



OFFICE OF THE COMMISSIONER OF CUSTOMS  
CUSTOM HOUSE KANDLA  
NEAR BALAJI TEMPLE, NEW KANDLA

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A	File No.	F.No.S/10-76/Adj/Commr/TIPL/2018-19.
B	Order-in-Original No.	KND-CUSTM-000-COM-07-19-20
C	Passed by	Shri Sanjay Kumar Agarwal Principal Commissioner, Custom House, Kandla.
D	Date of order	30.07.2019
E	Date of issue	30.07.2019
F	Show Cause Notice Nos. & Date	F.No.S/10-22/ThematicAudit/Tin&Copper/Gr.IV/2018-19 dated 14.02.2019 issued by Principal Commissioner, Custom House, Kandla.
G	Noticee(s)/Co-Noticee(s)	1. M/s Polycab Wires P. Ltd., Daman Indl. Estate, Kadaiya, Daman-396210; and 2. M/s Trafigura India Pvt. Ltd., Village Mithi Rohar, Gandhidham

1. This Order-in-Original is granted to the concerned free of charge.
2. Any person aggrieved by this Order - in - Original may file an appeal under Section 129 A (1) (a) of Customs Act, 1962 read with Rule 6 (1) of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

**Customs Excise & Service Tax Appellate Tribunal,  
West Zonal Bench,  
2nd Floor, Bahumali Bhavan Asarwa,  
Nr. Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad - 380004**

3. Appeal shall be filed within three months from the date of communication of this order.
4. Appeal should be accompanied by a fee of Rs. 1000/- in cases where duty, interest, fine or penalty demanded is Rs. 5 lakh (Rupees Five lakh) or less, Rs. 5000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 5 lakh (Rupees Five lakh) but less than Rs.50 lakh (Rupees Fifty lakhs) and Rs. 10,000/- in cases where duty, interest, fine or penalty demanded is more than Rs. 50 lakhs (Rupees Fifty lakhs). This fee shall be paid through Bank Draft in favour of the Assistant Registrar of the bench of the Tribunal drawn on a branch of any nationalized bank located at the place where the Bench is situated.
5. The appeal should bear Court Fee Stamp of Rs.5/- under Court Fee Act whereas the copy of this order attached with the appeal should bear a Court Fee stamp of Rs.0.50 (Fifty paisa only) as prescribed under Schedule-I, Item 6 of the Court Fees Act, 1870.
6. Proof of payment of duty/fine/penalty etc. should be attached with the appeal memo.
7. While submitting the appeal, the Customs (Appeals) Rules, 1982 and the CESTAT (Procedure) Rules, 1982 should be adhered to in all respects.

**BRIEF FACTS OF THE CASE:-**

1. The facts and circumstances leading to issue of the SCN, in brief, are as under-

1.1 M/s.Trafigura India Pvt. Ltd., having their office at Survey No. 236/1&237, Village Mithi Rohar, Gandhidham (hereinafter referred to as "the importer") had imported goods declaring as 'Continuous Cast Copper Rods Nominal Dia 8mm' for which they had filed three warehouse Bills of Entry bearing No.5521264 dated 06.06.2016, No.5796775 dated 18.06.2016 and No.6104525 dated 25.07.2016. The subject goods were imported from overseas supplier, M/s.Trafigura PTE Ltd., 10 Collyer Quay, #29-00, Ocean Financial Center, Singapore by claiming the benefit under Notification No.152/2009-Cus dated 31.12.2009, as amended, vide Notification No. 60/2015-Cus dated 30.12.2015, by classifying the goods under Tariff Item "74071020". To claim the benefit under subject notification for concessional Basic Customs Duty @ 0.94%, they had alongwith the said Bills of Entry, furnished Preferential Certificate of Origin (COO) issued by "M/s.Taihan Electric wire Co. Ltd., 25F, G Square B.D. Hogue-Dong, Dongan-GU, Anyang-SI, GYEONGGI-DO, Korea" wherein the subject goods were declared as of South Korea origin.

1.2 Later on, the subject goods were got cleared by M/s.Polycab Wires P. Ltd., 74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 by way of filing three Ex-bond Bills of Entry bearing No.6254961 dated 05.08.2016, No.6149586 dated 27.07.2016 and No.6291393 dated 08.08.2016 claiming the benefit as stated hereinabove.

1.3 It appeared that the importer had mis-classified the goods 'Continuous Cast Copper Rods Nominal Dia 8mm' under Tariff Item "74071020" instead of Tariff Item "74081190". At the material time, under the subject notification, the exemption was not extended to the goods covered under Tariff Item "74081190" and the effective rate of Basic Customs Duty was 5%.

1.4 The Notification No.152/2009 dated 31.12.2009, as amended, vide Notification No.60/2015-Cus dated 30.12.2015 provides exemption of Customs Duty in respect of goods covered under specific Chapter Headings only. Whereas the scrutiny conducted in this regard revealed that the importer had, in connivance/collusion with supplier, obtained Preferential Certificate of Origin (COO) mentioning wrong chapter heading.

1.5 It also appeared that the HS Code in which the goods have been issued, the subject Preferential Certificate of Origin (COO) is 74071020. The Product Specific Rules mentioned in Annex 3-A of Chapter-3 of India Korea CEPA do not cover Tariff Item "74071020", which reads as-

***"Part I-General Interpretative Notes***

1. *The specific rule or specific set of rules that applies to particular heading or subheading is set out immediately adjacent to the heading or subheading.*
2. *The following definition will apply:*

- (a) *The Product Specific Rules in this Annex are structured on the basis of the HS, including its general interpretative Rules, section Notes and Chapter Notes;*
  - (b) *Chapter means a chapter of that HS*
  - (c) *Heading means the first four digits in the tariff classification number under the HS; and*
  - (d) *Subheading means the first six digits in the tariff classification number under the HS.*
3. *A requirement of a change in tariff classification applies only to non-originating materials.*
4. *Where a specific rule of origin is defined using the criterion of a change in tariff classification, and the rule is written to exclude tariff provision at the level of a chapter heading or subheading of the HS, each party shall construe the rule of origin to require that material clarified in those excluded provisions be originating for the good to qualify as originating.*

**Part II-Product Specific Rules**

...  
...  
...

