DIN-20200171MO00001R3578

EDI section

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/48-40/Adj/ADC/MCH/2019-20
B. Order-in- Original No.	:	MCH/ADC/AK/88 /2019-20
C. Passed by	:	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	:	07.01.2020/ 07.01.2020
E. Show Cause Notice No. & Date	:	VIII/48-998/Cocoa Powder/ Gr-I/MCH/2018-19 Dated 03.05.2019
F. Noticee(s)/Party/ Importer	:	M/s Kiara Ingredients Inc, 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi – 110 037.

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS
22403
07 JAN
INWARD
Custom Hous

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 VIII/48-998/Cocoa Powder/ Gr-I/MCH/2018-19 Dated 03.05.2019 issued to M/s Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi – 110 037.

BRIEF FACTS OF THE CASE

M/s Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037(hereinafter referred to as "Importer"/"Noticee" for the sake of brevity)(PAN No. AJCPK6004HFT001) had filed a Bill of Entry No. 3975813 dated 13.11.2017 through Custom Broker M/s Shobha Shipping Services for clearance of imported goods declared as 'Cocoa Powder 10-12% FAT Content – JB190-11 (For Industrial use) '*(hereinafter referred to as "Imported goods"/"Impugned Goods")*. The goods have been shipped from Malaysia, falling under Custom Tariff Item18050000 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 bill of entry, the imported goods viz. 'Cocoa Powder 10-12% FAT Content – JB190-11 (For Industrial use) ' were cleared, having Gross weight 15240 Kgs and assessable value of Rs.18,63,900/- imported vide Bill of Lading No. OOLU2595260410 dated 03.11.2017 and Invoice No. 3026249 dated 03.11.2017.

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 have 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' 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 Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037, 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 document (COO No. JB-2017-AI-21-005723 dated 12.11.2017) 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. 5,21,892/- at the time of assessment of the goods in respect of Bill of Entry No. 3975813 dated 13.11.2017 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.12,59,102/- 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.5,21,892/- 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 appeared that the amount of differential Customs duties amounting to Rs.7,87,311/- (Rupees Seven Lakh Eighty Seven Thousand Three Hundred Eleven 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; appeared 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/48-998/Cocoa Powder/ Gr-I/MCH/2018-19 dated 03.05.2019 was issued, whereby the importer M/s Kiara Ingredients Inc, 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037(IEC No.0516946650) 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 was submitted purposefully, knowingly, intentionally for fraudulently claiming and availing Customs duty benefit. The importer is called upon to show cause as to why the 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 import goods;

(ii) The total quantity of 15240 Kgs of goods declared as 'Cocoa Powder 10-12% FAT Content – JB190-11 (For Industrial use)' imported vide Bill of Entry No. 3975813 dated 13.11.2017 and having assessable value of Rs. 18,63,900/- should not be held liable to confiscation under the provisions of section 111 (d), 111 (m) and 111(o) of the Customs Act, 1962 for the act of wilfull 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.7,87,311/- (Rupees Seven Lakh Eighty Seven Thousand Three Hundred Eleven only) as detailed in **Annexure B** to this show cause notice; 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 Bill 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.

(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.

2.1 Further vide Corrigendum dated 30.07.2019, the instant Show Cause Notice was made answerable to the Principal Commissioner of Customs, Custom House, Mundra, having his office at 1st Floor, Port User Building, Mundra Port, Mundra, Kutch, Gujarat. Subsequently, as per Para-4 of Circular No.24/2011-Customs dated 31.05.2011 as amended time to time which specifically stipulates the competency of Adjudication Officer, nature of cases and amount of duty involved for the SCNs issued under Section 28 of the Customs Act,1962, vide another Corrigendum dated 27.08.2019, the Show cause Notice was made answerable to the Additional Commissioner of Customs (Import), Custom House, Mundra, having his office at 1st Floor, 5B, Port User Building, Mundra Port, Mundra, Kutch, Gujarat.

DEFENCE SUBMISSION

3. The Noticee vide their letter dated 05.06.2019, received in this office on 04.07.2019, have submitted pointwise defence reply as under-

3.1 They had imported Cocoa Powder 10-12% FAT Content-JB 190-11 (For Industrial Use), having gross weight 15240 Kgs and assessable value of Rs. 18,63,900/- vide Bill of lading No. OOLU2595260410 dated 03.11.2017 and has got it cleared from Mundra Port under Notification No.46/2011- Customs, dated 01.06.2011.

