सीमा शुल्क आयुक्त का कार्यालय,
नवीन सीमा शुल्क भवन, नया कांडला
OFFICE OF THE COMMISSIONER OF CUSTOMS,
NEW CUSTOM HOUSE, NEW KANDLA-370 210 (GUJARAT)
Phone No: 02836-271468/469, Fax No. : 02836-271467.

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E	Date of order	29.05.2020
F	Date of issue	29.05.2020
G	SCN No. & Date	SCN F.No. S/20-22/Thematic audit/Tin & Copper/Gr. IV/2018-19 dated 23.10.2018
H	Noticee(s)/Co-Noticee(s)	1. M/s J. Poonamchand & Sons, K-2, Munisuvrat Compound, Rehnal Village, Bhiwandi, Maharastra-421302 2. M/s Asia Metals & Ferro Alloys, 44, Manak House, 2nd Floor, C.P Tank Road, Mumbai-400004 3. M/s Sri Bhavani Metals P. Ltd., D-152, Phase-III IDA, Jeedimetla, Hyderabad-500055 4. M/s Titra Trading P. Ltd., Survey No. 236/1 & 237, Warehouse No. k 05 & 06(B), Village Mithi Roha, Gandhidham

1. यह अपील आदेश संबन्धित को नि प्रदान शुल्क: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 (1) के अंतर्गत प्रपत्र सीए- 3 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 (1) (a) of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. -3 to:

"सीमा शुल्क आयुक्त (अपील), कांडला
मंजिल वीं 7, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड़, अहमदाबाद 380 009"
"THE COMMISSIONER OF CUSTOMS (APPEALS), KANDLA
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 2/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए-
Appeal should be accompanied by a fee of Rs. 2/- under Court Fee Act it must accompanied by –
(i) उक्त अपील की एक प्रति और
A copy of the appeal, and

(ii) इस आदेश की यह प्रति अथवा कोई अन्य प्रति जिस पर अनुसूची-1 के अनुसार न्यायालय शुल्क अधिनियम-1870 के मद सं॰-6 में निर्धारित 2/- 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. 2/- (Rupees Two 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 नियम (अपील),अधिनियम शुल्क सीमा और 1982, 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, आयुक्त (अपील्स) समक्ष मांग शुल्क का 7.5% भुगतान करना होगा।
An appeal against this order shall lie before the Commissioner (Appeals) 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.

BRIEF FACT OF THE CASE

The facts and circumstances leading to issue of the SCN F.No. S/20-22/Thematic audit/Tin & Copper/Gr.IV/2018-19 dated 23.10.2018 in this matter, in brief, are as under :-

1. M/s Titra Trading P. Ltd. having their office at Survey No. 236/1 & 237, warehouse No. K 05 & 06(B), Village Mithi Rohar, Gandhidham (hereinafter also referred to as Importer or as TTPL), had imported goods declaring as 'Tin Ingots' for which they filed warehouse Bill of Entry bearing No. 3448775 dated 04.10.2013, as mentioned in the Table enclosed to the SCN. The subject goods were imported from overseas supplier M/s Titra Trading PTE Ltd., 10 CollyerQuay,#29-00, Ocean Financial Center, Singapore by claiming the benefit under Notification No. 46/2011-Cus dated 01.06.2011. The "Country of Origin" declared in the said Bills of Entry was Malaysia, and COO Certificate, on which basis concessional Basic Customs Duty (0%) was claimed by the importer, was issued by "M/s Malaysia Smelting Corporation, BERH 27, Jalan Pantai, 12000 Butterworth, Penang, Malaysia".

1.1. Later on, the subject goods got cleared by the following importers (Ex –Bonders):- (1) M/s J. Poonamchand & Sons, K-2, Munisuvrat compound, Rehnal Village, Bhiwandi, Maharastra-421302 (2) M/s Asia Metals & Ferro Alloys, Gala no. 1 & 2, SER Logistics Parks, survey No. 186, Hisa No. 3, Purna Village, Bhiwandi, Thane, Maharastra-402302 and (3) M/s Sri Bhavani Metals P. Ltd., D-152, Phase-III IDA,Jeedimetla, Hydrabad-500055 by way of filing following four Ex-bond Bills of Entry (Table showing detailed list also enclosed to the SCN), claiming the benefit of concessional Basic Customs Duty (0%) on the basis of COO Certificate issued by "M/s Malaysia Smelting Corporation and paid CVD, Ed. Cess, HSEC & SAD accordingly:-

S. No	W. B.E No. & Date filed by M/s Titra Trading P. Ltd. for total 25 MT	Qty in MTS	Ass. Value (in Rs.)	Ex Bond BE No.	Date	Name of Ex Bonder	Diff Duty to be paid (in Rs.)
1.	3448775 dtd 04.10.2013	5.0310	7084881	3603799	22.10.2013	J. Poonamchand & Sons	425002.17
2.	3448775 dtd 04.10.2013	4.9870	7022918	3763782	11.11.2013	J. Poonamchand & Sons	421285.20
3.	3448775 dtd 04.10.2013	4.9965	7036296	3672483	29.10.2013	Asia Metals & Ferro Alloys	422088
4.	3448775 dtd 04.10.2013	4.9820	7015877	3672544	29.10.2013	M/s Sri Bhavani Metals P. Ltd.	420863
	TOTAL						**1689238**

1.2. The enquiries / investigation conducted in the matter has revealed that the importer had imported the said goods, through their supplier, manufactured by M/s Malaysia Smelting Corporation (MSC), by availing the concessional rate of duty (Zero BCD) under serial number 1002(I) of the said Notification No. 46/2011-Cus dated 01.06.2011 by misrepresenting the

Regional Value Content (RVC) to be above 35% whereas the actual RVC was much less than 35%.

1.3. In the subject Bill of Entry the importer had claimed concessional duty of Nil BCD benefit under Sl. No 1002 (I) of Notification No. 046/2011-Customs, dated 01.06.2011 and paid total duty Rs. 47,46,194/- on the strength of duty structure of BCD (0%)+CVD(12%) +CESS (2+1)% + SAD (4%) (effectively **16.8544%**) whereas the actual duty required to be paid has been found to be Rs. 64,35,432/- under duty structure BCD (5%)+CVD (12% or 12.5 %) +CESS (2+1)% + SAD (4%) (effectively **22.85312%** in case CVD @ 12%). Due to which there has been a short levy of duty to the tune of Rs. **16,89,238/-.** The duty details have been worked out in the table enclosed to the SCN.

2. The facts and evidences in support of aforesaid allegations as revealed during enquiries / investigation conducted in the matter are discussed in paras below:-

2.1. Representations were made by domestic industries regarding alleged violation of rules of origin in the import of Tin Ingots from Malaysia, the Tin Ingots imported from or manufactured by M/s Malaysia Smelting Corporation (MSC), Malaysia, by availing benefit under Notification No. 46/2011-Cus, dated 01.06.2011 and 53/2011-Cus dated 01.07.2011 read with Notification No. 189/2009-Cus (NT) dated 31.12.2009 and Notification No. 43/2011-Cus (NT) dated 01.07.2011 respectively. The Domestic industries had represented that certain importers were importing Tin Ingots from MSC either directly from them or through dealers/ traders, by availing concessional rate of duty under Notification No. 46/2011-Customs, dated 01.06.2011 or Notification No. 53/2011-Cus dated 01.07.2011, by misrepresenting the Regional Value Content (RVC) to be above 35%, whereas the actual RVC was much less than required 35%.

