3.21 As regard proposal to imposition of penalty under section 114 A is concerned, all submissions made herein above in regard to the wrong invocation of section 28 (4) of the Customs Act, 1962 are reiterated and it is put on record that they were not in any collusion or they have not made any mis statement and / or there is no suppression and thus no penalty can be imposed on us under the provisions of section 114 A of the Custom Act, 1962.

3.22 It may please be appreciated that in the present case they are not aware were not having any knowledge there is no allegation or evidence that they were aware of any alleged variations in the RVC or certificate in origin and in fact all Indian importers including Government of India undertaking such as MMTC have imported similar and identical goods with identical accompanied certificate and documents and were not aware about any alleged variations in RVC and further the SCN itself reaches at the conclusion that there was only lack of due diligence, on the part of the Indian importer and thus there is no allegation that any

documents was used with knowledge and thus no penalty under section 114 AA can be imposed on them.

3.23 The SCN relies upon two judgment in the matter of Alpha Traders -2007 (217) ELT 437 (T-Bang) and 2008 (223) ELT 289 (Tri Bang) but totally ignores the fact that these judgments are distinguishable on facts and the same have wrongly been referred in the impugned SCN.

3.24 They crave leave to file further reply after receipt of the documents specified in their earlier letters and above and they also crave leave to add amend or modify the above reply after receipt and scrutiny of the documents.

4. Further on behalf of the noticee, Shri S. A. Sahota, Consultant, vide their letter dated 06.01.2020, received in this office on 13.01.2020, has further submitted their defence reply in which they have mainly repeated their earlier submissions and have also placed their reliance on the same judgments/decisions. Since submissions of the Noticee are on the same set of issues with same contentions which have been placed above in details, the same are not repeated for the sake of brevity. However, some other relevant portions of their defence are submitted as under-

4.1 At the outset I am thankful for granting me a patient hearing on 26.12.2019 and in continuation to the written submissions already on record and made during the personal hearing I am making the following further submissions and request that the same may also be taken on record and considered before taking any decision in the matter.

4.2 I have now received copy of MITI letter dated 18.03.2014 under the cover of a letter dated 27.12.2019 (DIN. 20191271MO0000WAFD7) and the said letter categorically states as under:-

> "2. For your information, the Ministry of International Trade and Industry (MITI) Malaysia have completed a verification visit on 18 February 2014 to both factories (JB Cocoa and Guan Chong Cocoa) to verify the information regarding raw materials used in the production to cocoa powder for exports to India.
>
> 3. Based on the verification visit and internal investigation to both factories, MITI confirms that the raw materials used in the production of the finished products has full filled the 35% Regional Value Content (RVC) under the under the ASEAN India Free Trade Agreement (AIFTA). However we are not able to provide you the cost structure due to date privacy.
>
> 4. If you wish to proceed with the verification visit, kindly provide us the supporting documents (C/O forms related) and contact the relevant Parties as stated in the ASEAN-India Operational Certification Procedures for the Rules of Origin under Articles 16 and Article 17. "

4.3 From the above, it may please be appreciated that the MITI had categorically confirmed that the material used in the manufacture of finished goods have met the laid down criteria of RVC under the ASEAN FTA and thus the competent sovereign authority has re- confirmed the validity of the certificates which were questioned and thus nothing survives to make any further allegation or to propose to deny the benefit of the notification even in respect of the consignments which were under verification.

4.4. The MITI had also categorically offered, in the above mentioned letter dt. 18.03.2014, n to proceed with the verification visits by the concerned parties. However nothing is brought on record to show that any verification visit or retroactive checks were conducted by any Indian authorities and the results/findings of such verification have not been brought on record and instead the recourse for recovery of duty under the pretext that the information has not been given duo to data secrecy is taken which is totally premature and erroneous as no evidence is brought on record that the RVC was not as per the declarations given in the COO duly issued by the competent authority.

4.5 As per the Rules of Origin notified vide Notification No. 189/2009-cus dated 31.12.2009 each and every certificate is required to be verified and the allegation cannot be made without conduction retroactive check and verification visits and without bringing on record the details of such verification and retroactive checks and thus entire proceedings are being conducted in total dis-regard to the provisions of the Treaty, Rules of Origin and are thus required to be set aside only on this ground alone. In this regard the following judgments may please be considered:-2017 (349) E.L.T. 44 (A.P.) -NOBLE IMPORT PVT. LTD.