**Chapter 74**

**Copper and Articles Thereof**

**7403.11**

*A change to subheading 7403.11 from any other heading.*

**74.04**

*A change to subheading 74.04 from any other heading.*

**7407.21**

*A change to subheading 7407.21 from any other heading, provided that there is a regional value content of not less than 25%.*

**7407.29**

*A change to subheading 7407.29 from any other heading, provided that there is a regional value content of not less than 25%.*

**7408.11-7408.19**

*A change to subheading 7408.11 through to 7408.19 from any other heading, except from heading 74.07.*

...  
...  
..."

1.6 Further, it is seen that the "Bars & Rods" & "Wire" have specific meaning as assigned to them under Note-1(d) & 1(f)ofChapter-74 of Schedule-I of the Customs Tariff Act'1975which states that -

**1(d) Bars and rods**

*Rolled, extruded, drawn or forged products, not in coils, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a*

*rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including "modified rectangular") cross-section exceeds one tenth of the width. The expression also covers cast or sintered products, of the same forms and dimensions, which have been subsequently worked after production (otherwise than by simple trimming or de-scaling), provided that they have not thereby assumed the character of articles or products of other headings.*

**1(f) Wire**

*Rolled, extruded or drawn products, in coils, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including "modified rectangular") cross-section exceeds one-tenth of the width.*

*In the case of heading 74.14, however, the term "wire" applies only to products, whether or not in coils, of any cross-sectional shape, of which no cross-sectional dimension exceeds 6 mm.*

1.7 It appeared that the importer has actually imported "Wires" in coil form which is appropriately classifiable under Tariff Item "74081190" and not under Tariff Item "74071020" as "Rods". The goods under Tariff Item "74081190" are not covered in the Free Trade agreement benefit. The detailed scrutiny of Packing List, Preferential Certificate of Origin (COO) and Certificate of Analysis, revealed that these documents speak that the goods are "in coils". Further, it appeared that the origin criteria is mentioned in the Preferential Certificate of Origin (COO) as "CTH", thus indicating that the Preferential Certificate of Origin (COO) has been issued under Product Specific Rule and not the General Rule. It is also seen that the HS Code in which the goods have been issued, the subject Preferential Certificate of Origin (COO) is 74071020, and since the Product Specific Rules mentioned in Annex 3-A of Chapter-3 of India Korea CEPA do not cover Tariff Item "74071020", therefore, Preferential Certificate of Origin (COO) appeared as invalid.

1.8 In view of the above and specifically Note-1(d) & 1(f) of Chapter-74 of Schedule-I of the Customs Tariff Act'1975, the department is of the view that the goods are correctly classifiable under Tariff Item "74081190" as "Wire" and not as claimed by the importer as 'Continuous Cast Copper Rods Nominal Dia 8mm' under Tariff Item "74071020" as "Rods", as the "Wire" in coil form were appropriately classifiable under Tariff Item "74081190" and therefore, they were not entitled for benefit of concessional rate of duty under FTA. Therefore, by mis-classifying the imported goods as "Continuous Cast Copper Rods Nominal Dia 8mm" under Tariff Item "74071020" as "Rods", the importer had wrongly availed the benefit of the subject notification.

1.9 It, therefore, appeared that the benefit of concessional rate of duty availed by M/s.Polycab Wires P. Ltd., Daman (Ex-bonder), under Notification No.152/2009 dated 31.12.2009, as amended vide Notification No. 60/2015-Cus dated 30.12.2015 for the goods covered vide above said three Ex-bond Bills of Entry was not available to them and was liable to be rejected and the differential duty involved in the cases covered under three Ex-bond Bills of Entry is recoverable by invoking the extended period of demand under Section 28(4) of the Customs Act'1962 with consequential penalties.

1.10 The Ex-bonder M/s.Polycab Wires P. Ltd., Daman was asked to Show Cause to the Principal Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji Temple, Kandla, Kutch as to why:-

- (i) The imported goods covered under Ex-Bond Bills of Entry No.6254961 dated 05.08.2016, No.6149586 dated 27.07.2016 and No.6291393 dated 08.08.2016 should not be reclassified to Customs Tariff Item "74081190" and the said Ex-bond Bills of Entry should not be reassessed denying the benefit of Notification No.152/2009-Cus dated 31.12.2009 as amended vide Notification No.60/2015-Cus dated 30.12.2015.
- (ii) The differential duty amounting to Rs.51,62,682/- (Rupees Fifty One Lakh Sixty Two Thousand Six Hundred Eighty Two Only) should not be demanded and recovered from them under Section 28(4) of the Customs Act'1962 in respect of three Ex bond Bills of Entry by denying the benefits of concessional BCD claimed under Notification No.152/2009-Cus dated 31.12.2009 as amended vide Notification No.60/2015-Cus dated 30.12.2015.
- (iii) The applicable interest should not be demanded and recovered under Section-28AA of the Customs Act'1962 in respect of duty demand as mentioned in Para (i) above.
- (iv) The goods valued at Rs.10,55,17,935/-, covered in the said three Ex bond Bills of Entry should not be held liable for confiscation under Section-111(m) & (o) of Customs Act'1962.
- (v) Penalty should not be imposed on them under Section-114AA of the Customs Act'1962 for act of omission and commission as discussed above.
- (vi) Penalty should not be imposed on them under Section-114A of the Customs Act'1962, as mentioned in paras above.
- (vii) Penalty should not be imposed on them under Section-112(a) of the Customs Act'1962 for act of omission and commission as discussed above.