2.2. 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 [hereinafter referred to as "Rules of Origin"] were notified vide Notification No. 189/2009-Cus. (N.T.), dated 31-12-2009.

2.3. In terms of **Rule-5 read with Rule-3** of the said "Rules of Origin" for the products not wholly produced or obtained in the exporting party (of the Agreement), to qualify for the preferential tariff under the said Preferential Tariff Agreement, the goods must have at least **35% RVC** and non-originating materials must have undergone processing to warrant change in CTHS level (6 digit) with final process of manufacture within territory of export. Rule-3 and Rule-5 of the said "Rules of Origin" read as follows:-

> *"**3. Origin criteria.-** The products imported by a party which are consigned directly under rule 8, shall be deemed to be originating and eligible for preferential tariff treatment if they conform to the origin requirements under any one of the following:-*

(a) products which are wholly obtained or produced in the exporting party as specified in rule 4; or,

(b) products not wholly produced or obtained in the exporting party provided that the said products are eligible under rule 5 or 6.

***"5. Not wholly produced or obtained products.-** (1) For the purpose of clause (b) of rule 3, a product shall be deemed to be originating, if -*

(i) the AIFTA content is not less than 35 per cent. of the FOB value; and

(ii) the non-originating materials have undergone at least a change in tariff sub-heading (CTSH) level i.e. at six digit of the Harmonized System:

2.4. Further as per **Annexure-III** of the said "Rules of Origin", it is stipulated that for exporting of the products under preferential tariff treatment the exporter shall submit a written application for the AIFTA Country of Origin (COO) together with appropriate supporting documents proving that the products to be exported qualify for issuance of AIFTA COO. The following documents are required to be furnished before the competent authority for issuance of COO:-

(i) Product cost analysis;

(ii) Invoices of raw material;

(iii) Flow chart of production process; and

(iv) Details of exporter/manufacturer of products.

2.5. **Form AI** is a 'Combined Declaration and Certificate' wherein the declaration is made by the exporter which includes declaration of origin criteria and certificate is to be done by the issuing authority of the exporting country. As per **Note-2(iii) of overleaf of the COO** to enjoy preferential tariff under AIFTA, goods must comply with the origin criteria in the Rules and as per **Note No. 2(iii) of overleaf of COO**, for goods that meet the origin criteria, the exporter and /or producer must indicate in box-8 of this Form, the origin criteria met, in the manner shown in the following table:-

Table

Circumstances of production of manufacture I nth first country named in Box 11 of this form	*Insert in box 8*
(a)Goods wholly obtained or produced in the territory of the exporting Party	*"WO"*
(b)Goods satisfying Rule 5 (Not wholly produced or obtained products) of the Rules	*"RVC ( )% + CTHS*

2.6. Each import of goods of Malaysia origin eligible for concession in India and exported from Malaysia meeting the criteria laid down in the "Rules of Origin" was eligible for issuance of **Form-AI** by Malaysian authorities to enable the importers in India to claim concessional rate of customs duty on the goods imported.

2.7 In view of the above, Tin Ingots falling under Tariff item 8001 1090 imported from any ASIAN countries , including Malaysia, would have to satisfy the condition of 'deemed originating goods' to made it eligible for concessional rate of Customs duty. As per the Notification, the goods, in the instant of tin ingots has to have RVC of 35% or above to be termed as 'deemed originating'. However, intelligence indicated that some importers of tin ingot flat products, in collusion with MSC and /or the traders/dealers, are managing to obtain certificates showing RVC to be more than 35% by misrepresenting the facts so as to avail the benefits of the concessional duty under the said notification.

3. In view of the above facts and circumstances (reasonable doubt about true origin of the goods and RVC), the matter was taken up for investigation by DRI, Mumbai Zonal Unit (MZU), Mumbai, and accordingly, initiated process for "retroactive check" and in accordance with paragraph 16 of Annexure-III of Rules of Origin (Notification No. 189/2009-Cus (NT) dated 31.12.2009), request was made to the Board by DRI vide their letter F. No. DRI-HQ-Pol/XIIA/02//2017/998 dated 06.04.2017 on sample basis by sending COO certificates (Form AI) by India to Malaysia.

Paragraph -16 of the said "Rules of Origin" reads as follow:-

> *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 (iii) 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)."

3.1. However, owing to lack of response from Malaysia to the requests for these retroactive checks, a team of DRI, MZU, Mumbai visited the unit of MSC, Malaysia to examine the value addition and also to ascertain the originating criterion for Tin Ingots exported, in terms of **Paragraph-17 of Annexure-III** of the "Rules of Origin" (Notification No. 189/2009-Cus (NT) dated 31.12.2009) and **Paragraph 10 of Annexure-III** of the India Malaysia Preferential Trade Agreement Rules, 2011. Paragraph-17 of Annexure-III of the said Rules of Origin and Paragraph 10 India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011) reads as follows:-

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

***"10. Verification visit.-** (1) If the customs authority of the importing Party is not satisfied with the outcome of the retroactive check, it may, under exceptional circumstances, perform a verification visit, and for this purpose, it may deliver a written notification of its intention to conduct the said verification visit to the premises of the exporter or producer in the territory of the exporting Party.*

(2) The written notification mentioned in sub-paragraph (1), shall be delivered simultaneously to the importer, and, the producer or the exporter whose premises are to be visited, and to the following authorities, namely:-

(a) the Issuing Authority of the exporting Party; and,

(b) the customs authority or any other appropriate authority of the exporting Party.

(3) The written notification mentioned in sub-paragraph (1), shall be comprehensive and shall include the following, namely:-

(a) the name of the producer or the exporter whose premises are to be visited;

(b) the proposed date of the verification visit;

(c) the coverage, scope and purpose of the proposed verification visit; and,

(d) the names and designation of the officials performing the verification visit.

(4) The customs authority of the importing Party shall conduct the verification visit subject to receipt of the written consent of the producer or the exporter whose premises are to be visited:

Provided that when the written consent of the producer or the exporter is not obtained within thirty days from the date of receipt of the written notification, the customs authority of the importing Party may deny preferential tariff treatment to the goods

referred to in the said certificate of origin that would have been subject to the verification visit:

Provided further that, the Issuing Authority of the exporting Party may postpone the proposed verification visit and notify the customs authority of the importing Party of such intention within fifteen days from the date of receipt of the notification:

Provided further that, notwithstanding any postponement, the verification visit shall be carried out within sixty days from the date of receipt of the written notification, or such longer period as the Parties may agree.

(5) Subsequent to the verification visit or when the consent for the verification visit is not obtained, the customs authority of the importing Party shall provide the concerned producer or exporter and the Issuing Authority of the exporting Party with a written determination of whether or not the subject goods qualify as originating goods and any suspended preferential tariff treatment may be reinstated upon determination that the goods qualify as originating goods under the rules.

(6) The concerned producer or the exporter shall be allowed thirty days from the date of receipt of the written determination to provide in writing, comments or additional information, regarding the eligibility of the goods for preferential tariff treatment and if on receipt of the comments of the producer or the exporter, the customs authority of the importing Party maintains the view that the goods are non-originating, it shall communicate the final written determination to the Issuing Authority within thirty days of the date of receipt of the comments or the additional information from the producer or the exporter and the importer.

(7) The verification visit process, including the actual visit and the determination of whether the subject goods are originating or not, 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.