4.6 From a reading of Clause 16(b), it is evident that the requirement of obtaining information of the documents, relating to the origin of the imported goods in accordance with its domestic laws and regulations, is a preclude to the request for retroactive check in terms of Clause 16(a). If the documents, sought for by the competent authority, are furnished by the importer and, if the concerned authority is satisfied with it, then preferential tariff can be extended to the importer. If, on the other hand, the information, or the documents furnished, are found not to be satisfactory, then, in terms of Clause 16(a), a retroactive check can be conducted.

4.7. It is submitted that even otherwise it is not even the case the department that any information or verification was ever sought by the Govt. of India from MITI in respect of the COO which cover the imports in the impugned SCNS and all these imports have been made subsequently in the Years 2017-2019 and thus no reliance or reference can be made to any observations or doubts etc made in the years 2014 or earlier and the said observation cannot have any prospective application.

4.8 The SCN as well as the letters relied upon only refers to the Certificate of origin pertaining to M/s. JB Cocoa and M/s. Guan Chong Cocoa, whereas M/s. Sanjay Chemicals and

M/s. J.S.V. Ingredients have not imported any goods produced by these producers and they have imported the goods from M/s. K.L. Kris Food Industries SDN, and thus these letters are otherwise has no relevance for their imports and thus the SCN has been issued without even verification of basic facts and thus the observations in the letters are otherwise having no relevance for the imports made by us and thus the impugned SCN is required to be rejected solely on this ground alone.

4.9 The SCN has been issued mechanically without even verification of basic facts as the SCN referring to some old letters of 2014 alleges that the RVC is less than the prescribed limits without appreciating the fact that the goods imported by M/s. Sanjay Chemicals were wholly produced in Malaysia and thus there cannot be any dispute about any value addition and thus the entire SCN is required to be set aside solely on this ground alone.

4.10 Kind attention is invited to various letters in respect of the each of the above SCN, which were issued prior to the issue of the impugned SCN's directing to pay the amount of duty along with the interest and the said letters categorically say that the communication may be treated as to be issued under section 28 (1) (a) of the Customs Act,1962 thereby confirming that there is no evidence or reason to allege any suppression, willful mis-statement or any collusion.

4.11 In view of the above, the impugned Show case Notices are required to withdrawn as per the settled law as laid down by the Hon'ble Supreme court in various judgments which are binding on the adjudicating authority and which have been referred in the detailed replies filed earlier and also as above.

PERSONAL HEARING

5. The Personal hearing in the instant case was fixed on 27.11.2019, however, the Noticee vide their letter dated 19.11.2019 requested to adjourn the personal hearing and provide them copies of various documents referred in the SCN which are requested by them vide their letter dated 20.09.2019 .Thereafter, the personal hearing was fixed on 10.12.2019. Now, Shri S. A. Sahota, Consultant and authorized representative on behalf of the Noticee, vide their letter dated 30.11.2019, requested for adjournment of the hearing and grant of hearing in respect of six SCNs on same issue of their 03 different clients on a common date preferably on 26.12.2019. Their request was considered and the Personal hearing was fixed on 26.12.2019. Shri S. A. Sahota, Consultant appeared for personal hearing on 26.12.2019 and stated that they have submitted their written submission dated 18.12.2019 received in the department on 23.12.2019 and reiterated the submission made therein. He further submitted Hon'ble Supreme Court judgment in the case of Azadi Bachao Andolan. He submitted that the supplier in the case is, M/s K.L.Kris food Industries and no study was conducted in respect of their supplier. The goods are wholly produced in Malaysia and thereafter question of RVC does not apply on the supplier. He further said that he has nothing more to add, however, he further

asked for the letter dated 18.03.2014 and after that 15 days' time to submit its reply, if department supplied the said letter.

Further, the letter dated 18.03.2014 as desired by the authorised representative of the Noticee was made available through the department's letter dated 27.12.2019. Thereafter, Shri S. A. Sahota, Consultant made a reply in the instant case vide their letter dated 06.01.2020, which has been mentioned in foregoing Para 4.

