Rumut 17/12/19

DC (EDI)

	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/48-50/Adj./ADC/MCH/2019-20
B. Order-in- Original No.	:	MCH/ADC/AK/80/2019-20
C. Passed by	:	Shri Ajay Kumar Additional Commissioner of Customs, Custom House, AP & SEZ, Mundra.
D. Date of order /Date of issue	:	13.12.2019/ 13.12.2019
E. Show Cause Notice No. & Date	:	VIII/48-689/D P Chocolate/Adj/Gr-I/MCH/19-20 Dated 27.08.2019
F. Noticee(s)/Party/ Importer	:	M/s D P Chocolates, Plot No.166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.-Solan, Himachal Pradesh-173205

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 -

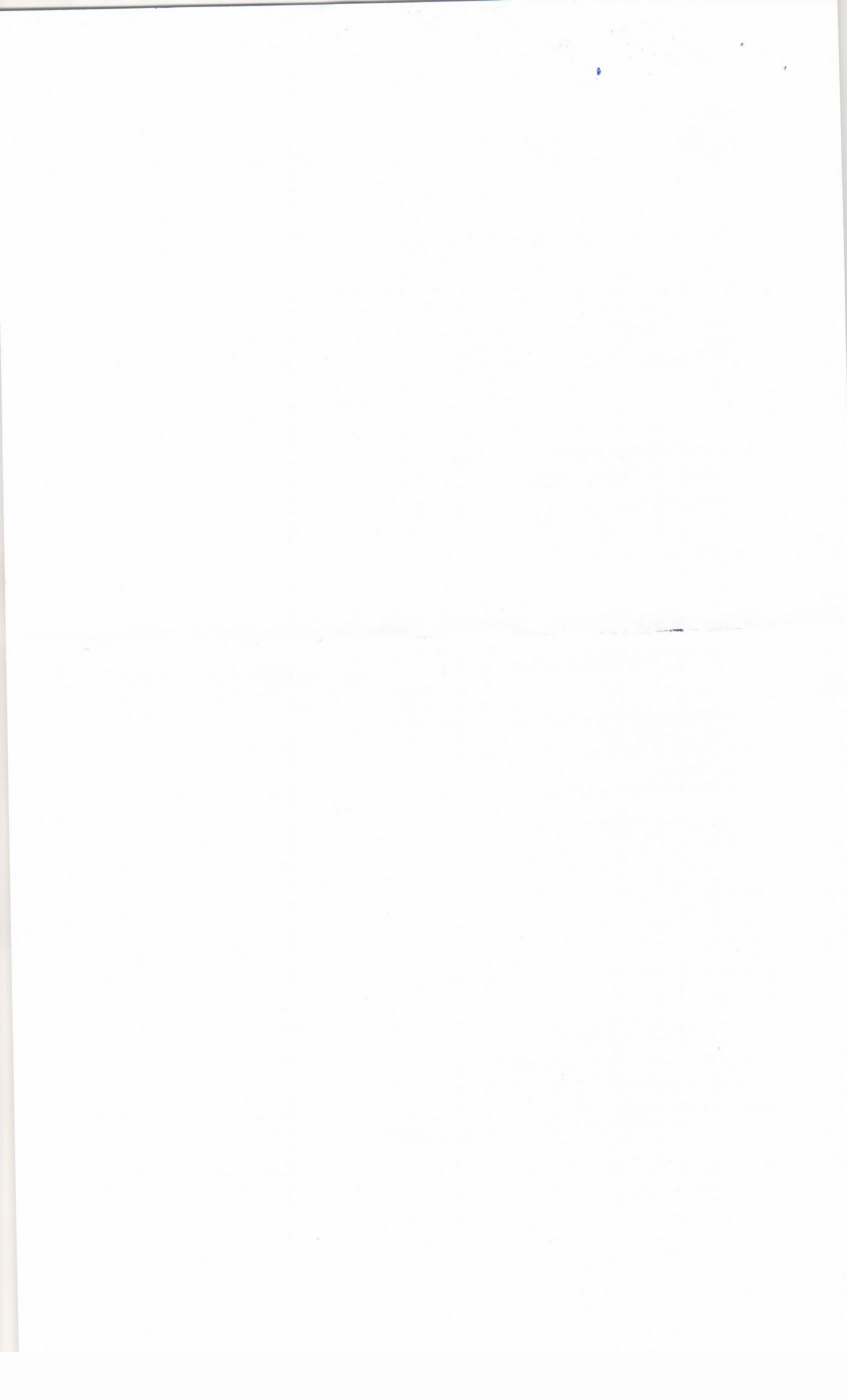
   (i) उक्त अपील की एक प्रति और
   A copy of the appeal, and
   (ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं०-6 में निर्धारित 5/- रुपये का न्यायालय शुल्क टिकट अवश्य लगा होना चाहिए।
   This copy of the order or any other copy of this order, 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/48-689/D P Chocolate/Adj/Gr-I/MCH/19-20 dated 27.08.2019 issued to M/s D P Chocolates, Plot No.166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.-Solan, Himachal Pradesh-173205



BRIEF FACTS OF THE CASE

M/s D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.- Solan, Himachal Pradesh-173205 ***(hereinafter referred to as "Importer"/"Noticee" for the sake of brevity)*** had filed Bills of Entry as detailed in Annexure-A to the SCN through Custom Broker M/s S.N. Shipping for clearance of imported goods declared as 'Cocoa Powder 10-12% Fat Content'***(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 Bills of Entry through the Customs Broker M/s S.N. Shipping 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' were cleared, having total Gross weight 40640 Kg and total declared assessable value of Rs.54,24,475/- imported vide Bill of Lading numbers and Invoices as detailed in Annexure-A to the SCN.