4. Verification / investigation conducted in the matter has revealed that in order to justify the origin criteria of Tin Ingots manufactured by MSC, a cost sheet reflecting cost incurred in production/manufacture of tin ingots during three months period of 2013 (July-September) to calculate the FoB value and Regional Value Content (RVC) was produced by MSC. It was revealed that it was usual practice of MSC to use the same cost sheet of 2013 for obtaining COO certificate over a prolonged period of time. Ministry of International Trade and Industry (MITI) has also confirmed that the cost data sheet of 2013 has been used for issuance of COO for prolonged period of time. The cost data sheet of 2013 does not accurately reflect the RVC. Thus

it is seen that RVC for qualifying the origin criteria in Form AI (COO) has been claimed in the range above 70%, which was exorbitantly higher.

5. Verification / investigation conducted in the matter has further revealed that in another model of their operation, tin ingots were being exported by MSC to Indian importers after being manufactured by them on job work/ works contract basis on behalf of the other traders/ suppliers. Further it was observed that the other traders/ suppliers used to supply free of cost (FOC) raw material (Tin Ore) of "Origin of Non-ASEAN countries". In such cases, MSC performed conversion of "Tin Ore" into "Tin Ingots" on job charges/conversion charges basis. In such cases, "smelting charges" paid by traders/suppliers for such conversion actually reflects the "Regional Value Addition" (RVC) in Malaysia, which in percentage terms of FoB value does not fulfill the criteria of origin. It was found that MSC raised an invoice on Indian importers for an amount of FoB value of the shipment arrived on the basis of trades/ suppliers invoices to Indian importers. The said invoices were being submitted by MSC along with the cost data sheet (mentioned at Para-6 above) to MITI for obtaining COO. The cost data sheet submitted by MSC to MITI in the application for COOs does not accurately reflect the RVC and FoB of the exported tin ingots as per "Rules of Origin" of ASEAN in terms of Notification No. 189/2009-Cus., dated 31.12.2009 and of India Malaysia Preferential Trade Agreement Rules, 2011.

6. Consequent to verification visit, based on verification report submitted by verification team, which contains relevant facts as discussed in paras above, as per Rule 17(e) of Annexure-III of the Notification No. 189/2009-Cus. (NT), dated 31.12.2009 and Rule 10(5) of Annexure-III of the Notification No. 43/2011-Cus. (NT),dated 01.07.2011, the outcome of the verification visit and denial of the preferential benefits in respect of all COOs issued to MSC, Malaysia was communicated by the Board to the Issuing Authority of COOs i.e. MITI, Malaysia vide letter dated 10.05.2018. Main content of said letter, which is relevant to the facts of present case are as under:

> *6. Further, during the verification visit conducted at the premises of the exporter M/s, Malaysia Smelting Corporation (MSC), it was noted by the officers that a cost sheet depicting costs incurred in production/manufacture of tin ingots during the period of 2013 (July-September) has been used by MSC to obtain COO over a long period of time. This cost sheet reflects a particular sourcing mix for a specific period. This sheet applicable for a three month period in 2013 cannot be used to compute the Regional Value Content (RVC) for prospective periods.*
>
> *6.1 Further, it was also found by the officers that Tin ingots were being exported to Indian importers on the basis of job work/works contract basis by MSC, on behalf of other traders/suppliers. In such cases, MSC raised invoices only for smelting charges. The conversion charges alone cannot fulfill the required value addition under AIFTA.*

6.2. Thus, it is evidenced that the cost sheet submitted by MSC to MITI does not accurately reflect the contemporaneous RVC and the FoB of the exported Tin ingots as per the originating criteria mandated under the Rules of Origin of AIFTA.

7. Accordingly, Indian Customs is initiating proceedings for denial of the preferential tariff benefits in respect of the COOs issued to M/s. Malaysia Smelting Corporation, Malaysia.

DUTY & INTEREST

7. Aforesaid communication dated 10th May 2018 by CBIC to the Issuing Authority of COOs i.e. MITI, Malaysia is conclusive evidence showing non-availability of benefit of exemption of duty / concessional rate of duty availed under Notification No. 46/2011-Cus dated 01.06.2011 on the basis of COO issued where supplier was M/s. Malaysia Smelting Corporation (MSC). In view of the above discussion, the concessional rate of duty availed vide Notification No. 46/2011-Cus dated 01.06.2011 by (1) M/s J. Poonamchand & Sons (2) M/s Asia Metals & Ferro Alloys (3) M/s Sri Bhavani Metals P. Ltd. for the goods covered vide 4 Ex-bond bills of entry as detailed in the said table appeared to be not admissible and are liable to be rejected and the differential duty involved in the cases covered vide 4 Ex-bond bills of entry are recoverable under the provisions of the Customs Act, 1962. The Importers (1) M/s J. Poonamchand & Sons (2) M/s Asia Metals & Ferro Alloys (3) M/s Sri Bhavani Metals P. Ltd., are liable to pay the differential duty of Rs. **16,89,238/-** as mentioned in the Table enclosed to the SCN, along with the applicable interest.

7.1. The Notification No. 46/2011-Cus dated 01.06.2011 provides for exemption from the whole of the duty of Customs leviable which is specified in the first Schedule to the Customs Tariff Act, 1975 subject to certain conditions. Now, since the investigation conducted in this regard has resulted that the RVC so mentioned in the COO (Form AI) was enhanced exorbitantly to qualify the origin criteria of minimum 35% value addition where actual value addition was much less than 35%. Thus, the COO issued by MITI and submitted before the Customs authorities in the instant cases with intent to avail undue benefit of AFTA scheme, becomes invalid as they were obtained by mis-statement/suppressing the facts of actual Regional Value Contents (RVC) in connivance / collusion with supplier/ M/s MSC, Malaysia.

7.2. M/s Titra Trading P. Ltd. and Ex bond importers (1) M/s J. Poonamchand & Sons (2) M/s Asia Metals & Ferro Alloys (3) M/s Sri Bhavani Metals P. Ltd., were required to exercise due diligence while availing benefit of exemption notification. However, they proceeded to claim the benefit of said exemption notifications on the basis of such fraudulently obtained Country of Origin Certificates by willful mis-statement and suppression of facts

pertaining to the Country of Origins so obtained. Hence, the importer M/s Titra Trading P. Ltd. and Ex bond importers (1) M/s J. Poonamchand & Sons (2) M/s Asia Metals & Ferro Alloys (3) M/s Sri Bhavani Metals P. Ltd., who stepped into the shoes of the supplier of fraudulently obtained documents do not stand on better footing and cannot be allowed to retain benefit illegally obtained. Therefore, the duty benefit claimed under Notification Nos.46/2011-Cus dated 1.6.2011 for the imports of tin ingots from M/s MSC, Malaysia (routed through M/s Titra Trading PTE Ltd., 10 CollyerQuay,#29-00, Ocean Financial Center, Singapore) affected within the last five years are recoverable under **Section 28(4)** of the Customs Act, 1962 along with applicable interest under **Section 28AA** of the Customs Act, 1962.

WRONG DECLARATION

8. Further, based on such fraudulently obtained Country of Origin certificate by MSC, Malaysia, all the imports of tin ingots from MSC in the case are not admissible for concessional duty benefits under Notification No. 46/2011-Cus dated 01.06.2011. Moreover, the importer has not submitted correct declaration while presenting the bills of entry under section 46 (4) of the Customs Act, 1962. Section 46 (4) of the Customs Act, 1962 reads as follows:-

> *"the importer while presenting a bill of entry shall at the foot thereof make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods".*

LIABILITY TO CONFISCATION

9. The said consignments, were imported by mis-declaring the facts as discussed in paras above and benefit of Notification No. 46/2011-Cus dated 01.06.2011 was wrongly availed, hence it appeared that subject goods are liable to confiscation under Section 111(o) of the Customs Act 1962 and the importer has rendered themselves liable to penal action under provisions of Section 112 (a) of the Customs Act, 1962.