3.2 The benefit under the said Notification for duty free is available to import cargo (Cocoa Powder) if the goods are of Malaysian Origin and a certificate in this regard is being issued by the designated authority and if the goods are not wholly produced or obtained products in Malaysia then the AIFTA (ASEAN-India Free Trade Area) content should not be less than 35% of the FOB Value.

3.3 The notification requires a certificate only to be given by the importer at the time of import and nothing else is required from the side of importer.

3.4 They have complied with all the regulations applicable at the time of import and submitted the desired certificate at the time of clearance of the goods and not done anything wrong.

3.5 Based on the costing of material purchased they paid the custom duty and sold the material to other parties. Imported goods are not in their possession. Further levying of any duty will result in undue harassment to the importer because material has already been sold no unjust benefit has been gained by them of low duty import from the other parties.

PERSONAL HEARING

4. The personal hearing was granted, in the case matter, on dated 25.11.2019, however no body appeared for the personal hearing on the said date. Further, the personal hearing in the case matter was fixed on dated 09.12.2019 and again on 30.12.2019, however, nobody attended the hearing on either dates.

DISCUSSION AND FINDINGS

5. I have carefully gone through the Show Cause Notice dated 03.05.2019, the written submission dated 05.06.2019 filed by the Noticee as well as the available records of the case. I find that in the present case ample opportunities have been given to the noticee to remain present for personal hearing. The adjudication process can not go indefinitely waiting for the noticee to turn up for personal hearing. Therefore, I find that the principle of Natural Justice, as prescribed in Section 122A of the Customs Act,1962 has been completed. Hence, I am going to proceed to decide the case on the basis of documentary evidences available with the department. 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 15240 Kgs of goods declared as 'Cocoa Powder 10-12% FAT Content-JB190- 11 (For industrial use)' imported vide Bill of Entry No. 3975813 dated 13.11.2017 and having assessable value of Rs. 18,63,900/- 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.7,87,311/- (Rupees Seven Lakh Eighty Seven Thousand Three hundred Eleven only) as detailed in Annexure B to the show cause notice; is required to be demanded and recovered from the importer 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 Bill 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 Kiara Ingredients Inc, is liable for penalty under Sections 112(a) and / or 114A of Customs Act, 1962.

(v) Whether the importer M/s Kiara Ingredients Inc, 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) 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.

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 No.3975813 dated 13.11.2017 as detailed in Annexure-B to the Show Cause Notice for clearance of imported goods declared as ' Cocoa Powder 10-12% FAT Content –JB190-11 (For industrial use) ' 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 Bill of Entry was filed on the basis of self-assessed declarations for the imported goods having gross weight 15240 Kgs. and total declared assessable value of Rs.18,63,900/- 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. 53/2011-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. 53/2011-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 JB COCOA SDN BHD, Malaysia and were shipped from Malaysia. Further JB 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, the 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

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.

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.

7,87,311/-, 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 Certificate as a valid document 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 duty totally amounting to Rs. 7,87,311/- (Rupees Seven Lakh Eighty Seven Thousand Three Hundred Eleven only) as detailed in Annexure-B to the Show Cause Notice from the importer M/s Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037, 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 Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037, 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 10-12% FAT Content – JB190-11 (For industrial use)' totally weighing 15240 Kgs, valued at Rs.18,63,900/- imported vide 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. 7,87,311/- (Rupees Seven Lakh Eighty Seven Thousand Three Hundred Eleven only) on the importer M/s Kiara Ingredients Inc., 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037, under Section 114A of the Customs Act, 1962 in respect of Bill 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 Kiara Ingredients Inc, 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037 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.60,000/- (Rupees Sixty Thousand only) on the importer M/s Kiara Ingredients Inc, 4th Floor, L-352, L-Block, Mahipalpur Extension, Mahipalpur, New Delhi - 110 037 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/48-40/Adj/ADC/MCH/2019-20 **Dated: 06.01.2020**

BY SPEED POST

To,

1. M/s Kiara Ingredients Inc,
4th Floor, L-352, L-Block,
Mahipalpur Extension,
Mahipalpur, New Delhi - 110 037.
2. M/s Shobha Shipping Services, Customs Broker

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