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' 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 D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt. Solan, Himachal Pradesh-173205, 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 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. 9,76,406 /- in respect of bills of entry as detailed in Annexure-B to the SCN 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. 30,88,696 /- in respect of bills of entry as detailed in Annexure-B to the SCN 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. 9,76,406 /- 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. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only)in respect of bills of entry 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/48-689/DP Chocolate/Gr-I/MCH/19-20 dated 27.08.2019 was issued, whereby the importer M/s D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt. Solan, Himachal Pradesh-173205(IEC No. 2207003591) 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 40,640/- Kgs of goods declared as 'Cocoa Powder 10-12% FAT Content' imported vide Bills of Entry as detailed in Annexure-A **to the SCN** and having total assessable value of **Rs. 54,24,475/-** 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. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only)** in respect of Bills of Entry as detailed in Annexure B to the 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 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 matter on dated 27.11.2019, however, the Noticee vide their letter dated 20.11.2019 informed that on the same issue for a different period a personal hearing is fixed on 25.11.2019 and requested to fix the personal hearing on the same day i.e. 25.11.2019. As per their request, the personal hearing was fixed on 25.11.2019. Shri Durga Prasad, Partner of the Noticee appeared for personal hearing on 25.11.2019 and submitted a written reply and reiterated the submission made therein. He further added that they have nothing more to add.

DEFENCE SUBMISSION

3.1 The Noticee submitted a written defence reply at the time of personal hearing on dated 25.11.2019. The Noticee in their defence reply submitted on 25.11.2019 also requested to take into consideration their defence submissions made vide letter dated 17.07.2019 in respect of another Show Cause Notice F.No. VIII/48-371/Cocoa Powder/DP/Gr.1/MCH/19-20 dated 19.06.2019 on the similar issue issued to M/s DP Chocolates. The Noticee in their aforesaid defence reply dated 17.07.2019 have *inter alia* submitted the following:-

3.2 Show Cause Notice issued on 19.06.2019 covering 31 Bills of Entry is hit by limitation of time in terms of Section 28(1) of the Customs Act, 1962 in respect of 23 Bills of Entry filed during the period 2015-16, 2016-17 & 2017-18 for the following reasons:-

7 Bills of Entry were filed during 2015-16 (between 15.05.2015 and 20.02.2016), 13 Bills of Entry were filed in 2016-17 (between 07.04.2016 and 15.02.2017) and 3 Bills of Entry were filed in 2017-18 (between 11.04.2017 and 07.06.2017) and the goods were cleared on payment of appropriate duty. As per Section 28(1) of the Customs Act, 1962 where any duty has not been levied or not paid or has been short-levied or erroneously refunded-proper officer shall within one year from the relevant date serve notice on the person chargeable with duty or interest. The period of one year has been increased to two years with effect from 14.05.2016. The Show Cause Notice issued proposing to demand duty on 19.06.2019 (received by us on 25.06.2019) is therefore, hit by limitation of time stipulated under Section 28(1) of the Customs Act, 1962, in respect of the 23 Bills of Entry mentioned above.

3.3 Further, the Noticee submitted parawise explanation to the Show Cause Notice . As regards Para 1 to 6, 14, 18, 19 & 20 of the SCN, the Noticee did not comment. Further, as regards Para 7 of the SCN, the Noticee stated that as per this Para, the Directorate of Revenue Intelligence, New Delhi had taken up investigation in the matter of verification of qualifying Regional Value Addition in the Cocoa Powder exported from Malaysia by M/s. JB Cocoa and M/s. Guan Chang Cocoa. It is seen from the letter dated 10.01.2014 of the Director (ICD), CBEC, New Delhi addressed to the High Commission of Malaysia, New Delhi referred to in this Para that the verification was in respect of the imports made by M/s. Morde Foods Private Ltd. Further, the Noticee mentioned that in response to the letter dated 10.04.2014, the Director, Asian Economic Corporation, Ministry of International Trade and Industry (MITI), New 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. J B Cocoa and M/s. Guan Chang 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".

Also, they submitted that from the two letters referred to in Para-7 of the SCN, it appears that verification was in relation to the imports made by M/s. Morde Foods Pvt. Ltd. Hence, it is no way relevant to the imports made by us M/s. D. P. Chocolates. They further submitted that they filed the Bills of Entry under straight assessment system and submitted along with the Bills of Entry all the required documents including the Purchase Orders, Invoices. Country of Origin Certificates issued by the Ministry of International Trade and Industry (MITI), Malaysia. It has been certified in each of the Country of Origin Certificates that the Regional Value Content (RVC) in the goods was in the Range of 44% -74%, The Customs authorities did not ask for any other information or documents at the time of clearance of the goods. Moreover, from the Examination Order- Sheets attached to the Bills of Entry states that the goods were examined with reference to the Notification No. 46/2011-Cus. dated 01.06.2011 for eligibility for the benefit of the Notification. The goods were allowed clearance after examination and satisfying for eligibility for the benefit of Notification and on payment of appropriate

duty. But, the notice has been issued to them now stated to be based on the outcome of verification in respect of imports made by M/s Morde Foods Pvt. Ltd., but not on the basis of verification in respect of the imports made by them. The Show Cause Notice issued is therefore, arbitrary.