DISCUSSION AND FINDINGS

6. I have carefully gone through the Show Cause Notice dated 27.08.2019, the written submissions dated 18.12.2019 & 06.01.2020 filed by the Noticee and available records of the case and I find that following main issues are involved in the subject Show Cause Notice, which are required to be decided-

(i) Whether Country of Origin Certificates issued as per the Notification No. 46/2011 dated 01.06.2011 submitted by the importer for claiming and availing Customs duty benefit should be rejected as a valid document for availment of the concessional rate of customs duty benefit based upon the country of origin of the impugned imported goods;

(ii) Whether the total quantity of 80000 Kgs of goods declared as 'Alkalised Cocoa Powder' imported vide Bills of Entry as detailed in Annexure-A to the SCN and having total assessable value of Rs.84,21,120/- are liable for confiscation under the provisions of Section 111(d), 111(m) and 111 (o) of the Customs Act, 1962.

(iii) Whether the differential Customs duties amounting to Rs. 32,79,184/- (Rupees Thirty Two Lakh Seventy Nine Thousand One Hundred Eighty Four only) in respect of Bills of Entry as detailed in Annexure B; is required to be demanded and recovered from the importer in terms of section 28(4) of the Customs Act, 1962, along with applicable interest thereon under section 28AA of the Customs Act, 1962 by re-assessing the aforesaid Bills of Entry after amendment under Section 149 of the Customs Act, 1962 and by denying concessional rate of customs duty benefit based upon the country of origin of imported goods.

(iv) Whether the importer M/s Sanjay Chemicals is liable for Penalty under Sections 112(a) and / or114A of Customs Act, 1962.

(v) Whether the importer M/s Sanjay Chemicals is liable for Penalty under Section 114AA of Customs Act, 1962.

6.1 I find that the importers had imported Cocoa powder by availing benefit of Notification No. 46/2011-Cus, dated 01.06.2011 and Notification No. 53/2011-Customs dated 01.07.2011, (as amended time to time), however the benefit of Notification No 46/2011-Customs is available provided that the goods are 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% of the FOB value. Hence the soul of the Notifications is that there should be at least 35% of the content and therefore it was necessary to verify in the matter of qualifying regional value content in "Cocoa Powder"(CTH 18050000) imported from Malaysia under Free Trade Agreement (FTA) and the said matter was taken up for investigation by Directorate of Revenue Intelligence, New Delhi. Based on some of the "Certificates of Origin" issued for this product, it was noticed that the goods were derived from Cocoa beans of Ghana Origin and in such cases, based on prevalent International price as well as information available on supplier's website, it appeared that the regional value addition would only be in the region of 3-17% as against minimum qualifying value of 35% of the FOB value. Accordingly, the matter was taken up by the Director(ICD), Central Board of Excise & Customs with the High Commission of Malaysia in Delhi vide letter F. No. 456/12/2013-Cus.V dated 10.01.2014 for verification.

6.2 The Director(ICD), Central Board of Excise & Customs, New Delhi vide aforesaid letter F. No. 456/12/2013-Cus.V dated 10.01.2014, regarding Certificates of Origin, pertaining to imports by M/s Morde Foods Pvt. Ltd. from two Malaysian exporters (bearing Certificates of Origin No. JB2011/AI/00961 and JB2012/AI/00252) had stated that perusal of some of the Certificates of Origin issued for the products imported by M/s Morde Foods Pvt. Ltd. indicates that the products were derived from Cocoa beans of Ghana origin. Further, based on prevalent international prices and information available on the supplier's websites, it appeared that the regional value addition would only be in the region of 13-17% in such cases. Accordingly, Minister (Economic), MITI, New Delhi, High Commission of Malaysia in New Delhi was requested to carry out verification in respect of Certificates of Origin No. JB2011/AI/00961 and JB2012/AI/00252 in addition to the 52 (Fifty Two) certificates listed from MITI with particular emphasis on the origin of the Cocoa beans, the cost structure of the finished goods and the quantum of value addition achieved.