9.1. Non-observance of provisions of Section 46 (4) by the importers has resulted into mis-declaration in the particular of the said bill of entry thereby has rendered the goods of declared value Rs. 2,81,59,973/- liable to confiscation under Section 111 (m) of the Customs Act, 1962 and the importer has rendered themselves liable to penal action under provisions of Section 112 (a) of the Customs Act, 1962. Relevant sections of the customs act are as follows:-

> *111 (m) 1[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 2[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];*

111 (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'

APPLICABILITY OF PENALTY ON IMPORTER (SECTION 114AA)

10. It also appeared that M/s Titra Trading P.Ltd. and Ex bond importers (1) M/s J. Poonamchand & Sons, (2) M/s Asia Metals & Ferro Alloys, and (3) M/s Sri Bhavani Metals P. Ltd. have caused submission of incorrect / false declarations to the Customs at the time of import, knowing fully that the items under import were not entitled for the benefit of said exemption notifications as such COO Certificates were issued by willful mis-statement and suppression of facts. By intentionally mis-declaring the particulars and attempted to claim wrong benefit of exemption notification (to avoid payment of appropriate Duty), it appeared that the importers have knowingly and intentionally caused declaration to be made signed and used which was false and incorrect, and thus it appeared that they are liable to a penalty under Section 114AA of the Act.

APPLICABILITY OF PENALTY UNDER SECTION 114A

11. Further, consequent upon amendment to the Section 17 of the Customs Act, 1962 vide Finance Act, 2011, 'Self-Assessment' has been introduced in Customs. Section 17 of the Customs Act, effective from 8.4.2011, provides for self-assessment of duty on imported goods by the importer himself by filing a Bill of Entry, in the electronic form. Section 46 of the Customs Act, 1962 makes it mandatory for the importer to make entry for the imported goods by presenting a Bill of Entry electronically to the proper officer. As per Regulation 4 of the Bill of Entry (Electronic Declaration) Regulation, 2011 (issued under Section 157 read with Section 46 of the Customs Act, 1962) the Bill of Entry shall be deemed to have been filed and self-assessment of duty completed when, after entry of the electronic declaration (which is defined as particulars relating to the imported goods that are entered in the Indian Customs Electronic Data Interchange System) in the Indian Customs Electronic Data Interchange System either through ICEGATE or by way of data entry through the service centre, a Bill of Entry number is generated by the Indian Customs Electronic Data Interchange System for the said declaration. Thus, under self-assessment, it is the importer who has to ensure that he declares the correct classification, applicable rate of duty, value, benefit of exemption notifications claimed, if any, in respect of the imported goods while presenting the Bill of Entry. Thus, with the introduction of self-assessment by amendments to Section 17, since 8th April, 2011, it is the added and enhanced responsibility of the importer to declare the correct description, value, notification, etc and to correctly classify, determine and pay the duty applicable in respect of the imported goods.

11.1. In the instant case, M/s Titra Trading P.Ltd. and Ex-bond importers (1) M/s J. Poonamchand & Sons (2) M/s Asia Metals & Ferro Alloys and (3) M/s Sri Bhavani Metals P. Ltd., have submitted/ caused submission of incorrect / false declarations to the Customs at the time of import, knowingfully that the items under import were not entitled for the benefit of said exemption notifications as such COO Certificates were issued by willful mis-statement and suppression of facts. They have also resorted to mis-declararion of facts with intent to evade duty of Customs as discussed above. Since the duty in this case is not be paid correctly by reason of willful mis-statement to suppression of facts, the importers (Ex-bonders), who are liable to pay duty under section 28 (4) and interest also appeared liable to penalty under section 114A of the Customs Act, 1962.

12. The importer (Ex-bonder) M/s J. Poonamchand & Sons was called upon to Show Cause to the Additional Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji temple, Kandla, Kutch as to why:-

(i) The differential duty amounting to Rs. 8,46,287/- should not be demanded and recovered from them under Section 28(4) of the Customs Act 1962 in respect of 2 Ex-bond Bills of Entry mentioned in the table enclosed to the SCN, by denying the benefits of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) The applicable interest should not be demanded and recovered under Section 28 AA of the Customs Act 1962 in respect of duty demand as mentioned in Para (i) above.

(iii) The goods valued at Rs. 1,41,07,799/-, covered in the said 2 Ex bond Bills of Entry should not be held liable for confiscation under section 111(m) & (o) of Customs Act, 1962.

(iv) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962 for act of omission and commission as discussed above.

(v) Penalty should not be imposed on them under Section 114A of the Customs Act, as mentioned in paras above.

(vi) 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.

13. The importer (Ex-bonder) M/s Asia Metals & Ferro Alloys was called upon to Show Cause to the Additional Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji temple, Kandla, Kutch as to why:-

(i) The differential duty amounting to Rs. 4,22,088/- should not be demanded and recovered from them under Section 28(4) of the Customs Act 1962 in respect of one Ex-

bond Bill of Entry mentioned in the table enclosed to the SCN, by denying the benefit of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) The applicable interest should not be demanded and recovered under Section 28 AA of the Customs Act 1962 in respect of duty demand as mentioned in Para (i) above.

(iii) The goods valued at Rs. 70,36,296/-, covered in the said one Ex bond Bills of Entry should not be held liable for confiscation under section 111(m) & (o) of Customs Act, 1962.

(iv) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962 for act of omission and commission as discussed above.

(v) Penalty should not be imposed on them under Section 114A of the Customs Act, as mentioned in paras above.

(vi) 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.

14. The importer (Ex-bonder) M/s Sri Bhavani Metals P. Ltd. was called upon to Show Cause to the Additional Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji temple, Kandla, Kutch as to why:-

(i) The differential duty amounting to Rs. 4,20,863/- should not be demanded and recovered from them under Section 28(4) of the Customs Act 1962 in respect of one Ex-bond Bill of Entry mentioned in the table enclosed to the SCN, by denying the benefits of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) The applicable interest should not be demanded and recovered from them under Section 28 AA of the Customs Act 1962 in respect of duty demand as mentioned in Para (i) above.

(iii) The goods valued at Rs. 70,15,877/-, covered in the said one Ex bond Bill of Entry should not be held liable for confiscation under section 111 (m) & (o) of Customs Act, 1962.

(iv) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962 for act of omission and commission as discussed above.

(v) Penalty should not be imposed on them under Section 114A of the Customs Act, as mentioned in paras above.

(vi) 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.

15. The importer M/s Titra Trading P. Ltd. was called upon to Show Cause to the Additional Commissioner of Customs, Custom House, Kandla, New Custom Building, Nr. Balaji temple, Kandla, Kutch as to why:-

(i) Penalty should not be imposed on them under Section 114AA of the Customs Act, 1962 for act of omission and commission as discussed above.

(ii) 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.

DEFENCE REPLY AND PERSONAL HEARING

16. Noticee wise details of the defence reply and personal hearing are given below:-

(I) M/s J. Poonamchand & Sons : Vide letter dated 20.08.2019 M/s J. Poonamchand & Sons have informed that the Telangana High Court restrained the Commissioner of Customs, Hyderabad from proceeding further on the strength of the SCN which falls under the similar facts of the case as the present matter. But, copy of the order was not submitted. Further, they have requested to provide them some time to present their case.