3.4 Further, as regards Paras 9 and 10 of the SCN, the Noticee submitted that it appears from these two Paras that the cost structure of the goods was not furnished by the MITI, Malaysia on the basis of data privacy and therefore, it was decided by the Board to deny the Preferential Customs Duty Benefit. This decision appears to be in respect of imports made by M/s. Morde Foods Pvt. Ltd. but not in relation to the imports made by M/s. D. P. Chocolates.

3.5 Moreover, in respect of Para 11 of the SCN, the Noticee submitted that in this Para, three decisions of the Hon'ble CESTAT in the case of M/s. Alfa Taders Vs Commissioner of Customs, Cochin reported in 2007(217) ELT 437 and 2008 (223) ELT 289 and in the case of Surya Lights Vs Commissioner of Customs reported in 2008 (226) ELT 74(Tri.-Bangalore) have been referred to and stated that these decisions squarely applicable wherein it has been held that the Certificate of Origin is not correct on facts, it can be rejected for disallowing the duty exemption.

In this regard, the Noticee/importer submitted that the case laws referred to dealt with the cases where the County of Origin Certificates were found incorrect. But, in the case of imports by the Noticee and the Country of Origin Certificates issued by the Ministry of International Trade and Industry (MITI), Malaysia, no verification appears to have been done. The allegation in the case of their imports appears to be on the basis of investigation undertaken in the case of imports made by M/s. Morde Foods Pvt. Ltd. Even in the case or imports made by M/s. Morde Foods Pvt. Ltd., it appears from Para 7 in the Show Cause Notice that the MITI re-verified and confirmed that the finished goods fulfilled the Regional Value Content (RVC) under the ASEAN India Free Trade Agreement. In this connection, it may be mentioned that if the importing party - India/Customs Department had any doubt about the correctness of the Certificates even after the report submitted after the retroactive check under Article 16 of the ASEAN and Republic of India Rules, 2009, by the MITI, the importing party has to follow the procedure stipulated in Article 17 of the ASEAN and Republic of India Rules, 2009. This exercise does not appear to have been done by the Department. In so far as the imports made by the Noticee, the Country of Origin Certificates issued by the Ministry of International Trade and Industry (MITI), Malaysia was submitted at the time of clearance of the goods and the same were verified as is evident from the Examination Order Sheets attached to the Bill of Entry. The goods were examined with reference to the claim for the benefit of Notification No. 46/2011-Cus. dated 01.06.2011 and the goods were allowed clearance with the benefit of the Notification. The Department has not proved with any evidence that the Country of Origin Certificates submitted by the Noticee were incorrect. As such, the case laws cited are not applicable to the imports made by them.

They further submitted that the Country of Origin Certificates were issued by the competent authority, Ministry of International Trade and Industry (MITI), Malaysia. The Certificates have not been recalled or cancelled by the issuing authority. In as much as the Certificates have been issued by

the competent authority, the benefit of Notification cannot be denied as held by the Hon'ble CESTAT, Principal Bench, New Delhi in the case of R. S. Industries (Rolling Mills) Ltd. Vs Commissioner of Central Excise, Jaipur 1, reported in 2018 (359) ELT 698 (Tri.-Del.). This order does not appear to have been challenged by the department before any higher Court. As such, it attained finality. It has been held by the Hon'ble Courts and Appellate Tribunal in several cases that - when the identical issue has been decided by the Hon'ble CESTAT and it has not been set aside or stayed by the Higher Court, the same has to be followed. The Noticee cited the following case Laws in this regard:-

(1) Lubi Industries LLP Vs Union of India 2016 (337) ELT 179(Guj.)

(2) Viny Royal Plasi Coats Pvt. Ltd. Vs Union of India 2010 (258) ELT 339(Guj.)

(3) Bharathi Hexacom India Ltd. Vs Commissioner of Central Excise, Jaipur- 1-2007(7) STR 438(Tri. -Del.)

3.6 Further, in context of Paras 12 and 13 of the SCN, the Noticee mentioned that the allegations in these two paragraphs are that the Noticee/importer contravened the Provisions of sub-Section (4) of Section 46 of the Customs Act, 1962 and thereby wrongly availed the Country of Origin benefit to evade the Customs duty and the importers knowingly and with intention and by design taken the benefit of Notification No. 46/2011-Cus. dated 01.06.2011, it appears to be a case of wilful mis-statement of actual Country of Origin, suppression of correct qualifying Regional Value Content (RVC) of 35% with intention to evade duty of Customs, the goods appear to be liable for confiscation under Section 111(d), 111(m) and 111(o) of the Customs Act, 1962 and the importer appears liable for penal action under Section 112(a) and/114 A and 114 AA of the Customs Act, 1962.

