DIN- 20200171MO00001L7EBB

	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/48-60/Adj./ADC/MCH/2019-20
B. Order-in- Original No.	:	MCH/ADC/AK/87/2019-20
C. Passed by	:	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	:	02.01.2020/ 02.01.2020
E. Show Cause Notice No. & Date	:	VIII/48-1010/Kiran/Adj//Gr-I/MCH/19-20 Dated 26.09.2019
F. Noticee(s)/Party/ Importer	:	M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai-400001 Maharashtra

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/48-1010/kiran/Adj/Gr-I/MCH/19-20 dated 26.09.2019 issued to M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai-400001, Maharashtra.

BRIEF FACTS OF THE CASE

M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001 ***(hereinafter referred to as "Importer"/"Noticee" for the sake of brevity)*** had filed a Bill of Entry No. 8747907 dated 05.11.2018 through Custom Broker M/s Arihant Shipping Agencies for clearance of imported goods declared as 'Cocoa Powder 10-12% Fat Content JB800LA-11' and 'Natural Cocoa Powder 10-12% Fat Content-Natural JB800LA-11' ***(hereinafter referred to as "Imported goods"/"Impugned Goods")***. 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 Bill 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. 'Cocoa Powder 10-12% Fat Content JB800LA-11' and 'Natural Cocoa Powder 10-12% Fat Content-Natural JB800LA-11' were cleared, having Gross weight 15000 Kgs and assessable value of Rs.21,96,180/- imported vide Bill of Lading No.AYN0502403 dated 03.11.2018 and Invoice No.3029865 dated 18.10.2018.

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 Commissionerates 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 10-12% FAT Content JB800LA-11' 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. It appeared therefore that importer M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, has knowingly and with intention and by design taken the benefit of Notification No. 46/2011-Cus dated 01.06.2011. It appeared to be a case of wilful mis-statement 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 to evade duty of Customs. This constitutes an offence of the nature covered in section 111 (d), 111(m) and 111 (o) of the Customs Act, 1962 and the goods imported appear liable for confiscation under section 111 (d), 111(m) and 111 (o) 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

appear that importer is liable for penalty under section 114AA of the Customs Act, 1962 for knowingly and intentionally using the country of origin documents (COO No. JB-2018-AI-21-006361 dated 22.10.2018) which was incorrect in material particularly in as much as it falsely shows the country of origin as Malaysia though the AIFTA (ASEAN-India Free Trade Area) 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.

1.13 The importer has paid total duty amount of Rs.3,95,312/- in respect of said Bill of Entry at the time of assessment of goods after wrongly availing concessional Customs duty benefit under Notification No. 46/2011 dated 01.06.2011.

1.14 The total Customs duty leviable on the said goods amount to Rs. 12,50,505 /- without allowing concessional rate of Customs duty benefit based on Country of Origin benefit of Malaysian origin. Concessional rate of Customs duty based on Country of Origin for the imported goods is not available to them for the reasons as discussed in the foregoing paras. The importer has already paid an amount of Rs.3,95,312/- for the clearance of the impugned 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 brought on record as discussed in the foregoing paras. Therefore, it appears that the amount of differential Customs duties amounting to Rs.8,55,192/- (Rupees Eight Lakhs Fifty Five Thousand One Hundred Ninety Two only) as detailed in Annexure-B to the show cause notice; attributable to concessional rate of Customs duties based upon wrong availment of Country of Origin benefit; appears demandable and recoverable in terms of section 28(4) of the Customs Act, 1962, along with applicable interest thereon under section 28AA of the Customs Act,1962 from them 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 import goods.