1.11 And the importer M/s.Trafigura India Pvt. Ltd. was asked to Show Cause to the Principal Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji temple, Kandla, Kutch as to why:-

- (i) The imported goods covered under Warehouse Bills of Entry No.5521264 dated 06.06.2016, No.5796775 dated 18.06.2016 and No.6104525 dated 25.07.2016 should not be reclassified under Customs Tariff Item 74081190 and the said warehouse Bills of Entry should not be reassessed by denying the benefit of Notification No.152/2009-Cusdated 31.12.2009, as amended, vide Notification No.60/2015-Cusdated 30.12.2015;
- (ii) Penalty should not be imposed upon them under Section-114AA of the Customs Act'1962 for act of omission and commission as discussed above;
- (iii) Penalty should not be imposed upon them under Section-112(a) of the Customs Act'1962 for act of omission and commission as discussed above.

### **RECORD OF PERSONAL HEARING**

2. A personal hearing was granted to both, the noticees i.e. importer and ex-bonder on 25.04.2019, 04.06.2019, 02.07.2019 & 18.07.2019.
3. Shri Jitendra Motwani, Advocate appeared for the hearing on behalf of M/s.Polycab Wires Pvt. Ltd. & M/s.Trafigura India Pvt. Ltd. on 18.07.2019.
4. Also Shri Chetan Deshmukh, Head Exim of Polycab India Ltd. appeared on behalf of M/s.Polycab Wires Pvt. Ltd. and Shri Ishwar Haswani, Finance Controller appeared on behalf of M/s.Trafigura India Pvt. Ltd.
5. Shri Jitendra Motwani, Advocate has submitted a written reply in respect of these noticees on 18.07.2019 i.e. during hearing only. He reiterated the contents therein and referred to the case laws referred in the written reply. The submissions made, *inter-alia*, are as under –

#### **5.1 M/s.Trafigura India Pvt. Ltd. (Importer)**

5.1.1 The importer M/s.Trafigura India Pvt. Ltd. in their submission stated that they have only filed the warehouse Bills of Entry and no exemption from payment of customs duty is claimed as there was no duty liability on them; the goods had been cleared for home consumption by the ex-bonder M/s.Polycab Wires P. Ltd. who are the importer for the subject goods and exemption has been availed by them.

5.1.2 To support their claim that they are not importer, they resort to the definition of import under the Customs Act'1962 and have relied on Hon'ble Supreme Court's judgment in case of Hotel Ashoka Vs. Assistant Commissioner of Commercial Taxes [2012(276)ELT-433(SC)].

5.1.3 They have further submitted that in terms of harmonious reading of Section-46, 59, 68 & 15 of Customs Act'1962, taxable event reaches when the ex-bond Bill of Entry is filed and not when Bill of Entry for Warehouse is filed, they have relied on Hon'ble Supreme Court's judgment in case of Garden Silk Mills

Ltd. Vs. UOI [1999 (133) ELT-358 (SC)] and UOI Vs. Apar Pvt. Ltd. [1999 (112) ELT-3 (SC)].

5.1.4 In terms of Section-59 of Customs Act'1962, the ex-bonder is to be considered as importer and not the warehouse, for which they have relied on various judgments in case of Nalin Z. Mehta Vs. CC, Ahmedabad [2014 (303) ELT-367 (Tri-Ahmd)], Bimal Kumar Mehta Vs. CC, Mumbai [2011 (270) ELT-280 (Tri-Mum)], Inderjit Nagpal Vs. Commissioner of Customs & C.Ex., Goa [2017 (357) ELT-1029 (Tri-Mum)], Sitaram Rajgarhia Vs. Collector of Customs, New Delhi [1997 (90) ELT-472 ( Tribunal)] and Commissioner of Customs, Jamnagar Vs. Dev Krupa Ship Breaking [2007 (210) ELT-591 (Tri-Mum)].

5.1.5 They have submitted that the Certificate of Origin has been obtained by submitting the data by the Taihan Electric Wire Co. Ltd. and no role has been played by them in obtaining the said certificate, and till the Certificate of Origin is proved as false and incorrect, they cannot be held responsible and no penalty under Section-114AA can be imposed upon them.

5.1.6 They have submitted that the validity of Certificate of Origin cannot be questioned by Customs Authorities and department cannot sit as adjudicator over the Certificate of Origin given by the designated authorities under India Korea, CEPA. In this regard, they have relied upon the decision of Hon'ble Tribunal in case of BDB Exports Pvt. Ltd. Vs. Commissioner of Customs (Prev), Kolkata [2017 (347) ELT-662 (Tri-Kolkatta)]. And if there is any doubt about the accuracy/genuineness of the Certificate of Origin, then the verification process as per Article-4.12 of CEPA be undertaken by the appropriate authority and reliance has been placed on Bullion and Jewellers Association Vs. UOI [2016 (335) ELT-639 (Del)].

5.1.7 They added that that Certificate of Origin given by the concerned contracting state cannot be dishonoured/rejected by the customs department unless said certificate is cancelled by the issuing authority. Reliance placed on judgments in case of BDB Exports Pvt. Ltd. Vs. Commissioner of Customs (Prev), Kolkata [2017 (347) ELT-662 (Tri-Kolkatta)]. Further, the doubt regarding the authenticity/genuineness of the Certificate of Origin should have been objected at the time of import and cannot be reassessed after some time and reliance has been placed on judgments in case of Commissioner of Customs (Import) Vs. Wings Electronics [2015 63 Taxmann.com-356 (SC)].

5.1.8 Since Certificate of Origin is issued by the concerned statutory authority in Korea, the foreign exporter's declaration that the goods are of Korea Origin, is correct, and therefore, no penalty under Section-114AA of Customs Act'1962 is imposable on them.

5.1.9 They have submitted product brochures of various companies that show that the subject goods are being sold in coil form only, and therefore, the imported goods merely because in coil form, cannot be termed as wire and cannot be classified under Tariff Item "74081190" as "Wire".