In this regard, the Noticee submitted that the above allegations in Paras 12 and 13 are absolutely baseless and far from the factual position. The Noticee filed the Bills of Entry along with the Purchase Orders, Invoices and Country of Origin Certificate issued by the competent authority i.e. the Ministry of International Trade and Industry (MITI), Malaysia. The declaration was made in the Bills of Entry as per the import documents received from the Malaysian suppliers. There is no discrepancy in the description of the goods, quantity and value. In each of the Country of Origin Certificates issued by the MITI, they have certified the RVC in the range of 44% to 74% in the Cocoa Powder supplied to the Noticee. The Customs authorities examined the goods before clearance was allowed as to the eligibility for the benefit of Notification No. 46/2011-Cus. dated 01.06.2011, as is evident from the Examination Order Sheet attached to the Bills of Entry. The Customs authorities have not asked for any other information or documents in addition to the documents submitted with the Bills of Entry at the time of clearance of the goods. The Noticee importer has not received any other documents from the suppliers other than the documents submitted with the Bills of Entry. Thus, no mis-statement or suppression of facts can be attributed. Further, when the goods were clearly, correctly and fully declared in the Bills of Entry along with the Country of Origin Certificates issued by the competent authority, no mis-declaration or suppression of facts with intention to evade payment of duty cannot be attributed as held by the Hon'ble Appellate Tribunal in the case of Sab Nife Power Systems Vs Commissioner of Customs, Chennai, reported in 2000(124) ELT 1080

(Tribunal). On filing an appeal by the Commissioner of Customs, Chennai against the Tribunal's order, the Hon'ble Supreme Court dismissed the appeal on 14.09.2009 reported in 2002 (141) ELT A95 (SC).

Regarding the proposal to confiscate the goods under Section 111(d), 111(m) and 111(0) of the Customs Act, 1962, the importer submitted that the goods were cleared on payment of appropriate duty during period from 15.05.2015 24.05.2018. It is obvious that the goods are not available to the Department and they are not under seizure. When the goods are already cleared and not available the question of confiscation does not arise. In support of this contention, they rely on the following judgments:

1. Commissioner of Customs Vs Finesse Creation INC 2009(248) ELT 122 (Mum.)
2. Commissioner of Customs Finesse Vs Creation INC 2010 (255) ELT A120 (SC)(Affirmed the decision of the CESTAT)
3. Taj Overseas Vs Commissioner of Customs, Mumbai 2018 (364) ELT 407 (Tri.-Mum.)

3.7 Regarding the allegation that the importers intentionally taken a wrong Customs duty benefit based upon invalid document namely Country of Origin Certificates in terms of the Notification No. 46/2011-Cus. dated 01.06.2011, the Noticee stated that Department never asked for any additional information or documents in addition to the documents submitted at the time of clearance of the goods. There is also no evidence made known to the importer that the RVC was less than 35% in the case of imports made by them. It appears that the notice has been issued on the basis of the investigation undertaken in respect of imports made by M/s. Morde Foods Pvt. Ltd. as is evident from Para 7 of the Show Cause Notice. The Notice therefore, appears to have been issued assuming that the RVC content in the case of imports made by them was also less than 35%. The Notice does not appear to be based on any facts. In this connection, they submitted that the "Customs Tariff (Determination of Origin of Goods under Preferential Trade Agreement between the Governments of Member States of Association of Southeast Asian National (ASEAN) and the Republic of India Rules, 2009" stipulate elaborate procedure to issue Country of Origin Certificates, verification, acceptance, rejection etc. As per Article 16 in the Annexure III to the said Rules, when there is reasonable doubt as to the information regarding the true origin of the goods, the importing party may request the issuing authority for a retroactive check. Article 16 reads as follows:

"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-months timeframe prior to the date of exportation subject to the following procedures: (i) the request for a retroactive check shall be accompanied by the AIFTA Certificate of Origin concerned and specify the reasons and any additional information suggesting that the particulars given in the said AIFTA Certificate of Origin may be inaccurate, unless the retroactive check is requested on a random basis; (ii) the Issuing Authority shall respond to the request promptly and reply within three months after receipt of the request for retroactive check; (iii)

In case of reasonable doubt as to the authenticity or accuracy of the document, the Customs Authority of the importing party may suspend provision of preferential tariff treatment while awaiting the result of verification. However, it may release the goods to the importer subject to any administrative measures deemed necessary, provided that they are not subject to import prohibition or restriction and there is no suspicion of fraud; and (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 (ii) shall be applied. (b) The Customs Authority of the importing party may request an importer for information or documents relating to the origin of imported good in accordance with its domestic laws and regulations before requesting the retroactive check pursuant to paragraph (a)."

Further, if the importing party Government of India/Customs Department/DRI is not satisfied with the outcome of the retroactive check undertaken by the issuing authority under Article 16(a), the importing party may request verification visits to the exporting party as stipulated in Article 17 of the Operational Certification Procedures for the Customs Tariff (Determination of Origin of goods under the Preferential Trade Agreement between the Governments of member states of the Association of South East Asian Nations (ASEAN) and the Republic of India) Rules, 2009. Article 17 is reproduced below:

"17. If the importing (a) party is not satisfied with the outcome of the retroactive check, it may, under exceptional circumstances, request verification visits to the exporting party. Prior to conducting a verification visit:-

(i) the importing party shall deliver a written notification of its intention to conduct the verification visit, through the competent authority, simultaneously to,-

1. the producer/exporter whose premises are to be visited;

2. the issuing Authority of the party in the territory of which the verification visit is to occur;

3. the competent authority of the party in the territory of which the verification visit is to occur; and

4. the importer of the goods subject to the verification visit;

(ii) the written notification mentioned in sub-paragraph (i) shall be as comprehensive as possible and include:

1. the name of the competent authority issuing the notification;

2. the name of the producer/exporter whose premises are to be visited;

3. the proposed date of the verification visit;

4. the coverage scope or purpose of the proposed verification visit, including reference to the goods subject to the verification; and

5. the names and designation of the officials performing the verification visit;

(iii) an importing party shall obtain the written consent of the producer/exporter whose premises are to be visited;

(iv) when a written consent from the producer/exporter is not obtained within thirty days from the date of receipt of the notification pursuant to sub-paragraph (i), the notifying party may deny preferential tariff treatment to the goods referred to in the said AIFTA Certificate of Origin that would have been subject to the verification visit; and

(v) the issuing Authority receiving the notification may postpone the proposed verification visit and notify the importing party of such intention within fifteen days from the date of receipt of notification. Notwithstanding any postponement, any verification visit shall be carried out within sixty days from the date of such receipt, or for such longer period as the parties may agree.