6.3 Further, the Director (ICD), CBEC, New Delhi vide letter dated 07.05.2014 addressed to the Director General, DRI, New Delhi informed that the Malaysian High Commission in New Delhi had been requested to verify the genuineness of two Certificates of Origin under the India ASEAN FTA in which the description of the goods indicated the origin of the Cocoa as Ghana. A letter-dated 18.03.2014 had been received from the Ministry of International Trade and Industry (MITI) received through the Malaysian High Commission in New Delhi in response to our letter dated 10.01.2014, wherein MITI has stated that they have conducted an internal investigation and verification visit to the two factories i.e. M/s JB Cocoa and Guan Chong Cocoa,

which had supplied the goods. MITI had confirmed that the raw materials used in the production of the finished products fulfil the 35% RVC. However, they (i.e. above-stated two factories) expressed inability to provide cost structure due to data privacy. Since there is no provision in the Rules of Origin of the India ASEAN FTA for denial of cost structure on the basis of data privacy and Article 18 (b) of this Rules clearly obligates information relating to the validity of the AIFTA Certificate of Origin to be furnished upon request of the importing Party, accordingly, Board has decided to deny the preferential benefit in the matter by way of issue of SCN and early adjudication.

6.4 In this case, the Noticee filed Bills of Entry No. 9877868 dated 31.01.2019, 8397685 dated 10.10.2018 and 8399930 dated 10.10.2018 as detailed in Annexure-B to the Show Cause Notice for clearance of imported goods declared as 'Alkalised Cocoa Powder' falling under Custom Tariff Head 18050000 to the First Schedule of the Customs Tariff Act, 1975. The imported goods were supplied by M/s K.L. Kris Food Industries SDN and were shipped from Malaysia. The above-stated Bill of Entry was filed on the basis of self-assessed declarations for the imported goods having gross weight 80000 Kgs and total declared assessable value of Rs. 84,21,120/- for clearance of aforesaid goods by availing concessional rate of Customs duty benefit on the basis of Country of origin certificate prescribed under Notification No. 46/2011-Customs, dated 01.06.2011 and Notification No. 53/2011-Customs dated 01.07.2011, as amended.

6.5 The benefit under Notification No. 46/2011-Customs dated 01.06.2011 is available provided that the goods are imported into the Republic of India from a country listed in Appendix I of the said Notification (Malaysia is one of countries falling under Appendix-I) in accordance with provisions 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 in Notification No. 189/2009-Customs (N.T.), dated 31.12.2009.

6.6 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 framed vide Notification No. 189/2009-Customs (N.T.), dated 31.12.2009 states that AIFTA Certificate of Origin shall be issued by the Government authorities (Issuing Authority) of the exporting Party and in case of goods not wholly produced or obtained products in Member States of the Association of southeast Asian Nations (ASEAN) (in this case Malaysia), the AIFTA content is not less than 35% of the FOB value. Further, benefit under Notification No. 53/2011-Customs dated 01.07.2011 is available provided that the goods in respect of which the benefit of this exemption is claimed are of the origin of Malaysia, 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 in Notification No. 43/2011-Customs (N.T.), dated 01.07.2011.

6.7 Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and Malaysia Rules, 2009 framed vide Notification No. 43/2011-Customs (N.T.), dated 01.07.2011 states that in case of goods not wholly produced or obtained products from Malaysia, the qualifying value content of the goods should not be less than 35% of the FOB value. Rule 5 (1) (ii) of the said Rule states that:-

"5. Not wholly obtained or produced goods:- (1) For the purposes of clause (b) of Rule 3, goods shall be deemed to be originating goods, when,-

(ii) Qualifying value content of the goods is not less than thirty five percent of the FOB value:

Provided that the final process of manufacturing is performed within the territory of the exporting Party."