5.1.10 They have submitted that the onus or burden to show that a product falls within a particular tariff item is always on the revenue. In this regard, they have placed reliance on judgments in case of Collector of Central Excise Vs. Culcutta Steel Industries & Ors. [1989 (39) ELT-175 (SC)], Hindustan Ferodo Ltd. Vs. CCE, Bombay [1997 (89) ELT-16 (SC)], Nanya Imports & Exports Enterprises Vs. CC, Chennai [2006 (197) ELT-154 (SC)] and HPL Chemicals Ltd. Vs. CCE, Chandigarh [2006 (197) ELT-324 (SC)].

5.1.11 As regards the imposition of penalty under Section-112(a) of Customs Act'1962, the importer has referred to Section-112(a) and Section-111(m) & (o), that there is no mis-declaration on their part and no exemption has been claimed by them and placed reliance on judgments in case of Commissioner of Customs Vs. Rajnarayan Jwalaprasad [2014 (306) ELT-592 (Guj)] and thus stated that no penalty under Section-112(a) of Customs Act'1962 is imposable on them.

## **5.2 M/s.Polycab Wires Pvt. Ltd. (Ex-Bonder)**

5.2.1 The Ex-bonder M/s.Polycab Wires Pvt. Ltd. have also in their submission stated that the goods in question are rightly classified under Tariff heading "74071020", and therefore, the imported goods merely because in coil form cannot be the ground for rejection of classification and not be termed as wire and cannot be classified under Tariff Item "74081190" as "Wire". To support their claim, they have also submitted product brochures of various companies that show that the subject goods are being sold in coil form only for ease of transport, and technical specification in IS 12444-1988 issued by the Bureau of Indian Standards.

5.2.2 They have also submitted that the onus or burden to show that a product falls within a particular tariff item is always on the revenue. In this regard they have placed reliance on judgments in case of Collector of Central Excise Vs. Culcutta Steel Industries & Ors. [1989 (39) ELT-175 (SC)], Hindustan Ferodo Ltd. Vs. CCE, Bombay [1997 (89) ELT-16 (SC)], Nanya Imports & Exports Enterprises Vs. CC, Chennai [2006 (197) ELT-154 (SC)] and HPL Chemicals Ltd. Vs. CCE, Chandigarh [2006 (197) ELT-324 (SC)]. Also reliance is placed on judgments in cases of Tamilnadu Newsprint & Papers Ltd. Vs. Commissioner of Customs, Tuticorin [2010 (253) ELT-153 (Tri-Chennai)] and D-Link India Ltd. Vs. Commissioner of Central Excise, Goa [2018 (9) GSTL-388 (Tri-Mumbai)].

5.2.3 They have also submitted that the validity of Certificate of Origin cannot be questioned by Customs Authorities and department cannot sit as adjudicator over the Certificate of Origin given by the designated authorities under India Korea, CEPA. In this regard, they have relied upon the decision of Hon'ble Tribunal in case of BDB Exports Pvt. Ltd. Vs. Commissioner of Customs (Prev), Kolkata [2017 (347) ELT-662 (Tri-Kolkatta)]. And if there is any doubt about the accuracy/genuineness of the Certificate of Origin, then the verification process as per Article-4.12 of CEPA be undertaken by the appropriate authority and reliance is placed on Bullion and Jewellers Association Vs. UOI [2016 (335) ELT-639 (Del)].



5.2.4 They also added that the Certificate of Origin given by the concerned contracting state cannot be dishonoured/rejected by the customs department unless said certificate is cancelled by the issuing authority. Reliance has been placed on judgment in case of BDB Exports Pvt. Ltd. Vs. Commissioner of Customs (Prev), Kolkata [2017 (347) ELT-662 (Tri-Kolkatta)]. Further, they added that if Certificate of Origin is valid, assessing authorities in India cannot deny the benefit of exemption notification. Reliance is placed on R.S. Industries (Rolling Mills) Ltd. Vs. Commissioner of C. Ex., Jaipur-I [2010 (359) ELT-698 (Tri-Del)] & [2007 (210) ELT-648 (SC)]. It is also submitted that the doubt regarding the authenticity/genuineness of the Certificate of Origin should have been objected at the time of import and cannot be reassessed after some time and reliance has been placed on judgments in case of Commissioner of Customs (Import) Vs. Wings Electronics [2015 63 Taxmann.com-356 (SC)].

5.2.5 They have also submitted that without any check about the genuineness/authenticity of Certificate of Origin, any benefit available cannot be denied. They have relied on judgment in case of Mahadev Metaliks Pvt. Ltd. Vs. UOI [2016 (331) ELT-424 (AP)] & Nobel Import Pvt. Ltd. Vs. UOI [2017 (349) ELT-44 (AP)].

5.2.6 As regards the invocation of the extended period, they have submitted that in order to constitute wilful suppression, it should be established that something was in possession or knowledge of the assessee, reason to belief to the department, and deliberate withholding of certain things by the assessee. They have also submitted that the department did not raise any objection in respect of genuineness of the Certificate of Origin. The documents required to clear the goods to avail the benefit, if any, were available with the department at the time of clearance of goods in question. They relied on the judgment in case of Padmini Products vs. CCE, [1989 (43) ELT-195 (SC)], CCE Vs. Chemphar Drugs & Liniments [1989 (40) ELT-276 (SC)]& CC, Culcutta Vs. GC Jain [2011 (269) ELT-307 (SC)].

5.2.7 They have also added that to hold the case of collusion/wilful mis-statement, the department has to prove that the payment of duty was intentionally evaded. In this regard, they have placed reliance on judgements in case of Aban Lloyd Chiles offshore Ltd. Vs. Commissioner of Customs [2006 (200) ELT-370 (SC)], Cosmic Due Chemical Vs. Collector of Central Excise, Bombay [1995 (75) ELT-721 (SC)], Continental Foundation Jt. Venture Vs. Commissioner of Central Excise, Chandigarh [2007 (216) ELT-177 (SC)]& Rainbow Industries Vs. CCE [1994 (74) ELT-3 (SC)].