2. In view of the above, a show Cause Notice F.No. VIII/48-1010/Kiran/Adj/Gr-I/MCH/19-20 dated 26.09.2019 was issued, whereby the importer M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001 (IEC No.0388149281) were called upon to show cause to the Additional Commissioner of Customs, Custom House Mundra having his office at, 1st Floor, Port User Building, Mundra Port, Mundra, Kutch, Gujarat as to why:-

(i) Country of Origin Certificate issued as per the Notification No. 46/2011 dated 01.06.2011 submitted by the importer purposefully, knowingly and intentionally for fraudulently claiming and availing Customs duty benefit. The importer is called upon to show cause as to why certificate of country of origin should not 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) The total quantity of 15000 Kgs of goods declared as 'Cocoa Powder' imported vide Bill of Entry no. 8747907 dated 05.11.2018 and having total assessable value of **Rs. 21,96,180/-** should not be held liable for confiscation under the provisions of Section 111(d), 111(m) and 111(o) of the Customs Act, 1962 for the act of wilful mis-statement and intentional suppression of facts by the importer with regard to the description and Country of Origin of the import goods by way of submitting false and incorrect Country of Origin certificate as Malaysia leading to unlawful, illegal and wrong availment of concessional Customs duty benefit under Notification No. 46/2011 dated 01.06.2011 by them.

(iii) The total amount of differential Customs duties amounting to Rs.8,55,192/- (Rupees Eight Lakhs Fifty Five Thousand One Hundred Ninety Two only) in respect of Bill of Entry no.8747907 dated 05.11.2018, attributable to the concessional rate of Customs duties based upon wrong availment of Country of Origin benefit by the importer under Notification No. 46/2011-Cus dated 01.06.2011 should not 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 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) Penalty should not be imposed on them under Sections 112(a) and / or 114A of Customs Act, 1962.

(v) Penalty should not be imposed on them under section 114 AA of the Customs Act, 1962.

PERSONAL HEARING

3. The Noticee was granted personal hearing in the case matter on dated 27.12.2019. However, they vide their letter dated 16.12.2019 informed that in their case matter vide SCN F.No. VIII/48-359/Cocoa powder/kiran/Gr.-I/MCH/19-20 dated 29.05.2019 on the similar issue, a personal hearing is fixed on 20.12.2019 at Mundra and it will be difficult for them to come again from Mumbai for the hearing and accordingly requested to prepone the 2nd matter hearing on 20.12.2019. Considering their request, the personal hearing was granted on 20.12.2019. Shri J.C. Patel, Advocate & authorized representative of the Noticee appeared for personal hearing on 20.12.2019 and submitted that he has already filed a reply and submitted O-I-O dated 02.02.2017 in the case matter of SCN F.No. VIII/48-359/Cocoa powder/kiran/Gr.-I/MCH/19-20 dated 29.05.2019. He reiterated the facts mentioned therein and further stated that they have nothing more to add.

DEFENCE SUBMISSION

4. The Noticee vide their letter dated 06.12.2019, received in this office on 10.12.2019, have submitted written defence reply on the similar issue Show Cause Notice vide F.No. VIII/48-359/Cocoa powder/kiran/Gr.-I/MCH/19-20 dated 29.05.2019. In respect of contentions raised in the Show Cause Notice, they have interalia made submissions as under-

4.1 The proposal to deny exemption on the allegation that the Certificates of Origin are invalid, is totally contrary to the provisions of Rules of Origin issued under Notification No.189/2009-Cus(NT) dated 31-12-2009:

4.2 At the time of import of the goods in question, they had duly submitted to Indian Customs, Certificates of Origin in respect of the imported goods, which were issued by the certifying authority in Malaysia in accordance with the Rules of Origin issued under Notification No.189/2009-Cus(NT) dated 31-12-2009.

4.3 The said Certificates of Origin submitted by them were duly accepted by Indian Customs and no doubts about the authenticity of the said Certificates or of the information contained therein were raised by Indian Customs.

4.4 They submitted that Clause 7 (c) of "Operational Certification Procedures" in Annexure III to Notification No.189/2009-Cus (NT) provides that in cases where an AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party, such AIFTA Certificate of Origin shall be marked accordingly in box 4 and the original AIFTA Certificate of Origin shall be returned to the Issuing Authority within a reasonable period but not to excced two months. The Issuing Authority shall be duly notified of the grounds for the denial of preferential tariff treatment.

4.5 It is clear from the said Clause 7(c) that if the Certificate of Origin is not accepted by Customs in the country of import, the same has to be returned to the issuing authority within two months and the issuing authority shall be duly notified of the grounds for denial of the preferential treatment.