6.8 In this case, ongoing through the available records, **it is found that the imported goods, which are 'not wholly obtained or produced goods from Malaysia' were supplied by M/s K.L. Kris Food Industries SDN, Malaysia and were shipped from Malaysia. Further M/s K.L. Kris Food industries, the supplier, are Malaysian Company and Director, Asian Economic Corporation, vide letter-dated 18.03.2014 informed that the MITI, Malaysia had conducted an internal investigation and verification visit to the two Malaysian factories, which had supplied the goods.** MITI had confirmed that the raw materials used in the production of the finished products fulfil the 35% RVC. However, the suppliers expressed inability to provide cost structure due to data privacy, which has been accepted by the Noticee vide its letter dated 06.01.2020. Further, as mentioned in paras supra, on verification of qualifying value content in the matter, **DRI had noticed that based on prevalent international price as well as information available on suppliers' website, the regional value addition would only be in the region of 13-17% as against minimum qualifying value of 35%.**

6.9 Further, relevant Para(s) to Article 16 of APPENDIX-D to the Operation Certification Procedures for the Rules of Origin for the ASEAN-India Free Trade Area (AIFTA) under head "VERIFICATION" stipulates that:-

"16. (a) The importing party may request a retroactive check at random and/or when it has reasonable doubt as to the authenticity of the document or as to the accuracy of the information regarding the true origin of the good in question or of certain parts thereof. The Issuing Authority shall conduct a retroactive check on the producer/exporter's cost statement based on the current cost and prices within a six-month timeframe prior to the date of exportation subject to the following procedures:

(ii) the Issuing Authority shall respond to the request promptly and reply within three months after receipt of the request for retroactive check;

(iv) the retroactive check process, including the actual process and the determination of whether the subject good is originating or not, should be

completed and the result communicated to the Issuing Authority within six months. While the process of the retroactive check is being undertaken, sub-paragraph (iii) shall be applied.

From the above, it is seen that according to Article 16 (a) (ii) of APPENDIX-D (Operational Certification Procedures) to the Rules of Origin under the ASEAN India FTA, the Issuing Authority shall respond to the request promptly and reply within 03 months after receipt for retroactive check. Further, as per Article 16 (a) (iv), the retroactive check process, including the actual process and the determination of whether the subject goods is originating or not, should be completed and the result communicated to the issuing authority within 6 months. It is observed that in this case, the supplier of the Noticee denied providing the cost structure due to data privacy. However, there is no provision in the said Rules of Origin of India ASEAN FTA for denial of cost structure on the basis of data privacy. Further, Article 18 (b) of APPENDIX-D to the Operation Certification Procedures for the Rules of Origin for the ASEAN-India Free Trade Area (AIFTA) clearly obligates information relating to the validity of the AIFTA Certificate of Origin to be furnished upon request of the importing party.

6.10 From the available evidences as discussed in above paras, I find that the Noticee had wrongly availed concessional rate of Customs duty and had 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 had mis-declared Country of Origin as 'Malaysia' imported as ' Alkalised Cocoa Powder' in the declaration in the form of Bill of Entry filed under the provision of Section 46 (4) of the Customs Act 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% to mis-state the country of origin and thus 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."

6.11 The Noticee in their defence reply have denied the allegation made in the instant Show cause Notice by stating that they have submitted all the documents required to claim Customs duty exemption as per Notification No.46/2011-Cus. Dated 01.06.2011. They have further contended that after due verification of all such documents and assessment of Bills of Entry by the Customs authorities, they paid an amount of Customs duty of Rs. 15,15,802/- by availing concessional rate of Custom duty based on country of origin benefit. However, I find that the Noticee have contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they had intentionally availed/taken a wrong Customs duty benefit based upon invalid document namely Country of Origin Certificate in terms of Notification No. 46/2011-customs dated 01.06.2011 & Notification No. 53/2011-Customs dated 01.07.2011 and thereby suppressed material facts from the department and produced invalid Country of Origin Certificate as discussed supra for the imported goods, while filing the declaration at the time of importation of the imported goods. As the allegations in this case relates to wilful mis-statement of actual country of origin and deliberate suppression of facts of correct qualifying Regional Value Content (RVC), it is not a relevant fact that the goods were assessed by the assessing officer. I find no force in this contention because Section 28 of the Customs Act, 1962 does not differentiate or debar demand in such situation. The assessments under Section 17 or 18 *ibid* are without prejudice to Section 46 and subsequent action including demand of differential duty with interest or any other action under the provisions of the Customs Act, 1962. In this regard, I 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."*

6.12 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. 47,94,986/- in respect of Bills of Entry as detailed in Annexure-B 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. 15,15,802/- 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. Therefore, differential Customs duty amounting to an amount of Rs. 32,79,184/- (Rupees Thirty Two Lakh Seventy Nine Thousand One Hundred Eighty Four only) in respect of Bills of Entry as detailed in Annexure-B to the Show Cause Notice is recoverable in terms of Section 28 (4) of the Customs Act, 1962, along with applicable interest thereon under Section 28 AA of the Customs Act, 1962 and by denying concessional rate of customs duty benefit based upon the country of origin of imported goods.