(b) The importing party conducting the verification visit shall provide the producer/exporter whose goods are subject to the verification and the relevant Issuing Authority with a written determination of whether that goods qualify as originating goods.

(c) The importing party conducting the verification visit shall provide the determination of whether the goods qualify as originating goods shall be notified to the producer/exporter, and the relevant Issuing Authority. Any suspended preferential tariff treatment shall be reinstated upon a determination that the goods qualify as originating goods.

(d) If the goods are determined to be non-originating, the producer/exporter shall be given thirty days from the date of receipt of the written determination to provide any written comments or additional information regarding the eligibility of the goods for preferential tariff treatment. If the goods are still found to be non-originating, the final written determination issued by the importing party shall be communicated to the Issuing Authority within thirty days from the date of receipt of the comments/additional information from the producer/exporter.

(e) The verification visit process, including the actual visit and the determination whether or not the goods subject to verification is originating, shall be carried out and its results communicated to the Issuing Authority within a maximum period of six months from the date when the verification visit was conducted. While the process of verification is being undertaken, sub-paragraph a (iii) of paragraph 16 shall be applied."

In this regard, they submitted that perusal of Show Cause Notice reveals that the importing party DRI / Indian Customs Authorities have not undertaken the verification visits as envisaged in Articles 16 and 17 of the said Rules to verify and establish that the RVC in the Cocoa Powder imported

by them was less than 35%. The Department therefore, failed to follow procedure laid down in the Rules.

In this connection, they refer to the judgment of the Hon'ble High Court of Delhi in the case of Bullion and Jewellers Association Vs Union of India reported in 2016(335) ELT 639 (Del.). It is a case of import of jewellery from Indonesia under Customs Tariff (Determination of Origin of Goods under Preferential Trade Agreement between the Government of Member States of the Association of Southeast Asian Nations (ASEAN) and the Republic of India) Rules, 2009. The Customs authorities disregarded the Country of Origin Certificate even after the designated authority confirmed the correctness of the Certificates after conducting the retroactive check as per Article 16 of India - ASEAN FTA without undertaking the verification visits to the exporting party by the importing party as stipulated in Article 17 of the Operational Certification Procedures for 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. *The Hon'ble Delhi High Court held inter alia in Para 48 of the judgment that "if there was any doubt about appropriate inventory not being maintained regarding the Origin of the Gold, then either of the verification process as set out in the Customs Tariff Origin Rule, which in turn adopted the provisions in the Appendix - D to the ASEAN FTA, could have been undertaken or a questionnaire is issued for that purpose. No recourse to such process appears to have been undertaken. The inescapable conclusion is that there was no material for the respondents to draw the conclusions that from the actual basis of the impugned circular." The Hon'ble High Court further held in Para 58 "apart from the fact that the SCN suffers from the above fatal flaw, it has been issued overlooking the COOs produced by the said importer verified by issuing Authority. Therefore, the said SCN and the proceedings consequent thereto are held to be invalid and unsustainable in law".*

In view of the above, they submitted that the ratio of the judgment of Hon'ble High Court supra squarely applicable to the present case. Accordingly, the Show Cause Notice issued to the Noticee is not sustainable.

3.8 As regards Para 15 of the SCN, the Noticee submitted that in respect of various Bills of Entry listed in Annexure-A to the Show Cause Notice, the notice was issued after the expiry of one year/two years period stipulated under Section 28(1) of the Customs Act, 1962 during the relevant time. However, it is proposed in the Show Cause to invoke larger period under Section 28(4) of the Customs Act, 1962 which is not tenable as explained hereunder.

Invocation of Section 28(4) of the Customs Act, 1962: Section 28 (4) of the Customs Act, 1962 is invokable "Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded reason of-

(a) Collusion or

(b) Any willful mis-statement, or

(c) Suppression of facts

by the importer, or the exporter or the agent or employee of the importer or exporter, the proper office shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short - levied or short- paid or to whom the refund has erroneously been made, requesting him to Show Cause why he should not pay the specified amount in the notice"