5.2.8 As regards the confiscation of goods, they referred to Section-111(m) & (o), that there is no mis-declaration on their part and exemption has been rightly claimed by them and placed reliance on judgment in case of Beekay Engineering Corporation Vs. Commissioner of Customs [2010 (262) ELT-1126 (Tri-Mumbai)], Sutures India Pvt. Ltd. Vs. Commissioner of Customs, Bangalore [2009 (245) ELT-596 (Tri-Bang)] ,Commissioner Vs. Sutures India Pvt. Ltd. [2010 (255) ELT-A85 (SC)].They have also added that merely by making a claim to particular Chapter heading will not make the goods liable for confiscation and

reliance in this regard has been placed on judgment in case of Northern Plastic Ltd. Vs. Collector of Customs [1998 (101) ELT-549 (SC)].

5.2.9 They have pleaded that since the goods have already been cleared and not available for confiscation, it cannot be the subject matter of confiscation or redemption fine and thereby no penalty under provisions of Section-112(a) of Customs Act'1962 is imposable. In this regard, reliance is placed on various judgments, such as, Airport Authority of India Vs. CC(Exports-Seaport), Chennai [2016 (334) ELT-529 (Tri-Chennai)], New Drug & Chemicals Co. vs. CC (EP) [2016 (331) ELT-600 (Tri-Mumbai)], Skoda Auto India Pvt. Ltd. Vs. CC (Import), Nhava Sheva [2014 (313) ELT-600 (Tri-Mumbai)], CC (Import), Mumbai Vs. Finess Creation Inc [2009 (248) ELT-122 (Bom)], Shreeji Shipping Ltd. Vs. Commissioner of Customs, Kandla [2014 (302) ELT-139 (Tri-Ahmd)]

5.2.10 As regards the imposition of penalty under Section-112(a) of Customs Act'1962, they have submitted that the issue of classification of goods is one of the interpretations of statute and they were under bonafide belief that the classification is appropriate, and therefore, no penalty under Section-112(a) of Customs Act'1962 is imposable on them. In support of their submission, they placed reliance on judgments in case of Kuwait Airways Corporation Vs. CC, Mumbai [2005-TIOL-264-CESTAT-MUM], Akbar Badruddib Jiwani Vs. Collector of Customs [1990 (47) ELT-161 (SC)], Extrusion Vs. Collector of Customs, Cal [1994 (70) ELT-52 (Cal)], Luxor Pen Company Vs. Collector of Customs [1992 (57) ELT-323], Peejay Woollens Pvt. Ltd. Vs. Collector of Customs, Bombay-II [1997 (95) ELT-364 (Tri-Mumbai)], NB Killick Air Courier & Forwarders Ltd. Vs. Collector of Customs [1998 (97) ELT-182], HK Shipping Services Pvt. Ltd. [2000 (121) ELT-828 (Tribunal)], and GL Gupta Vs. DN Mehta [AIR-1971-SC-2162].

5.2.11 As regards the imposition of penalty under Section-114A of Customs Act'1962, they submitted that in view of their submission, no duty liability is tenable, and so no penalty under Section-114A is arising and placed reliance on judgments in case of Commissioner of Central Excise Vs. HMM Ltd. [1995 (76) ELT-497 (SC)], Commissioner of Central Excise, Aurangabad Vs. Balkrishna Industries [2006 (201) ELT-325(SC)].

5.2.12 They have also submitted that penalty under Section 114A & 114AA cannot be imposed in cases where extended period of limitation is not imposable or where there is no wilful suppression of facts & misstatement for which reliance is placed on judgment in case of UOI Vs. Rajasthan Spinning & Weaving Mills [2009 (238) ELT-3 (SC)], CC Vs. Jai Balaji Industries Ltd. [2018 (361) ELT-429 (AP)] & CC Vs. Tiong Woon Project & Contracting (I) Pvt. Ltd. [2017 (356) ELT-138 (Tri-Mumbai)].

5.2.13 Further, they have submitted that penalty cannot be imposable if anything acted in good faith and in bonafide belief. In this regard, they have relied upon the judgments in case of Hindustan Steel Ltd. Vs. State of Orissa 91978 (2) ELT-J159 (SC)], Emilio Ruiz Berdejo Vs. DCIT [2012 (26) taxmann.com 24 (Pune Tri)], CCE Vs. Vetril Electronics Pvt. Ltd. [2012 (281) ELT-222 (Kar)],

Essar Telecom Infrastructure Pvt. Ltd. Vs. UOI [2012 (275) ELT-167 (Kar)] & CCE Vs. ITC Ltd. [2010 (257) ELT-514 (Kar)].

5.2.14 As regards the proposal of demand of interest, it is argued that since the demand is not sustainable, there is no question of demand of interest and needs to be set aside and they referred to and relied upon the decision of Hon'ble Supreme Court in case of Prathibha Processors Vs. UOI [1996 (88) ELT 12 (SC)].

## FINDINGS

6. I have carefully gone through the Show Cause Notice dated 14.02.2019, relied upon documents to the show cause notice, defence replies filed by the noticees, oral submissions made during the course of personal hearing and the available records.

7. In this case, I find that the dispute is over the classification of goods. The issue to be decided is whether the goods viz. "*Continuous Cast Copper Rods Nominal Dia 8mm*" imported and cleared, are classifiable under Tariff Item "74071020" as "Rods" or "74081190" as "Wire" of the Customs Tariff Act'1975. Consequently, upon rejection of the classification and thereby denial of the benefit of Notification No.152/2009-Cus dated 31.12.2009 as amended vide Notification No.60/2015-Cus dated 30.12.2015, proposals of demand of duty with interest, confiscation and penalty are to be decided.