6.13 The Show cause Notice has proposed for confiscation of imported goods under Section 111 (d), 111(m) and 111 (o) of the Customs Act, 1962.

In this context, the relevant parts of Section 111 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:*
>
> *(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;*
>
> *(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;*
>
> *(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;*

From the relevant statutory provisions as reproduced above, I find that Section 111 (d) of the Customs Act, 1962 deals with the import of prohibited goods under Customs Act, 1962. Since, imported goods i.e. 'Alkalised Cocoa Powder' does not fall under the list of prohibited items, I find that said goods are not confiscable under Section 111 (d) of the Customs Act, 1962. Further, 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 the Noticee have contravened the provision of Section 46(4) of the Customs Act, 1962 in as much as they had mis-declared the Country of Origin as Malaysia in the declaration of Bills of Entry and thereby, the Noticee have wrongly availed/taken the Country of

Origin benefit knowingly and intentionally to evade Customs duty. Accordingly, the Noticee made wilful mis-statement of actual Country of Origin, suppression of facts of correct qualifying Regional Value Content (RVC) and therefore, I find that by indulging in mis-declaration & suppression of facts, the Noticee have contravened the provisions of Section 46(4) of the Customs Act, 1962 as they did not declare true particulars pertaining to Country of Origin and correct qualifying RVC. All these acts on the part of the Noticee have rendered the imported goods covered in the Show Cause Notice liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962.

6.14 As the impugned goods are found to be liable for confiscation under Section 111 (m) and 111 (o) 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 detailed in Annexure-B to 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 Bill of Entry as detailed in Annexure-B 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-B to the Show Cause Notice.

6.15 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. 32,79,184/-, 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.*

6.16 Further, penalty has also been proposed on the Noticee under Section 112 (a) 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) of the Customs Act, 1962.

6.17 In regard to the proposal for Imposition of penalty on the Noticee under Section 114AA of the Customs Act, 1962, I find that they produced the country of origin document which was incorrect in as much as it falsely shows the country of origin as Malaysia though the AIFTA content is far less than 35% of the FOB value and thus the country of origin produced is in violation of Notification No. 189/2009-Customs (N.T.) dated 31.12.2009 viz., 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. Hence, I find that the Noticee has knowingly and intentionally made, signed or caused to be made and presented to the Customs authorities such documents which they knew were false/fabricated and incorrect in respect of the imported goods. Hence, for the said act of contravention on their part, the importer is liable for penalty under Section 114AA of the Customs Act, 1962.

6.18 I find that the Consultant/authorized representative of the Noticee in their written defence submissions have placed reliance on various case laws/judgements in support of their contention on some issues raised in the SCN. In this regard, I am of the view that the conclusions arrived may be true in those cases, but the same cannot be extended to other case(s) without looking to the hard realities and specific facts of each case. Those decisions/judgements were delivered in different context and under different facts and circumstances, which cannot be made applicable in the facts and circumstances of this case. Therefore, I find that while applying the ratio of one case to that of the other, the decisions of the Hon'ble Supreme Court are always required to be borne in mind. The Hon'ble Supreme Court in the case of CCE, Calcutta Vs Alnoori Tobacco Products [2004(170)ELT 135(SC) has stressed the need to discuss, how the facts of decision relied upon fit factual situation of a given case and to exercise caution while applying the ratio of one case to another. This has been reiterated by the Hon'ble Supreme Court in its judgement in the case of Escorts Ltd. Vs CCE, Delhi [2004(173) ELT 113(SC)] wherein it has been observed that one additional or different fact may make difference between conclusion in two cases, and so, disposal of cases by blindly placing reliance on a decision is not proper. Again in the case of CC(Port), Chennai Vs Toyota Kirloskar[2007(213)ELT4(SC)], it has been observed by the Hon'ble Supreme Court that, the

ratio of a decision has to be understood in factual matrix involved therein and that the ratio of a decision has to culled from facts of given case, further, the decision is an authority for what it decides and not what can be logically deduced there from.