4.6 In the present case the Certificates of Origin produced by them were duly accepted by Mundra customs. The same were not rejected and the same were not returned to the issuing authority within two months and no grounds were notified to the issuing authority for denial of the preferential treatment. It is therefore submitted that in view of the said provisions of Notification No.189/2009-Cus (NT), the Indian customs cannot now after more than a year seek to reject the Certificates of Origin and deny the preferential treatment.

4.7 Further, no verification has been requested and carried out by Indian Customs under Clauses 16 and 17 of "Operational Certification Procedures" in Annexure III to Notification No.189/2009-Cus (NT) in respect of the Certificates of Origin pertaining to their imports. In absence of any verification having been requested and carried out by Indian customs under the said Clauses 16 and 17 in respect of the Certificates of Origin pertaining to their imports, the validity of the said Certificates cannot be questioned by Indian Customs and the benefit of exemption cannot be denied to them on the allegation that the said Certificates are not valid.

4.8 The said Clause 16 provides that the importing party may request a retroactive check at random and/or when it has a reasonable doubt as to the authenticity of the certificate of origin or as to the accuracy of the information regarding the true origin of the goods in question. Upon such a request being made by the importing party, the issuing authority has conduct a retroactive check on

the producer/exporter's cost statement based on the current cost and prices within a six-months timeframe prior to the date of exportation. In the present case no such request was made by Indian Customs to Malaysian authority to carry out a check in respect of the Certificates of Origin pertaining to their imports. The verification request made by Indian Customs to Malaysian authority in the years 2013 and 2014 cannot be the basis for rejecting the Certificates of Origin pertaining to their imports. It is clear from the said Clause 16 that the check on the producer/exporter's cost statement has to be with reference to the cost and prices prevailing within a six-months timeframe prior to the date of exportation. Therefore any verification or check conducted in the years 2013 and 2014 based on the cost and prices then prevailing cannot be made applicable to exports made in 2017-18 as the same would be well beyond the said time frame of six months prior to the date of exportation.

4.9 The said Clause 17 further provides that if the importing party is not satisfied with the outcome of the retroactive check, it may, under exceptional circumstances request verification visits to the exporting party with the knowledge of the importer. Rule 17 further provides for an elaborate procedure for conducting a verification visit. In the present case neither was the request for check under Clause 16 made in respect of the Certificates of Origin pertaining to our imports, nor was any verification visit undertaken as provided in Clause 17.

4.10 In the present case there is nothing in the Show Cause Notice to show that the procedure under the said Clauses 16 and 17 had been followed in respect of the Certificates of Origin pertaining to their imports. The show cause notice has relied upon a verification conducted in the past in the years 2013 and 2014 in respect of cocoa powder imported by some other importer viz. Morde Foods Pvt Ltd. which has no relation whatsoever to their imports. A verification conducted in respect of Certificates of Origin produced by some other importer i.e. Morde Foods P. Ltd in the past in the years 2013 and 2014 (which is three years before their imports) has no relevance to the genuineness of the Certificates pertaining to their imports made during August 2017 to April 2018. There is nothing to show that the cocoa powder imported by Morde Foods P. Ltd was of the same grade as the cocoa powder imported by them. Nor is there anything to show that the manufacturing process in respect of the cocoa powder imported by Morde Foods P. Ltd. is the same as the manufacturing process in respect of the cocoa powder imported by them. Therefore the said verification conducted in case of Morde Foods P. Ltd. has absolutely no bearing on the authenticity of their Certificates. Consequently, in the absence of any independent verification having been conducted in their case, exemption under Notification No. 46/2011Customs dated 1-6-2011 cannot be arbitrarily denied.

4.11 Without prejudice to the aforesaid submissions, copy of letter dated 18-3-2014 relied upon in the Show Cause Notice has not been provided to them and therefore the same cannot be used by the department to deny them the exemption.

4.12 Without prejudice to the aforesaid submissions and assuming while denying that the verification made in the case of another importer viz. Morde Foods P. Ltd, in the years 2013 and 2014, can be relied upon to examine the validity of Certificates of Origin pertaining to their imports made during August 2017 to April 2018, even so, it is submitted that the said verification made in

2013 and 2014 does not in any way establish that the goods in that case were not of Malaysian Origin in accordance with the Rules of Origin contained in Notification No.189/2009-Cus (NT). The Malaysian authority had maintained that the Regional Value content was 35% as per the Rules of Origin and if Indian customs was not satisfied with the response given by the Malaysian authority by letter dated 18-3-2014, it was open to Indian customs to have carried out verification visits to the exporting party as provided by Clause 17 of "Operational Certification Procedures" in Annexure III to Notification No.189/2009-Cus (NT). There is no evidence to show that any such verification visit was undertaken by Indian customs.