8.1 The importer M/s.Trafigura India Pvt. Ltd., in their submissions as stated above at Paras 5.1.1 to 5.1.4, have mainly argued that they are not liable for any duty as they are not importer, they have just warehoused goods by filing the In-to Bond Bills of Entry. Whoever has filed the Ex-bond Bills of Entry, is to be considered as importer and duty is to be demanded from them only.

8.2 The importer M/s.Trafigura India Pvt. Ltd. in their submissions as stated above at Paras 5.1.9 to 5.1.11, have mainly argued that the goods in question is rod and product brochures of various companies show that the subject goods are being sold in coil form only. Therefore, the imported goods being merely in coil form, cannot be termed as wire and cannot be classified under Tariff Item "74081190" as "Wire" and onus or burden to show that a product falls within a particular tariff item is always on the revenue.

8.3 The ex-bonder M/s.Polycab Wires Pvt. Ltd. have also in their submissions as stated above at Paras 5.2.1 to 5.2.2, mainly argued that the goods in question is rod and product brochures of various companies show that the subject goods are being sold in coil form only. Therefore, the imported goods being merely in coil form, cannot be termed as wire and cannot be classified under Tariff Item "74081190" as "Wire" and onus or burden to show that a product falls within a particular tariff item is always on the revenue.

8.4 I find that the duty is demanded from the Ex-Bonder only and there is no proposal in the show cause notice to demand any duty from M/s.Trafigura India Pvt. Ltd. I find that in the show cause notice, in respect of their part, it is proposed to reclassify Customs Tariff Item "74081190" instead of "74071020" in respect of the goods imported by them for which In-to Bond Bills of Entry have been filed by them.

8.5 The definition of 'assessment' includes 're-assessment', under clause-2 specifically defines giving it a specific meaning as determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, with reference to classification, value, exemption and other parameters of levy of duty.

8.6 As regard to onus or burden to show that a product falls within a particular tariff item, in the current era of trust based self-assessment system and selective examination subject to verification in the form of post clearance audit by customs officer, it is the responsibility of the importer and/or ex-bonder to determine the correct classification of goods including claim for any exemption benefit and file clearance documents. If self-assessment is found to be not correct at later stage, Customs authority has power to re-assess the documents. In this case, they claimed that classified the goods in question were classified on the basis of HS code shown in Certificate of Origin certificate provided by foreign supplier of the goods which came was found to be incorrect by the department at the post clearance audit stage. In this regard, I find that Hon'ble Supreme Court in case of Hotel Leela Venture Ltd. Vs. CC (General), Mumbai [2009 (234) ELT-389 (SC)] held that the burden is on the concerned party to establish eligibility to the exemption notification.

8.7 As regards classification decided at the time of warehousing of goods intended to import, can be reclassified at the time of assessment of Bill of Entry for Home Consumption. I find that in the case of VBC Industries Ltd. Vs. CC, Chennai [2003 (156) ELT-872 (Tri)] the Hon'ble Tribunal held that classification determined on into-bond bill of entry at the time of warehousing can be reassessed in case of mis-declaration. I find that the importer himself assessed the chapter heading based on the certain documents, which is not correct in the Bills of Entry filed by them.

8.8 I find that Hon'ble Supreme Court in case of OK Play (India) Ltd. Vs. CCE, Delhi-III, Gurgaon [2005 (180) ELT-300 (SC)] held that for determination of classification of goods, three main parameters are to be taken into account; first HSN alongwith Explanatory Notes, second equal importance to be given to Rules of Interpretation of the Tariff and third Functional utility, design, shape and predominant usage. These aids and assistance are more important than names used in trade or in common parlance.

8.9 I also find that in case of Pandi Devi Oil Industry Vs. Commissioner of Customs, Trichy [2016 (334) ELT-566 (Tri-Chennai)] the Hon'ble Tribunal held that it is settled law that for classification of any imported goods, the principles and guidelines laid out in General Interpretative Rules for classification should be followed and the description given in chapter sub-heading and chapter notes, section note should be the criteria.

8.10 I further find that for deciding the issue of classification of goods, one has to refer to the Customs Tariff and chapter and heading notes etc. It is pertinent to note that Chapter Heading 7407 reads as "Copper bars, rods and profiles" whereas Chapter Heading 7408 reads as "Copper wire". In this context, I find that the Chapter Notes-1(d) and (f) under Chapter-74 are relevant which specifically mention and meaning has been assigned that bars and rods are that which is not in coils and wire which is in coils. For sake of clarity, the extract of said Chapter Note is reproduced below:

**1(d) Bars and rods**

*Rolled, extruded, drawn or forged products, **not in coils**, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including "modified rectangular") cross-section exceeds one tenth of the width. The expression also covers cast or sintered products, of the same forms and dimensions, which have been subsequently worked after production (otherwise than by simple trimming or de-scaling), provided that they have not thereby assumed the character of articles or products of other headings.*

**1(f) Wire**

*Rolled, extruded or drawn products, **in coils**, which have a uniform solid cross-section along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons (including "flattened circles" and "modified rectangles", of which two opposite sides are convex arcs, the other two sides being straight, of equal length and parallel). Products with a rectangular (including square), triangular or polygonal cross-section may have corners rounded along their whole length. The thickness of such products which have a rectangular (including "modified rectangular") cross-section exceeds one-tenth of the width.*

*In the case of heading 74.14, however, the term "wire" applies only to products, whether or not in coils, of any cross-sectional shape, of which no cross-sectional dimension exceeds 6 mm.*

8.11 Thus, the goods to be imported are to be classified according to the Tariff item number mentioned against them in the Customs Tariff. Therefore, the decisions relied upon by the importer do not help their cause as it specifies who is the importer and from whom the duty is to be recovered, whereas in this case, the dispute is relating to classification.

8.12 Thus, considering altogether, I am of the opinion that since the goods imported are in coil form and the same are also mentioned in import related documents i.e. foreign suppliers invoice, Certificate of Origin etc. the said goods are correctly classifiable under Tariff item 74081190.