7. In view of the forgoing discussions and findings, I pass the following order:-

ORDER

(i) I hereby reject the Country of Origin Certificates as a valid documents issued as per Notification No. 46/2011-Customs dated 01.06.2011 and submitted by the importer purposefully, knowingly and intentionally for fraudulently claiming and availing Customs duty benefit covered under Bill of Entry as detailed in Annexure-B to the Show Cause Notice.

(ii) I confirm and order to recover differential Customs duties amounting to Rs. 32,79,184/- (Rupees Thirty Two Lakh Seventy Nine Thousand One Hundred Eighty Four only) as detailed in Annexure-B to the Show Cause Notice from the importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai,Maharashtra -400064, under proviso to Section 28 (4) of the Customs Act, 1962. I also order to re-assess the Bills of Entry as detailed in Annexure-B to the Show Cause Notice after amendment under Section 149 of the Customs Act, 1962 and by denying concessional rate of Customs duty benefit based upon the country of origin of imported goods.

(iii) I order to charge and recover interest from the importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai,Maharashtra -400064, on the confirmed duty at Sr. No. (ii) above under section 28AA of the Customs Act, 1962.

(iv) I hold the imported goods i.e. 'Alkalised Cocoa Powder' totally weighing 80000 Kgs, valued at Rs.84,21,120/- covered under Bills of Entry as detailed in Annexure-A to the Show Cause Notice liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962. Since, the imported goods are not physically available; therefore, I refrain from imposing any redemption fine in lieu of confiscation.

(v) I impose penalty of Rs. 32,79,184/- (Rupees Thirty Two Lakh Seventy Nine Thousand One Hundred Eighty Four only) on the importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai,Maharashtra -400064, under Section 114A of the Customs Act, 1962 in respect of Bills of Entry detailed at Annexure- 'B' to the Show Cause Notice. However, I give an option, under proviso to Section 114A, to the Noticee, to pay 25% of the amount of total penalty imposed at (v) above, subject to payment of total amount of duty and interest confirmed at (ii) and (iii) above, and the amount of 25% of penalty imposed at (v) above within 30 days of receipt of this order.

(vi) I refrain from imposing penalty on the importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai, Maharashtra -400064, under Section 112 (a) of the Customs Act, 1962 in respect of Bill of Entry detailed at Annexure- 'B' to the Show Cause Notice.

(vii) I impose penalty of Rs.2,25,000 /- (Rupees Two Lakh Twenty Five Thousand only) on the importer M/s Sanjay Chemicals, 301, Sterling Est., Plot -8, Kachpada, Ramchandra Lane Extn. Malad West, Mumbai, Maharashtra -400064, under Section 114AA of the Customs Act, 1962.

8. This order is issued without prejudice to any other action that may be taken under the 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.

[AJAY KUMAR]
ADDITIONAL COMMISSIONER

F. No. VIII/48-48/Adj/ADC/MCH/2019-20 **Dated: 31.01.2020**

BY SPEED POST

To,

M/s Sanjay Chemicals,
301, Sterling Est., Plot -8, Kachpada,
Ramchandra Lane Extn.,
Malad West, Mumbai,Maharashtra -400064

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
74694
31 JAN 2020
INWARD SECTION
Custom House, Mundra

Copy to:

1. The Chief Commissioner (In Situ), Custom House, Mundra.
2. The Commissioner of Customs (NS-Audit), Jawaharlal Nehru Custom House, Nhava Sheva, Tal:- Uran, Distt.:- Raigad, (Maharashtra)- 400 707.
3. The Deputy/Assistant Commissioner (RRA), Custom House, Mundra.
4. The Deputy/Assistant Commissioner (TRC), Custom House, Mundra.
5. The Deputy/Assistant Commissioner (EDI), Custom House, Mundra.
6. The Deputy/Assistant Commissioner (GR-I), Custom House, Mundra.
7. The Deputy/Assistant Commissioner (Audit), Custom House, Mundra.
8. Guard File.

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