The Noticee further submitted that all the Bills of Entry were filed under Straight Assessment System. All the relevant documents - Invoices, Purchase Orders, Country of Origin Certificates issued by the Ministry of International Trade and Industry, Malaysia in the Form prescribed in 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. The documents were verified by the Customs authorities and allowed the clearance with the benefit of the Notification Nos. 46/2011-Cus. dated 04.06.2011. They did not receive any other documents / information from the Malaysian suppliers nor were they in possession of any other documents or information with regard to imports made by us other than the documents submitted at the time of clearance of the goods. The department did not ask for any further information or documents. Thus, there was no suppression of any information/ facts by us-the importers. As such, the provisions of Section 28(4) of the Customs Act, 1962 cannot be invoked to demand the alleged short levy short payment of duty. When there is allegation of suppression of facts / information, heavy burden lies upon the Department to prove the alleged suppression as held by the Hon'ble Kolkata High Court in the case of Simplex Infrastructure Ltd. Vs Commissioner of Service Tax, Kolkata reported in 2016 (42) STR 634 (Kolkata) and followed by the Hon'ble CESTAT, Principal Bench, New Delhi in the case of International Metro Civil Contractors Vs Commissioner of Service Tax, Delhi, reported in 2019(20). GSTL 66 (Tri-Del). The Hon'ble CESTAT held in Para 10 of the decision as follows:

"10. Now, coming to the final aspect of Show Cause Notice being barred by time, it is observed that the period in hand is w.e.f. April, 2004 to September, 2005. The Show Cause Notice was issued on 23-10-2009. The same is beyond the normal period of one year as mentioned in Section 73 of the Act. To invoke the extended period as mentioned in the proviso thereof, heavy burden lies upon the Department to prove the alleged wilful suppression. The law has by now been settled that a mere sweeping statement that the assessee has suppressed the fact without mention of any conscience act on part of assesse about fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of provisions of law that too with intent to evade service tax is not sufficient to take the benefit of this proviso. The same is only a vague assertion which is highly insufficient to invoke the extended period of limitation, as was held by the Hon'ble High Court of Kolkata in the case of Simplex Infrastructure Ltd. v. Commissioner Service Tax, Kolkata, 2016 (42) S.T.R. 634 Kolkata. It was also clarified in this case that mere mechanical reproduction of language of proviso of the Section 73(1) of the Finance Act, 1994 does not per se justify invocation of extended period of limitation. The Order under challenge is absolutely silent about any positive act on part of the appellant which may

entitle the Department to invoke the extended period of limitation. Resultantly, we are of opinion that the Show Cause Notice in this case is otherwise barred by limitation".

The Noticee referred to Para 4 of the judgment of the Hon'ble Supreme Court in the case of *Pushpam Pharmaceuticals Company Vs Collector of Central Excise, Bombay reported in 1995 (78) ELT 401 SC)*, which reads as follows:

"4. Section 11A empowers the department to re-open proceedings if the levy has been short levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

3.9 As regards Para 16, the Noticee submitted that a detailed explanation has been furnished in the preceding paragraphs with reference to the allegations in Paras 12 and 13 of the Show Cause Notice and the same is applicable here. They also submitted it has not been proved with any evidence by the department that Certificates issued by the Competent Authority - MITI, Malaysia were incorrect and the Show Cause Notice issued as a whole is not sustainable in view of the exhaustive explanation submitted in the preceding Paras, the question of imposing of penalty under Section 112 (a) or 114 A and Section 114 AA does not arise.

In view of the above submission, the noticee requested that further proceedings in the Show Cause Notice issued may please be dropped in light of the detailed explanation furnished in the preceding Paras supported by the judgments of the Hon'ble Courts and the CESTAT.

4. The Noticee in their additional written defence submissions submitted at the time of personal hearing on dated 25.11.2019, have *inter alia* stated the following:-

4.1 **Demand cannot be issued without challenging the assessment in the Bills of Entry: -** They filed all the 3 Bills of Entry covered in the SCN along with the invoices, Country of Origin Certificates issued by the Ministry of International Trade and Industry, Malaysia certifying that Regional Value Content (RVC) was more than 35% in each of the Certificates and other related documents. It is seen from the enclosures to the Bills of Entry that the goods were examined and the documents including the Certificates of Origin were verified with particular reference to eligibility of the imported goods for the benefit of Notification No. 46/2011-Customs All the Bills of Entry were finally assessed (they

were not assessed provisionally under Section 18 (1) of the Customs Act, 1962). The assessment in the Bills of Entry therefore, attained finality and the assessment in the Bills of Entry by the proper officer of Customs is "Assessment Order" and it is 'appealable order' as held by the Hon'ble Supreme Court and followed by the Hon'ble CESTAT in several cases. Hence, no demand notice can be issued under Section 28 of the Customs Act, 1962, unless the assessment in the Bills of Entry is modified by the Commissioner (Appeals) under Section 128 of the Customs Act, 1962. In support of this contention, they rely on the following decisions of the Hon'ble CESTAT:-

i) Anant Wines & Spirits Vs Commissioner of Customs, Amritsar-2016 (342) ELT 419 (Tri.-Chand.)

ii) Ashoosons Vs Commissioner of Customs, New Delhi- 2009 (239) ELT 107 (Tri.- Del.)

iii) Commissioner of Customs (Imports), Mumbai Vs Hindustan Gas & Industries Ltd.- 2006 (202) ELT 693 (Tri.-Mum.)

The Noticee further submitted that as per Section 2(2) of the Customs Act, 1962, "assessment" includes provisional assessment, self-assessment, re-assessment and assessment in which the duty assessed is NIL. Further, the Noticee referred the judgment of Hon'ble Supreme court in the case of ITC Limited Vs Commissioner of Central Excise, Kolkata-IV in Appeals Nos. 293-294 of 2009 on the issue of claiming refund under Section 27 of the Customs Act, 1962 on the issue of claiming refund under Section 27 of the Customs Act, 1962. In Para 47 of the judgment, the Hon'ble Apex Court ruled as follows:-

"47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and re-assess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act."