4.13 Assuming while denying that the verification made in the case of another importer viz. Morde Foods P. Ltd, in the years 2013 and 2014, can be relied upon to examine the validity of Certificates of Origin pertaining to their imports made during August 2017 to April 2018, even so, it is submitted that the case against the said Morde Foods P. Ltd has itself been dropped by Principal Commissioner of Customs (NS-I), Nhava Sheva by Order No.126/2016-17/CC/NS-I/INCH dated 31-1-2017. Consequently, the question of relying on the verification done in the case of the said other importer pertaining to the years 2013 and 2014 can most certainly not be used to question the validity of Certificates of Origin pertaining to their imports made during August 2017 to April 2018 and to deny them the exemption.

4.14 The Show Cause notice has placed reliance on the decisions in Alfa Traders v CC - 2007 (217) ELT 437 and Surya Lights v-CC - 2008 (223) ELT 289. It is submitted that the said decisions can have no application to the present case. The said decisions pertained to Rules of Origin of the years 1995 and 2000 in which there were no provisions similar to Clause 7 (c) and Clauses 16 and 17 of of "Operational Certification Procedures" in Annexure III to Notification No.189/2009-Cus (NT) which apply in the present case.

On Confiscation, fine and Penalty:

4.15 The proposal for confiscation of goods under Section 111(d),(m) and (o) of the Customs Act, 1962 is totally unsustainable in law.

4.16 Section 111(d) of the said Act can have no application to the present case. Section 111(d) of the said Act applies to a case where the goods are imported contrary to any prohibition imposed by law. The present case is not one where the goods are contrary to any prohibition imposed by law. The said goods imported in the present case are 'Free' for import. No prohibition against their import has been spelt out in the Notice. Therefore Section 111(d) of the said Act has no application to the present case.

4.17 Section 111(m) of the said Act also has no application whatever to the present case. The goods are correctly described in the Bill of Entry. Thus, there is no misdeclaration of the description of the said goods. Neither is there any misdeclaration with regard to any other particulars of the said goods. The claiming of an exemption Notification in the Bill of Entry is not a statement of any particular of the goods referred to in Section 111(m). It is settled law that a mere alleged untenable

claim of exemption is not misdeclaration provided that the goods are correctly described in the Bill of Entry. Reliance in this behalf is placed on the following decisions:

a) Northern Plastic Ltd v Collector - 1998 (101) ELT 549

b) S Rajiv and Co v CC 2014 (302) E.L.F. 412 (Tri. - Mumbai)

c) C Natwarlal and Company v Commissioner of Customs (Import), Mumbai 2012-TIOL-2171-CESTAT-MUM

d) CC v Gaurav Enterprises-2006 (193) ELT 532

(e) Asian Rubber works v CC-1999 (109) ELT 401

(f) Jay Kay Exports v CC-2003 (161) ELT 443

g) Jay Kay Exports v CC-2004 (163) ELT 359

h) Kores (India) ltd v CC 2019(5) TMI922

4.18 Section 111(o) of the Customs Act, 1962 also has no application to the present case. The said Section 111(o) applies to a case where the exemption granted is subject to fulfilment of some post clearance condition which the importer fails to fulfill. In the present case, the cxemption was not subject to any post clearance condition to be fulfilled by them. Section 111(o) therefore has no application, When the Department subsequent to the grant of exemption and clearance, disputes the very eligibility to such exemption, that is not a case covered by Section 111(o).

4.19 Since the demand of duty is liable to fail as explained above, and since the goods are not available for confiscation, the question of imposition of penalty under Section 112 does not arise.