Further, vide letter dated 14.09.2019, M/s J. Poonamchand & Sons have expressed their inability to addend the personal hearing fixed on 18.09.2019 and pleaded to supply the copies of relied upon documents related to investigation so that reply to SCN can be filed. They have inter alia submitted that in identical matter, Hon'ble High Court Bombay vide order dated 09.07.2019 , in Writ Petition No.3474 of 2018, though dismissed the Writ Petition finally yet directed that the adjudicating authorities should decide the SCNs without in any manner being influenced by the view taken by the CBIC. The SCN issued on the basis of administrative instructions are void ab initio. There is no positive and cogent evidence to prove any of the ingredients of Section 28(4), 114A,114AA and 112 of the Customs Act, 1962. All the relied upon documents must be made available. SCN is invalid as per interim order dated 10.07.2019, in Writ Petition No.14026 of 2019, of Hon'ble Telengana High Court in identical case of M/s. Radiant Corporation Private Limited. Proceedings under the Customs Act are in excess of jurisdiction. They have also cited the relevant part of Free Trade Agreement (FTA), Rules of origin for the ASEAN India Free Trade Area (AIFTA) and Agreement on Dispute Settlement Mechanism (DSM) in this regard. Further, earlier assessment amount to order in adjudication and cannot be modified by issuing SCN under Section 124 or 28 ibid. No positive evidence and mere bald statements made in SCN without any corresponding evidence. Further, the COOs subsist and are not cancelled or suspended by the issuing authority. Claiming the benefit of exemption notification cannot prove misstatement or suppression and cannot entail penal consequences. Without bringing on record and considering all the evidences pertaining to the

alleged violation of Country of Origin, if any decision is taken, DRI letter dated 06.04.2017 and CBIC letter dated 10.05.2018 any such decision shall be invalid and void ab initio as per the judgment of the Hon'ble Supreme Court in the matter of Goverdhandas Bhanji – 1952 (AIR-16)(SC) and as per the order dated 09.07.2019 of Hon'ble High Court Bombay. No evidence to show that RVC is less than 35% which is required to be proved in terms of Rule 5 of the Rules of Origin. Demand under Section 28(4) is totally erroneous as there is not even an allegation that the importer or his agent or his employee was in collusion or made any willful mis-statement or there was any suppression on their part. For this they relied upon the judgment of the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture – 2017(216)ELT 177 (SC) and CC Mumbai A.S. Muloobhoy & Sons – 2015(318)ELT 576(SC).

They have also submitted a copy of letter No. (51)MITI/600-4/2/16 dated 12.06.2018 of MITI wherein inter alia it is stated that MITI disagrees with the outcome of verification reached by CBIC. The COO issuing authority for Malaysia, MITI is satisfied that tin ingots produced in Malaysia MSC and exported to India met the requirements set-forth in Annexure-2(Rules of Origin) under the AIFTA and eligible for preferential treatment. The denial of preferential treatment imposed to MSC by India is in contention to the parties object and purpose of the AIFTA.

Vide letters dated 26.12.2019 and 11.01.2020 M/s J Poonamchand & Sons have inter alia submitted that no valid SCN subsist as same stand concluded as per provisions of Section 28(9) of the Customs Act, 1962 as the same was to be determined within one year i.e. by 05.11.2019 from the date of notice i.e. 06.11.218. They have further added in their earlier submissions that the required documents sought for by them must be made available. The proceedings under customs act are in excess of jurisdiction. Central Government / Supreme Court confirmed that certificates issued under treaties are sufficient evidence. They have also submitted that the in similar case of Morde Foods Pvt. Ltd. the Commissioner of Customs, JNCH vide order dated 31.01.2017 the certificates were held to be valid and the demands were dropped. Further, in another similar case of Starcom Food India Ltd. the Commissioner(Appeals) vide an order in appeal dated 09.09.2019 also allowed the benefit of notification No.46/2011-Cus.

No one has appeared on behalf of the noticee for personal hearing fixed on 19.06.2019, 18.09.2019, 08.01.2020 and 16.01.2020.

(II) M/s Asia Metals & Ferro Alloys : Vide letter dated 08.11.018 M/s Asia Metals & Ferro Alloys have filed their reply to the SCN wherein they have inter alia submitted that the goods were purchased on High Sea sale basis from M/s. Titra Trading Pvt. Ltd. and the same were cleared under order passed by the proper officer under Section 47 of the Customs Act, 1962 with benefit of Notification No.46/2011-Cus dated 01.06.2011. Thus, they are bonafide purchaser of the goods on transfer of ownership basis. Further, they have submitted that no relied upon

documents have been supplied to them with the SCN. Hence, they have demanded the copies of documents related to investigation and they would file reply to the SCN within 2 months of receipt of these documents.

Vide letter dated 12.06.2019 they have informed about their change of address. Further, they have reiterated the facts already submitted vide their letter dated 21.12.2018 and again submitted that they would submit their reply to the SCN within 4 weeks from the date of receipt of the required relied upon documents. They have also pleaded to adjourn the personal hearing fixed on 19.06.2019.

Vide letter dated 18.07.2019 M/s Asia Metals & Ferro Alloys have submitted that the only document relied upon in the SCN is duty calculation sheet and copy of which was supplied. In this connection, the DRI letter dated 06.04.2017(discussed in para 5 of the SCN), Cost Sheet produced by MSC and confirmation of MITI (discussed in para 6 of the SCN) and Verification report of verification team and CBIC letter dated 10.05.2018 addressed to MITI, Malaysia (discussed in para 8 of the SCN) are relied upon. They have pleaded to supply the above said documents and other information to file their reply to the SCN.

Vide letter dated 19.08.2019 M/s Asia Metals & Ferro Alloys have informed that no submissions can be made in detail after inspection of any documents as the issue involved is legal in nature and thus legal advice from competent legal councils is required to be sought. It is settled legal position that offer to inspect the documents is not sufficient compliance with the principle of natural justice and non furnishing of the copies thereof amount to violation of principle of natural justice and the same vitiate the entire proceedings itself. Further, they have again pleaded to adjourn the personal hearing till the filing of their reply to the SCN which would be filed after 4 weeks of receipt of the certified copies of the documents sought for by them vide their earlier letter dated 18.07.2019. For this they have cited the following case laws:-

(i) M/s. Santogen Silk Mills – 2003(157)ELT 208(T).

(ii) Subodh Kumar Chajjer – 2016(331)ELT 559(Cal).

(iii) PGO Processors Pvt. LTd. – 2000(122) ELT 26 (Raj).