The Noticee submitted that the judgment of the Hon'ble Apex Court is equally applicable to the notice issued under Section 28 of the Customs Act, 1962 also as held by the Hon'ble CESTAT in the case of Commissioner of customs (Imports) Vs Hindustan Gas and Industries Ltd. supra.

4.2 Show Cause Notice/Demand issued is baseless:-

The Show Cause issued proposing to reject the County of Origin Certificates issued by the competent authority, deny the benefit of the Notification No. 46/2011-Cus., demand the differential amount of duty and impose penalty is baseless and cannot be sustained for the following reasons:

(i) In respect of all the 3 Bills of Entry, they submitted that the Country of Origin Certificates issued by the competent authority i.e. Ministry of International Trade and Industry, Malaysia certifying that Regional Value Content (RVC) in the 'Cocoa Powder' supplied was more than 35%. The Department has not questioned the competence of the issuing authority nor alleged forgery of

the certificates. There is no mention in the Show Cause Notice that the Department had verified and found that the RVC indicated in the Certificates submitted by the importer was not correct. The Department has also not asked for from the importer for any information or documents with regard to the Country of Origin Certificates. The notice issued is therefore, arbitrary.

(ii) From Paras 7 and 10 of the Show Cause Notice and the letter-dated 10.01.2014 of the Central Board of Excise and Customs addressed to Ms. Aida Shafinaz Allias, Minister (Economic) MITI, New Delhi, High Commissioner of Malaysia in New Delhi and letter dated 07.05.2014 of the Central Board of Excise and Customs addressed to Shri Najib Shah, Director General, DRI, New Delhi, mentioned therein, that reference was made to MITI for verification in respect of some Country of Origin Certificates relating to imports made by M/s. Morde Foods Pvt. Ltd. and the MITI has confirmed that the raw materials used in the production of the finished products fulfil the 35% RVC. However, they have expressed inability to provide cost structure due to data privacy. The Board therefore, directed to deny the preferential benefit. It appears, though the Board's direction was with reference to the imports made by M/s. Morde Foods Pvt. Ltd., the notice appears to have been issued to the Noticee applying the same instructions. The notice issued is therefore, presumptive in nature and not based on any facts. When there is a bonafide doubt about the correctness of the Country of Origin Certificates, the Department may verify in each case, but cannot automatically apply the outcome of the verification made in some other imports made by other importers during a different period. The Board's letters supra refer to the imports made by M/s. Morde Foods Pvt. Ltd. prior to 2014 whereas the Noticee made the imports during the period 2015 - 18). In support of this contention, the importer rely on the judgment of the Hon'ble High Court of Madras in the case of **Unik Traders Vs Directorate of Revenue Intelligence, Chennai, reported in 2019(367) ELT 353 (Mad.).** In this case, the Hon'ble High Court dealt with import of Areca nuts from Sri Lanka under South Asia Free Trade Area Agreement (SAFTA) and Indo Sri Lanka Free Trade Agreement (SFTA). The importers claimed the benefit of the Notification based on the decision of the Court in some earlier cases of imports. The Hon'ble High Court held inter alia in Para 16 of the judgment that each Bill of Entry has to be examined on the declaration effected in it regarding the genuinity of the Certificates of Origin. For the sake of clarity and better appreciation, Para 16 of the judgment is reproduced below:

"16. The second trumpcard is the order passed by the Madurai Bench in W.P. (MD). No. 997 of 2019 etc., dated 29-1-2019. In our view, the said order cannot be treated as a precedent. As the Learned Single Judge examined the facts therein and came to a conclusion that the documents submitted by the petitioner therein has not been shown to be not genuine or in other words there is no material to show that the documents submitted by those petitioners are not genuine. In any event, assuming an illegality had been committed; there can be no equality in an illegality. Each Bill of Entry has to be examined on the declaration effected in it and merely because few consignments were allowed to be cleared can be no ground to say that similar treatment should be uniformly applied, especially when the matter is under investigation regarding the genuinity and the certificates of origin."

4.3 Regarding confiscation of imported goods in SCN under Section 111(d), 111(m) and 111(0) of the Customs Act, 1962 and on other issues, the Noticee repeated their earlier submission dated 17.07.2019 and have also placed their reliance on the same judgments/decisions. Since submissions of these Noticees are on the same set of issues with same contentions which have been discussed above in details, I do not repeat the same for the sake of brevity.

DISCUSSION AND FINDINGS

5. I have carefully gone through the Show Cause Notice dated 27.08.2019, the written submissions filed by the Noticee as well as the oral submissions made during the course of personal hearing on 25.11.2019 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 40,640/- Kgs of goods declared as 'Cocoa Powder 10-12% FAT Content' imported vide Bills of Entry as detailed in Annexure-A **to the SCN** and having total assessable value of **Rs. 54,24,475/-** 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. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only)** in respect of Bills 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 D P Chocolates is liable for penalty under Sections 112(a) and / or 114A of Customs Act, 1962.

(v) Whether the importer M/s D P Chocolates 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.