9.1 The importer ex-bonder M/s.Polycab Wires Pvt. Ltd. as well as M/s.Trafigura India Pvt. Ltd. in their submissions have mainly argued that Certificate of Origin given by the concerned contracting state cannot be dishonoured/rejected by the customs department; authenticity/genuineness of the Certificate of Origin should have been objected at the time of import and not at the later time and if there is any doubt about the accuracy/genuineness of the Certificate of Origin, then the verification process as per Article-4.12 of CEPA be undertaken by the appropriate authority; and no role played by them in obtaining the said certificate, and till the Certificate of Origin is proved as false

and incorrect, they cannot be held responsible and no penalty under Section-114AA can be imposed upon them.

9.2 I find that in the show cause notice, penalty under Section-114AA has been proposed on both the noticees for submission of incorrect/false declaration to the customs at the time of import& subsequent clearance. As discussed at Paras 8.1 to 8.12, the subject goods are classifiable under Tariff Item "74081190".However, they have knowingly classified the subject goods under Tariff Item "74071020" instead of Tariff Item "74081190" for the sole purpose to avail the undue benefit of the exemption notificationNo.152/2009-Cus dated 31.12.2009, as amended vide Notification No.60/2015-Cus dated 30.12.2015, thereby evaded the payment of customs duty leviable on the goods imported.

9.3 As stated hereinbefore, the importer as well as ex-bonder are working under the self-assessment and selective examination system of control, and it is obligatory on their part to determine the correct classification of goods including claim for any exemption benefit, whereas they have classified the goods in question on the basis of incorrect material supplied by foreign supplier of the goods and filed Bills of Entry accordingly despite their obligatory responsibility.

9.5 I find that the decisions relied upon by the importer do not help their cause as these decisions are delivered, among other thing, in the matter that the goods are not imported from the specified country; in one case doubt raised on genuineness of Certificate of Origin whereas in another case no allegation that the certificate of origin is forged. Whereas in this case, the dispute is relating to mis-classification of goods and no question raised on genuineness of Certificate of Origin.

9.6 I find that in order to avail the undue benefit of exemption Notification No.152/2009-Cus dated 31.12.2009, as amended vide Notification No.60/2015-Cus dated 30.12.2015, the importer as well as ex-bonder had mis-declared the facts in the Bills of Entry and thereby violated the provisions of Section-17 of the Customs Act'1962. The above act of omission and commission, use of incorrect material for classification of the goods to undue avail the benefit of exemption notification, render themselves liable for penalty under the provisions of Section-114AA of the Customs Act'1962.

10.1. The ex-bonder M/s.Polycab Wires Pvt. Ltd. have in their submission as stated above at Paras 5.2.6 & 5.2.7, mainly argued that in order to constitute wilful suppression, it should be established that something was in possession or knowledge of the assessee, reason to belief to the department, and deliberate withholding of certain things by the assessee to hold a case of collusion/willful mis-statement, the department has to prove that the payment of duty was intentionally evaded.

10.2 As discussed hereinbefore, I find that neither the importer M/s.Trafigura India Pvt. Ltd., nor the ex-bonder M/s.Polycab Wires Pvt. Ltd. reveal the correct and complete information about the goods and had mis-classified the goods in question in the Bills of Entry filed with an intention to evade customs duty by way of availing the undue benefit of exemption notification. Further, I find that neither importer M/s.Trafigura India Pvt. Ltd., nor the ex-bonder M/s.Polycab Wires Pvt. Ltd. have challenged the classification on merit as the same is consistent with the provisions of the Customs Tariff Act'1975.

Even after the correct classification was revealed to them by way of issuance of show cause notice which categorically mention that what the Chapter Notes says and also what Chapter head says, they continued to contest the matter on the basis of Certificate of Origin and not challenged the classification on merit. It is thus clear that there was an intention to clear the goods classifying under such Tariff item so that benefit of exemption notification can be availed. This amounts to nothing but suppression of facts with an intention to evade payment of duty. I find that the Appellate Tribunal in case of A.S. Impex Ltd. Vs. Commissioner of Central Excise, Chandigarh [2001 (127) ELT-442 (Tri-Del)] held that extended period of limitation is invokable when exemption is availed without observing the statutory condition. Thus, I find that the extended period under Section-28(4) of the Customs Act'1962 would be rightly applicable in this case and penalty under Section-114A is imposable upon them.

11.1 The ex-bonder M/s.Polycab Wires Pvt. Ltd., in their submissions as stated above at Paras 5.2.8 to 5.2.10, have mainly argued that there is no mis-declaration on their part and exemption has been rightly claimed by them, and so the goods are not liable for confiscation under Section-111(m) & (o) of Customs Act'1962; that issue of classification of goods is one of the interpretation of statute and they were under bonafide belief that the classification is appropriate, and therefore, no penalty under Section-112(a) of Customs Act'1962 is imposable on them.

11.2 Confiscation of goods in terms of Section-111(m) & (o) of Customs Act'1962 is invited when any goods do not correspond in respect of value or in any other particular with the entry made under the Act and when any goods exempted, subject to any condition, from duty in respect of which the condition is observed.

11.3 I reiterate that since the importers are working under the self-assessment and selective examination system of control, it is obligatory on their part to determine the correct classification of goods including claim for any exemption benefit, whereas they have classified the goods in question on the basis of incorrect material supplied by foreign supplier of the goods and filed Bills of Entry accordingly. I find that Hon'ble Supreme Court in case of Hotel Leela Venture Ltd. Vs. CC (General), Mumbai [2009 (234) ELT-389 (SC)] held that the burden is on the concerned to establish eligibility to the exemption notification by doing correct classification of the goods. In this case, the importer has mis-classified the goods to avail undue benefit of the exemption notification. Had they classified the goods under the correct Chapter Head, they would have to pay appropriate customs duty. Therefore, their omission or commission has rendered the impugned goods liable for confiscation. Penalty under Section-112 is corollary to confiscation under Section-111. Their argument for non-imposition of penalty under Section-112 is not sustainable. However, I find that when penalty under Section-114A *ibid* is imposable upon them, simultaneously penalty under Section-112 cannot be imposed in terms of the fifth proviso to Section-114A.