Vide letter dated 14.09.2019 M/s Asia Metals & Ferro Alloys have inter alia submitted that in identical matter, Hon'ble High Court Bombay vide order dated 09.07.2019 , in Writ Petition No.3474 of 2018, though dismissed the Writ Petition finally yet directed that the adjudicating authorities should decide the SCNs without in any manner being influenced by the view taken by the CBIC. The SCN issued on the basis of administrative instructions are void ab initio. There is no positive and cogent evidence to prove any of the ingredients of Section 28(4), 114A,114AA and 112 of the Customs Act, 1962. All the relied upon documents must be made available. SCN is invalid as per interim order dated 10.07.2019, in Writ Petition No.14026 of 2019, of Hon'ble Telengana High Court in identical case of M/s. Radiant Corporation Private

Limited. Proceedings under the Customs Act are in excess of jurisdiction. They have also cited the relevant part of Free Trade Agreement (FTA), Rules of origin for the ASEAN India Free Trade Area (AIFTA) and Agreement on Dispute Settlement Mechanism (DSM) in this regard. Further, earlier assessment amount to order in adjudication and cannot be modified by issuing SCN under Section 124 or 28 ibid. No positive evidence and mere bald statements made in SCN without any corresponding evidence. Further, the COOs subsist and are not cancelled or suspended by the issuing authority. Claiming the benefit of exemption notification cannot prove misstatement or suppression and cannot entail penal consequences. Without bringing on record and considering all the evidences pertaining to the alleged violation of Country of Origin, if any decision is taken, DRI letter dated 06.04.2017 and CBIC letter dated 10.05.2018 any such decision shall be invalid and void ab initio as per the judgment of the Hon'ble Supreme Court in the matter of Goverdhandas Bhanji – 1952 (AIR-16)(SC) and as per the order dated 09.07.2019 of Hon'ble High Court Bombay. No evidence to show that RVC is less than 35% which is required to be proved in terms of Rule 5 of the Rules of Origin. Demand under Section 28(4) is totally erroneous as there is not even an allegation that the importer or his agent or his employee was in collusion or made any willful mis-statement or there was any suppression on their part. For this they relied upon the judgment of the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture – 2017(216)ELT 177 (SC) and CC Mumbai A.S. Muloobhoy & Sons – 2015(318)ELT 576(SC).

They have also submitted a copy of letter No. (51)MITI/600-4/2/16 dated 12.06.2018 of MITI wherein inter alia it is stated that MITI disagrees with the outcome of verification reached by CBIC. The COO issuing authority for Malaysia, MITI is satisfied that tin ingots produced in Malaysia MSC and exported to India met the requirements set-forth in Annexure-2(Rules of Origin) under the AIFTA and eligible for preferential treatment. The denial of preferential treatment imposed to MSC by India is in contention to the parties object and purpose of the AIFTA.

Vide letters dated 24.12.2019 and 10.01.2020 M/s Asia Metals & Ferro Alloys have inter alia submitted that no valid SCN subsist as same stand concluded as per provisions of Section 28(9) of the Customs Act, 1962 as the same was to be determined within one year i.e. by by 05.11.2019 from the date of notice i.e. 06.11.218. They have further added in their earlier submissions that the required documents sought for by them must be made available. The proceedings under customs act are in excess of jurisdiction. Central Government / Supreme Court confirmed that certificates issued under treaties are sufficient evidence. They have also submitted that the in similar case of Morde Foods Pvt. Ltd. the Commissioner of Customs, JNCH vide order dated 31.01.2017 the certificates were held to be valid and the demands were dropped. Further, in another similar case of Starcom Food India Ltd. the Commissioner(Appeals) vide an order in appeal dated 09.09.2019 also allowed the benefit of notification No.46/2011-Cus.

No one has appeared on behalf of the noticee for personal hearing fixed on 19.06.2019, 18.09.2019, 08.01.2020 and 16.01.2020.

(III) M/s Sri Bhavani Metals Pvt. Ltd.:- Vide letter dated 15.11.2018 M/s Sri Bhavani Metals P. Ltd. have inter alia requested to grant them further 8 weeks time to file reply to the SCN. Vide letter dated 14.06.2019 they have again requested to give them 6 weeks time to file reply to the SCN. In similar matter for imports through Nhava Sheva port, they have filed Writ Petition which is pending, hence, requested to wait for the outcome of the case before taking any further action.

Vide letter dated 21.08.2019 M/s Sri Bhavani Metals P. Ltd. have inter alia have submitted that certificate of origin issued by designated authority cannot be disregarded without observing the due process of law as prescribed under the ASEAN India FTA. On presentation of the original COO, the Customs authority has power to reject the same if the veracity of the same is doubted in any manner. However, in present case, right from inception the COO certificate has been accepted by the assessing Customs authorities and assessments have been finalized on the basis of the said COO certificates submitted at the time of import. They have also cited the relevant part of Free Trade Agreement (FTA), Rules of origin for the ASEAN India Free Trade Area (AIFTA) and Agreement on Dispute Settlement Mechanism (DSM) in this regard. They have also submitted that the outcome of verification done by DRI and communicated to MITI vide letter dated 10.05.2018, has not been accepted by the authority competent for issuing certificates. Vide letter dated 12.06.2018 MITI inter alia stated that they disagrees with the outcome of verification reached by CBIC. The COO issuing authority for Malaysia, MITI is satisfied that tin ingots produced in Malaysia MSC and exported to India met the requirements set-forth in Annexure-2(Rules of Origin) under the AIFTA and eligible for preferential treatment. They have submitted that in terms of Article 24 of the Operational Certification Procedure, where no mutually satisfactory solution to the dispute is reached through consultations, the party concerned may invoke the dispute settlement procedures provided under Article 18 of the ASEAN-India DSM Agreement. Further, it is a settled position in law that unless anything contrary is contained in the local law, the provisions of te treaty will prevail and must be respected and given effect to. For this they rely on the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs, Banglore Vs. G.M. Exports [2015(324)ELT 209(SC)]. The Revenue must comply with the provisions of the ASEAN India DSM Agreement for getting the COOs cancelled and / or nullified and cannot unilaterally decide that MITI has issued wrong COOs. Accordingly, question of demanding customs duty from them does not arise at all. In this regard, they have given reference of the following decisions of the Hon'ble High Courts:- (i) Bullion and Jewellers Association vs. Union of India [2016(335)ELT 639(Del.)] (ii) Noble Import Private vs. Union of India [2017(349)ELT 44(APl.)]

They have further submitted that once certificate issued by competent authority is produced at the time of filing of Bill of Entry, benefit under exemption notification cannot be denied on subsequent discovery of alleged fraud by the exporter. Even if there is any allegation that the certificate has been issued fraudulently, unless it is cancelled by the issuing authority or by the competent court, customs authorities cannot dispute the validity of the certificate. The provisions of an exemption notification have to be construed strictly and the eligibility under a particular notification has to be determined keeping in mind the specific language used in the notification. In any event, even if the COOs stand to be annulled and /or cancelled in the future, no Customs Duty can be recovered from the Indian importers, such as the importer has imported the goods backed by a COO which was valid at the time of importation of the goods in to India. For this they rely upon the following decision of Hon'ble Supreme Court:-

(i) *Commissioner of Customs(Imports), Mumbai Vs. Tullow India Operations Ltd. [2005(189) E.L.T. 401(S.C.)].*

(ii) *Compack Pvt. Ltd. vs. Commissioner of Central Excie, Vadodara [2005(189) E.L.T. 3(S.C.)].*

(iii) *East India Commercial Co. Ltd., Calcutta vs. Commissioner of Customs, Calcutta [1983(13) E.L.T. 1342(S.C.)].*

They have further submitted that the demand is barred by limitation as the SCN was issued on 23.10.2018 for the goods imported on 29.10.2013. There is no suppression or willful mis-statement involved at the part of the importer, hence, demand cannot be raised under Section28(4) of the Customs Act, 1962 to invoke the extended period of last five years. For this they rely upon the following decision of Hon'ble Supreme Court:-

(i) *Pahwa Chemicals Private Limited vs. Commissioner of C.Ex., Delhi [2005(189) E.L.T. 257(S.C.)].*

(ii) *Nesle India Ltd. vs. CCE [2009(235) E.L.T. 577(S.C.)].*

(iii) *CCE vs. Damnet Chemicals Pvt. Ltd. [2007(216) E.L.T. 3(S.C.)].*

Vide letter dated 31.12.2019 M/s Sri Bhavani Metals Pvt. Ltd. have inter alia submitted that in the identical issue M/s. Purple Products Ltd. and M/s. Kothari Metals Ltd. were filed Writ Petition before the Hon'ble Bombay High Court which was dismissed by the court vide order dated 09.07.2019 on the ground that said issue can be decided at the time of adjudication. The said order was challenged before the Hon'ble Supreme Court vide Civil Appeals which have been decided in favour of the importers vide order dated 25.11.2019 wherein the order of the Hon'ble High Court Bombay was set aside and the original petitions were restorted for hearing on merits of the case. Therefore, the present SCN cannot be decided unless the issue of competence is decided by the Bombay High Court on hearing the matter.