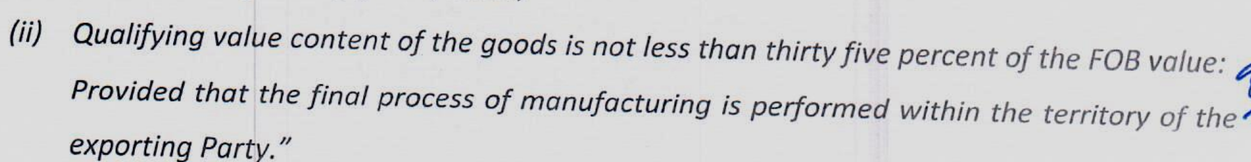
5.4 In this case, the Noticee filed 03 Bills of Entry as detailed in Annexure-A to the Show Cause Notice for clearance of imported goods declared as 'Cocoa Powder 10-12% Fat Content' falling under Custom Tariff Head 18050000 to the First Schedule of the Customs Tariff Act, 1975. The imported goods were supplied by M/s J B Cocoa and M/s Guan Chong Cocoa 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 40640 Kgs. and total declared assessable value of Rs.54,24,475/- 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' were supplied by M/s J B cocoa and M/s Guan Chong Cocoa and were shipped from Malaysia. Further, M/s J B Cocoa and M/s Guan Chong Cocoa are the same 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 these 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' 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 have challenged the allegation on various factual and legal grounds. The preliminary objection raised by the Noticee is that extended period of demand under proviso to Section 28(4) of the Customs Act, 1962 is not invokable. In order to invoke the proviso, the department must make out a justifying case of collusion, wilful mis-statement or suppression of facts as held by the Hon'ble Kolkata High Court in the case of Simplex Infrastructure Ltd. Vs Commissioner of Service Tax, Kolkata reported in 2016 (42) STR 634 (Kolkata) and followed by the Hon'ble CESTAT, Principal Bench, New Delhi in the case of International Metro Civil Contractors Vs Commissioner of Service Tax, Delhi, reported in 2019(20) GSTL 66 (Tri-Del). Further, It has been contended that in respect of Bills of Entry as detailed in Annexure-A to the Show Cause Notice, demand cannot be issued without challenging the assessment as all the Bills of Entry mentioned in Annexure-A to the Show Cause Notice were finally assessed under Section 18 (1) of the Customs Act, 1962. 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. 30,88,696/- in respect of Bills of Entry as detailed in Annexure-B to the Show Cause Notice without allowing concessional rate of Customs duty benefit based on Country of Origin. I, further, find that the Noticee has already paid an amount of Rs. 9,76,406/- 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. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only) in respect of Bills of Entry as detailed in Annexure-B to the Show Cause Notice is recoverable in terms of Section 28 (4) of the Customs Act, 1962, along with applicable interest thereon under Section 28 AA of the Customs Act, 1962 and by denying concessional rate of customs duty benefit based upon the country of origin of imported goods.

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 the imported goods were cleared on payment of appropriate duty and since the goods are not available to the department and they are not under seizure. When the goods are already cleared and not available, the question of confiscation does not arise. Further, the Noticee submitted that 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. Further, Section 111 (o) deals with only post import conditions. Even otherwise, there is no evidence cited in the Show Cause Notice that RVC content in the imported Cocoa Powder' was less than 35%. Thus, there was no offence by the importer under any of the sub-Sections to Section 111 of the Customs Act, 1962. In support of this contention, they rely on the following judgments:-

a. *Commissioner of Customs Vs Finesse Creation INC 2009(248) ELT 122 (Mum.)*

b. *Commissioner of Customs Finesse Vs Creation INC 2010 (255) ELT A120 (SC)(Affirmed the decision of the CESTAT)*

c. *Taj Overseas Vs Commissioner of Customs, Mumbai 2018 (364) ELT 407 (Tri.-Mum.)*

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' 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-A 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-A to the Show Cause Notice.

5.14 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. 21,22,291/-, 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.*

5.15 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.

5.16 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-A to the Show Cause Notice.

(ii) I confirm and order to recover differential Customs duty totally amounting to Rs. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only) as detailed in Annexure-B to the Show Cause Notice from the importer M/s D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt. Solan ,Himachal Pradesh, 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 D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.- Solan, Himachal Pradesh-173205 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' totally weighing 40,640 Kgs, valued at Rs.54,24,475/- covered under Bills of Entry as detailed in Annexure-A to the Show Cause Notice liable for confiscation under Section 111(m) and 111(o) of the Customs Act, 1962. Since, the imported goods are not physically available; therefore, I refrain from imposing any redemption fine in lieu of confiscation.

(v) I impose penalty of Rs. 21,12,291/- (Rupees Twenty One Lakh Twelve Thousand Two Hundred Ninety One only) on the importer M/s D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.- Solan, Himachal Pradesh-173205, 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 D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.- Solan, Himachal Pradesh-173205 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.1,50,000/- (Rupees One Lakh Fifty Thousand only) on the importer M/s D P Chocolates, Plot No. 166, Apparel Park Cum Industrial Area, Katha Bhatoli, Baddi, Distt.-Solan, Himachal Pradesh-173205 under Section 114AA of the Customs Act, 1962.

[AJAY KUMAR]
ADDITIONAL COMMISSIONER

F. No. VIII/48-50/Adj/ADC/MCH/19-20 **Dated: 13.12.2019**

BY SPEED POST

To,

M/s D P Chocolates,
Plot No. 166, Apparel Park Cum Industrial Area,
Katha Bhatoli, Baddi, Distt. Solan,
Himachal Pradesh-173 205

Copy to:

1. The Pr. 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