4.20 The invocation of Sections 28(4) and 114A of the Customs Act 1962 in the present case is thoroughly misconceived and totally unsustainable in law. In the present case the demand has been raised within the normal period of limitation of two years to which Section 28(1) applies. Even otherwise there is no question of there being any collusion, wilful mis-statement or suppression of facts on their part. The Government of India having entered into Preferential Trade Agreement with the Governments of Member States of the Association of Southeast Asian Nations (ASEAN) and having issued an exemption Notification pursuant thereto, an importer in India is entitled to rely on the Certificate of Origin issued by the competent authority in Malaysia viz. Secretary General, Ministry of International Trade and Industry, Malaysia. It is totally perverse on the part of the customs department to allege that by relying on such Certificate of Origin they have acted fraudulently. It is totally irresponsible on the part of the authority issuing the Show Cause notice to allege that in relying on the said Certificates of Origin, they have acted fraudulently.

4.21 The proposal to impose penalty on them under Section 114AA of the Customs Act 1962 is equally perverse and untenable in Taw. Claiming an exemption Notification by relying on Certificate of Origin issued by the competent authority in Malaysia viz. Secretary General, Ministry of International Trade and Industry, Malaysia cannot be equated with knowingly or intentionally making, signing or using, or causing to be made, signed or used, any declaration, statement or

document which is false or incorrect in any material particular. Section 114AA has no application whatever.

4.22 Without prejudice to the submission that the goods are not liable to confiscation, it is submitted that in any event since the goods are not available for confiscation, no redemption fine can be imposed as laid down in the following judgments:

CC v Raja Impex P. Ltd - 2008 (229) ELT 185

Shiv Kripalspat P. Ltd v CC- 2009 (235) ELT 623

CC v Finesse Creation Inc - 2009 (248) ELT 122 (Bom)

Upheld in 2010 (255) ELT A120(SC).

4.23 In the circumstances the Show Cause Notice is unsustainable in law and is liable to be discharged and dropped and Your Honour is requested to do so.

DISCUSSION AND FINDINGS

5. I have carefully gone through the Show Cause Notice dated 26.09.2019, the written submission dated 06.12.2019 filed by the Noticee as well as the oral submissions made during the course of personal hearing on 20.12.2019 and the available records of the case and I find that the following main issues are involved in the subject Show Cause Notice, which are required to be decided-

(i) Whether the Country of Origin Certificate 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 15000 Kgs of goods declared as 'Cocoa Powder' imported vide Bill of Entry as detailed in Annexure-B **to the SCN** and having total assessable value of **Rs. 21,96,180/-** 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 of **Rs.8,55,192/- (Rupees Eight Lakhs Fifty Five Thousand One Hundred Ninety Two only)** in respect of Bill of Entry as detailed in Annexure B to the show cause notice; is required to be demanded and recovered from them under 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 Kiran Kotak & Co. is liable for penalty under Sections 112(a) and / or 114A of Customs Act, 1962.

(v) Whether the importer M/s Kiran Kotak & Co. is liable for penalty under section 114 AA of the Customs Act, 1962.

5.1 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) 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.

5.2 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.

5.3 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.

5.4 In this case, the Noticee filed a Bill of Entry as detailed in Annexure-B to the Show Cause Notice for clearance of imported goods declared as 'Cocoa Powder 10-12% Fat Content JB800LA-11' falling under Custom Tariff Head 18050000 to the First Schedule of the Customs Tariff Act, 1975. The imported goods were supplied by M/s JB Cocoa SDN BHD and were shipped from Malaysia. The above-stated Bills of Entry were filed on the basis of self-assessed declarations for the imported goods having gross weight 15000 Kgs. and total declared assessable value of Rs.21,96,180/- 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.

5.5 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.

5.6 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.

5.7 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."

5.8 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 J B Cocoa SDN BHD and were shipped from Malaysia. Further, M/s J B Cocoa SDN BHD are one of the suppliers for which 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 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, both the above-stated suppliers expressed inability to provide cost structure due to data privacy. 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%.**

5.9 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 suppliers 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.

5.10 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 'Cocoa Powder 10-12% FAT Content JB800LA-11' in the declaration in the form of Bills 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."