No one has appeared on behalf of the noticee for personal hearing fixed on 19.06.2019, 18.09.2019, 08.01.2020 and 16.01.2020.

(IV) M/s Titra Trading Pvt. Ltd. : Vide letter dated 08.01.2019 M/s Titra Trading Pvt. Ltd. have requested to grant them additional 60 days time to file reply to the SCN. Again vide letter dated 21.08.2019 they have requested for adjournment of personal hearing fixed on 23.08.2019 for two weeks time.

Vide letter dated 28.08.2019 M/s Titra Trading Pvt. Ltd. have inter alia submitted that they deny each and every allegation made under the SCN. Further, insofar as they are concerned, as per factual and legal provisions provided under Section 112(a), 111(o), 111(m), 46(4) of the Customs Act, 1962 and Notification No. 46/2011-Cus dated 01.06.2011, no penalty is imposable on them as no duty was payable by them at the time of warehouse of goods and no benefit of exemption notification has been availed by them. They sold the goods while the same were lying in the custom bonded warehouse on ex-warehouse basis and their demand of duty has been made from the importers(Ex-bonders) who filed the ex-bond Bills of Entry as per the provisions of Section 68 ibid. Further, the required AIFTA COO with respect to imported goods was furnished by them where percentage of value addition as per Rules of Origin was also indicated. The COO certificate has been issued by the competent authority of Malaysian Government, which is not under their power and control. The COO certificate has not been recalled or cancelled by the issuing authority. Therefore, the declaration in the bill of entry was made on the basis of a valid COO and the same cannot be held to be incorrect. Thus, they cannot be held to be liable for mis-declaring the facts and fraudulently obtaining the COO. Moreover, the benefit of the notification has not been claimed by them. Since the authenticity of the COO was not challenged by the department at the time of import, the assessments cannot be reopened for valuation under the guise of mis-declaration of county of origin. Further, if there was any doubt about the genuineness of the COO, then either the verification process as set out in Rule 10 of Annexure-III of the India Malaysia Preferential Trade Agreement Rules, 2011, which in turn adopted the provisions in the Rule 16(a) and 17 of the Rules of Origin, could have been undertaken. But, no recourse to such process appeared to have been undertaken. For conducting a retroactive check even assuming that there is no requirement of rejection, but there being a doubt that is required to be verified into, the same ought to have been completed and the result of the retroactive check should be communicated to the importer within six months of the date of presentation of the COO to the customs authority of the importing party. Whereas, in the present case, it was communicated to them almost 4-5 years after presentation of the COO to the Customs authority. The authorities have failed to adhere to the procedure with respect to entertaining of the doubt within the timeframe allowed under the Regulations, hence, SCN needs to be set aside. In terms of Rule 9 of the India Malaysia Preferential Trade Agreement Rules, 2011 a retroactive check can be conducted if the information or the documents furnished are found not to be satisfactory.

Without conducting a retroactive check, in terms of Rule 9, it is not open to the department to pass an adjudication order. The COO is still valid and the department has no proof that the Malaysian exporter has mis-declared anything with MITI and same is evident from the fact that the COO is still subsisting and not been cancelled. In view of above, when no confiscation can be upheld in respect of the said goods, the question of imposition of penalty under Section 112(a) does not arise. Accordingly, penalty under Section 114AA of the Customs Act, 1962 is not imposable on them as they did not knowingly or intentionally make or sign or use any declaration , statement or document which is false or incorrect in any material particular. For this they have cited various judgments, out of them relevant are mentioned below:-

(i) Commissioner of Customs (Import) Vs Wings Electronics [(2015)63 taxmann.com 356(SC)].

(ii) Bullion And Jewellers Association Union of India [2016(335) E.L.T. 639(Del.)].

(iii) Mahadev Metaliks Pvt. Ltd. Vs.Union of India [2016(331)E.L.T. 424 (A.P.)]

(iv) Noble Import Pvt. Ltd. Union of India [2017(349)E.L.T. 44 (A.P.)].

(v) Commissioner of Customs V. Rajnarayan Jwalaprasad [2014(306)E.L.T. 592 (Guj.)].

Vide letter dated 07.01.2020 M/s Titra Trading Pvt. Ltd. have requested for short adjournment of personal hearing fixed on 08.01.2020. Shri Sumit Jain and Ms. Rinkey Jassiya on behalf of M/s Titra Trading Pvt. Ltd. have appeared for personal hearing held on 16.01.2020.

17. Keeping in view of the request made by most of the noticees to supply the copies of the documents discussed and relied upon to issue the SCN, vide letter dated 25.06.2019 the Ex-bonder mentioned at Sr. No. (II) has been informed by the department that the requisite relied upon documents i.e. Annexure of duty calculation sheet has already been supplied with the SCN, however, the same has again been sent with the above said letter.

18. Further, vide letter dated 09.08.2019 all the noticees have been informed by the department that the SCN in question has been issued for denial of exemption benefit under Notification No.46/2011-Cus dated 01.06.2011 and Not. No. 53/2011-Cus dated 01.07.2011 on the basis of the directions given by the Board after necessary verification and investigation regarding authenticity of the certificates of Origin (COO). Copies of the following letters related to the issue are available in office and the same ,along with other documents available in the office, would be made available for verification ,if so desired, at the time of Personal hearing :-

a) Letter dated 12.07.2018 issued by CBIC to Ministry of International Trade & Industry (MITI), Malaysia wherein Para 2 gives detailed reason and basis for denying the FTA benefit. Further, at para-4 it is explicitly mentioned that this communication may be considered as the final written determination for denial of preferential benefit in respect of COOs issued to the exporter M/s. Malaysia Smelting Corporation.

b) Letter dated 10.05.2018 issued by CBIC to Ministry of International Trade & Industry (MITI), Malaysia wherein, inter alia, it is mentioned that during the verification visit

M/s. Bahru had refused to share any information required for verification of the certificates of Origin (COO) because of business secrets. Hence, action initiated for denial of preferential benefit in respect of COOs issued to the exporter M/s. Bahru Stainless SDN BHD, Malaysia.