12.1 As regards the proposal of demand of interest, the ex-bonder M/s.Polycab Wires Pvt. Ltd. have in their submission argued that since the demand is not sustainable, there is no question of demand of interest under Section-28AA of Customs Act'1962 and needs to be set aside.

12.2 I reiterate that it is found that the goods have been imported under incorrect classification and the same, as discussed hereinbefore, is required to be reclassified by denying the benefit of exemption notification, the demand of customs duty arises, interest is liable to be recovered from the importer. Therefore, the decisions relied upon by the importer do not help their cause. As discussed in Para-10.2, the assessee has chosen not to pay duty, and thus in terms of the provisions of Section-28AA of Customs Act'1962, they are necessarily required to pay duty demand alongwith applicable interest thereon. In this regard, I find that the Hon'ble Bombay High Court in case of M.J. Exports Pvt. Ltd. Vs. Union of India, held that the expression "fails to pay such duty" in the context of Section 28AA, in their opinion would mean unable to pay such duty or choose not to pay the duty. The reason for not paying the duty may be many and varied. The reason is not material nor the intention.

10. In view of the above, I pass the following order:

### ORDER

- (i) I reject the classification of the goods imported under CTH "74071020" and warehoused under Bills of Entry No.5521264 dated 06.06.2016, No.5796775 dated 18.06.2016 and No.6104525 dated 25.07.2016 filed by M/s.Trafigura India Pvt. Ltd., having their office at Survey No. 236/1&237, Village Mithi Rohar, Gandhidham and also reject the classification of the warehoused goods imported under CTH "74071020" and cleared under Ex-Bond Bills of Entry No.6254961 dated 05.08.2016, No.6149586 dated 27.07.2016 and No.6291393 dated 08.08.2016 filed by M/s.Polycab Wires P. Ltd.,74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 and order to classify the subject goods under CTH "74081190" of Customs Tariff Act'1975 and to assess the subject In-to Bills of Entry and Ex-Bond Bills of Entry accordingly;
- (ii) I deny the benefit of exemption of Notification No.152/2009 dated 31.12.2009 as amended vide Notification No.60/2015-Cus dated 30.12.2015 which was availed by M/s.Polycab Wires P. Ltd.,74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 under Ex-Bond Bills of Entry No.6254961 dated 05.08.2016, No.6149586 dated 27.07.2016 and No.6291393 dated 08.08.2016 and order to recover Customs duty of Rs.51,62,682/- (Rs. Fifty one lakh sixty two thousand six hundred eighty two only) from M/s.Polycab Wires P. Ltd.,74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 under Section-28(4) of the Customs Act'1962 alongwith interest thereon under Section-28AA ibid;
- (iii) I impose penalty of Rs.51,62,682/- (Rs. Fifty one lakh sixty two thousand six hundred eighty two only) with interest on M/s.Polycab Wires P. Ltd.,74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 under Section-114A of the Customs Act'1962. However, I give an option, under proviso



to Section-114A of the Customs Act'1962, to pay 25% of the amount of total penalty imposed, subject to payment of total amount of duty confirmed at (ii) above, interest confirmed at (ii) above and the amount of 25% of penalty within 30 days of receipt of this order;

- (iv) I hold the goods valued at Rs.10,55,17,935/- (Rs. Ten crore fifty five lakh seventeen thousand nine hundred thirty five only) liable for confiscation under Section-111(m) & (o) of the Customs Act'1962.However, as the goods are not physically available, I do not impose redemption fine under Section-125 of the Customs Act'1962;
- (v) I impose penalty of Rs.5,00,000/- (Rs.Five lakh only) on M/s.Trafigura India Pvt. Ltd., having their office at Survey No. 236/1&237, Village Mithi Rohar, Gandhidham under Section-112(a) of the Customs Act'1962;
- (vi) I impose penalty of Rs.5,00,000/- (Rs.Five lakh only) on M/s.Polycab Wires P. Ltd.,74/7 to 11,38/1-6,41/4-9,42/1-2,43/1-3,44/1-3,45/1-2,52/1-2,53/1-3-4, Daman Industrial Estate, Kadaiya, Daman-396210 under Section-114AA of the Customs Act'1962, and
- (vii) I impose penalty of Rs.5,00,000/- (Rs.Five lakh only) on M/s.Trafigura India Pvt. Ltd., having their office at Survey No. 236/1&237, Village Mithi Rohar, Gandhidham under Section-114AA of the Customs Act'1962.



(Sanjay Kumar Agarwal)  
Principal Commissioner,  
Custom House, Kandla

**BY RPAD/SPEED POST**

F.No.S/10-76/Adj/Commr/TIPL/2018-19.

Kandla, Date:30.07.2019.

To

- (1) M/s Polycab Wires P. Ltd.,  
74/7 to 11,38/1-6,41/4-9,  
42/1-2,43/1-3,44/1-3,  
45/1-2,52/1-2,53/1-3-4,  
Daman Indl. Estate, Kadaiya,  
Daman-396210
- (2) M/s Trafigura India Pvt. Ltd.,  
Survey No. 236/1&237,  
Village Mithi Rohar,  
Gandhidham



**Copy to:**

- (1) The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad.  
(2) The Deputy/Assistant Commissioner (SIIB), Customs House, Kandla.  
(3) The Deputy/Assistant Commissioner (Recovery), Customs House, Kandla.  
(4) The Deputy/Assistant Commissioner (Group-IV), Customs House, Kandla.  
(5) The Deputy/Assistant Commissioner (EDI Section), Customs House, Kandla for uploading in the Kandla Commissionerate's website.  
(6) Guard file.