5.11 The Noticee in their defence reply have denied the allegations made in the instant Show Cause Notice by stating that at the time of import of goods in question, they have submitted the Country of Origin certificates required to claim Customs duty exemption as per Notification No.46/2011-Cus. Dated 01.06.2011. They have further contended that said document was duly verified and accepted by the Customs and the Bills of Entry in respect of the said goods imported by them were assessed by the Proper Officer of Customs granting the benefit of the said exemption under Notification No.46/2011-Customs dated 01.06.2011.The invocation of section 28(4) of the Customs Act,1962 is thoroughly misconceived as there is no question of collusion, wilful mis-statement or suppressions on their part. 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."*

5.12 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.12,50,505/- in respect of Bill 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 has already paid an amount of Rs.3,95,192/- 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.8,55,192/- (Rupees Eight Lakh Fifty Five Thousand One Hundred Ninety Two only) in respect of Bill 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.

5.13 Opposing the proposal of confiscation under Section 111 (d), 111(m) and 111 (o) of the Customs Act, 1962, the Noticee have contended that when the goods are already cleared and not

available, the question of confiscation does not arise. Further, the Noticee submitted that Section 111 (d) deals with the import of prohibited goods and import of 'Cocoa Powder' is not prohibited. Further, Section 111 (m) deals with the imports which do not correspond in respect of value, quality or quantity with the declaration made in the Bill of Entry. There was no such allegation in the Show Cause Notice. Further, Section 111 (o) deals with the imports which are exempted subject to certain conditions and importer does not fulfil such conditions. The Section 111 (o) deals with only post import conditions. In support of their contentions, they rely on the following judgments:-

a) Northern Plastic Ltd v Collector - 1998 (101) ELT 549

b) S Rajiv and Co v CC 2014 (302) E.L.F. 412 (Tri. - Mumbai)

c) C Natwarlal and Company v Commissioner of Customs (Import), Mumbai 2012-TIOL-2171-CESTAT-MUM

d) CC v Gaurav Enterprises-2006 (193) ELT 532

(e) Asian Rubber works v CC-1999 (109) ELT 401

(f) Jay Kay Exports v CC-2003 (161) ELT 443

g) Jay Kay Exports v CC-2004 (163) ELT 359

h) Kores (India) ltd v CC 2019(5) TMI922

In this context, the relevant parts of Section 111 of the Customs Act, 1962 stipulates that:

"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. 'Cocoa Powder 10-12% FAT Content JB800LA-11' does not fall under the list of prohibited items, I accept the contention of the Noticee 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.

5.14 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-A 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 three Bills 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 Bills of Entry as detailed in Annexure-B to the Show Cause Notice.

5.15 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. 8,55,192/-, 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 wilful 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.*

5.16 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 under Section 112 (a) of the Customs Act, 1962.

5.17 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. 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 Bills of Entry as detailed in Annexure-B to the Show Cause Notice.

(ii) I confirm and order to recover differential Customs duty totally amounting to Rs.8,55,192/- (Rupees Eight Lakh Fifty Five Thousand One Hundred Ninety Two only) as detailed in Annexure-B to the Show Cause Notice from the importer M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, under proviso to Section 28 (4) of the Customs Act, 1962. I also order to re-assess the aforesaid 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 Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, 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. 'Cocoa Powder' totally weighing 15000 Kgs, valued at Rs.21,96,180/- covered under Bill of Entry as detailed in Annexure-B 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.8,55,192/- (Rupees Eight Lakh Fifty Five Thousand One Hundred Ninety Two only) on the importer M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, 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 Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, under Section 112 (a) of the Customs Act, 1962 in respect of Bills of Entry detailed at Annexure- 'B' to the Show Cause Notice.

(vii) I impose penalty of Rs.60,000/- (Rupees Sixty Thousand only) on the importer M/s Kiran Kotak & Co., 414/418, M J Phule Market, Crawford Market, Mumbai, Maharashtra-400001, under Section 114AA of the Customs Act, 1962.

7. 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/48-60/Adj/ADC/MCH/19-20 **Dated: 02.01.2020**

BY SPEED POST

To,

M/s Kiran Kotak & Co.,
414/418, M J Phule Market,
Crawford Market, Mumbai,
Maharashtra-400001,

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
22187
02 JAN 2020
INWARD SECTION
Custom House, Mundra

Copy to:

1. The Principal Commissioner of Customs, 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

P.O (EDI)