19. Further vide letter dated 04.09.2019 all the noticees have again been informed by the department that the SCN has been issued for denial of exemption benefit under Notification No.46/2011-Cus dated 01.06.2011 and Not. No. 53/2011-Cus dated 01.07.2011 on the basis of the clear cut directions given by the Board after necessary verification and investigation regarding authenticity of the certificates of Origin (COO). Copies of the letters dated 10.05.2018 and 12.07.2018 issued by CBIC to Ministry of International Trade & Industry (MITI), Malaysia wherein preferential benefit in respect of COOs issued to the exporter M/s. Malaysia Smelting Corporation and M/s. Bahru Stainless SDN BHD, Malaysia has been denied, along with other documents (as mentioned in said SCN) available in office, would be made available for verification, if so desired, at the time of personal hearing.

20. In this case Personal hearing was fixed on 19.06.2019, 18.09.2019, 08.01.2020 and 16.01.2020.

Shri Sumit Jain and Ms. Rinkey Jassiya on behalf of M/s Titra Trading Pvt. Ltd. have appeared for personal hearing held on 16.01.2020. They reiterated the content of written submission made by the notice and requested to drop the SCN.

Apart from the above one noticee, no one has appeared for personal hearing on their behalf even after giving the ample opportunities to follow the principal of natural justice. However, they have submitted their written submissions as discussed above.

21. It is pertinent to mention here that in similar case file of M/s. Trafigura India Pvt. Ltd. Shri Anil L Balani, Advocate of M/s. Metals & General Trading Co. and M/s. Jitendra Overseas vide their letters dated 04.02.2020 and 22.02.2012 respectively have submitted that in the identical case of M/s Shiva Metalloys International Ltd., Delhi and M/s Brilliant Metals Pvt. Ltd., Delhi the Principal Commissioner of Customs (Import), ICD, Tughlakabad vide OIO No. 17/2019/MKS/Pr. Commr/Import/ICD/TKD dated 04.09.2019 and OIO No. 20/2019/MKS/Pr. Commr/Import/ICD/TKD dated 17.09.2019 has dropped the demand mainly on the ground that there is neither any investigation of the importers' involvement in issuance of the said COOs nor there is any allegation that the importers suppressed or misstated any facts or colluded with supplier for issuance of wrong COOs.

DISCUSSION AND FINDINGS

22. I have carefully gone through the case records, documents relied upon under the Show Cause Notice, facts of the case and the submissions made by the the noticees. Only M/s Titra Trading Pvt. Ltd. of the four noticees have submitted their written as well as oral submission at the time of personal hearing. Before going into the merit and demerit of the case, it is pertinent to mention here that having satisfied with the reasons for non adjudication of the SCN within the specified time period the competent authority has extended the period specified in clause (b) of sub-section 9 of section 28 of the Customs Act, 1962, to a further period of one year to adjudicate the present SCN as provided under the proviso to Section 28(9) ibid, and accordingly the SCN is taken up for adjudication.

22.1. The following issues are to be determined by me in this case:-

(i) Whether the importer and Ex-bonders have wrongly availed the benefit of exemption Notification No.46/2011-Cus dated 01.06.2011 on the basis of fraudulently obtained Country of Origin certificate by the supplier namely MSC, Malaysia by submitting incorrect declaration while presenting the bills of entry under Section 46(4) of the Customs Act, 1962, if so, whether differential duty is to be recovered with appropriate interest under Section 28(4) and 28AA ibid and the subject goods are liable to confiscation under Section 111(o) ibid ibid and they have rendered themselves liable to penal action under Section 112(a), 114A and 114AA of the Customs Act, 1962.

(ii) Whether non-observance of provisions of Section 46(4) of the Customs Act, 1962 by the importer and Ex-bonders have resulted in to mis-declaration and thereby they have rendered the goods of declared value Rs. 2,81,59,973/- , as mentioned in the Table enclosed to the SCN, liable to confiscation under Section 111(m) ibid and they have rendered themselves liable to penal action under Section 112(a), 114A and 114AA of the Customs Act, 1962.

Therefore, the prime issue to be decided in the present case is to verify the authenticity of the 'Country of Origin certificate (COO)' as the benefit of the exemption notification No.46/2011-Cus dated 01.06.2011 is entirely based on the same. The proposals made in the impugned show cause notice related to recovery of differential duty with interest, confiscation of imported consignment and penal action under Custom Act, 1962 are to be decided accordingly thereafter.

22.2. Now, coming to the first issue that M/s Titra Trading Pvt. Ltd., had imported total 50 MTs of 'Tin Ingots' overseas supplier M/s Trafigura PTE Ltd., Singapore for which they filed one warehouse Bill of Entry bearing No. 3448775 dated 04.10.2013. The "Country of Origin" declared in the said Bill of Entry was Malaysia, and COO Certificate, on which basis benefit of concessional Basic Customs Duty (0%) was claimed by the importer under Notification No.

46/2011-Cus dated 01.06.2011. The "Country of Origin" certificate was issued by "M/s Malaysia Smelting Corporation, BERH 27, Jalan Pantai, 12000 Butterworth, Penang, Malaysia". Later on, the subject goods got cleared by 4 different importers (Ex –Bonders) by way of filing four Ex-bond Bills of Entry as mentioned in the Table enclosed to the SCN, claiming the benefit of concessional Basic Customs Duty (0%) on the basis of COO Certificate. The enquiries / investigation conducted in the matter has revealed that the importer had imported the said goods, through their supplier, manufactured by M/s Malaysia Smelting Corporation (MSC), by misrepresenting the Regional Value Content (RVC) to be above 35% whereas the actual RVC was much less than 35%. In order to consider the issue in a better prospective, it would be worthwhile to discuss the provisions and conditions stipulated under the above said exemption notification No.46/2011-Cus dated 01.6.2011.

22.3. I find that the notification No.46/2011-Cus dated 01.6.2011 incorporated in it the conditions of Notification No. 189/2009(N.T.) dated 31.12.2009. This notification No. 189/2009 inter alia provides Rules for determination of origin of the goods in terms of the Preferential Trade Agreement between the members States of Association of South East Asia Nations (ASEAN) and Republic of India. Notification No.46/2011-Cus dated 01.6.2011 provides for preferential rate of duty in respect of the goods imported from ASEAN countries that includes Malaysia, subject to satisfaction of Deputy / Assistant Commissioner of Customs that the imported goods satisfy Notification No. 189/2009(N.T.) dated 31.12.2009 to determine the country of origin from where the goods are imported. The rules framed under Notification No. 189/2009(N.T.) dated 31.12.2009 to determine the country of origin is called as 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 (herein after also referred to as "Rules of Origin").

The Origin criteria has been explained in Rule 3 of these rules. Further, in the instant case the imported products not wholly produced or obtained in the exporting party, therefore, the origin criteria would be decided as per the guidelines provided under Rule 5 of the above said Rules. Rule 3 and Rule 5 of Rules of Origin are reproduced hereunder for ease of reference:-

Rule-3. Origin criteria.- *The products imported by a party which are consigned directly under rule 8, shall be deemed to be originating and eligible for preferential tariff treatment if they conform to the origin requirements under any one of the following:-*

(a) products which are wholly obtained or produced in the exporting party as specified in rule 4; or,

(b) products not wholly produced or obtained in the exporting party provided that the said products are eligible under rule 5 or 6.

Rule-5. Not wholly produced or obtained products.-

(1) For the purpose of clause (b) of rule 3, a product shall be deemed to be originating, if -

(i) the AIFTA content is not less than 35 per cent of the FOB value; and

(ii) the non-originating materials have undergone at least a change in tariff sub-heading (CTSH) level i.e. at six digit of the Harmonized System:

Provided that the final process of the manufacture is performed within the territory of the exporting party.

(2) For the purpose of clause (i) of sub-rule (1), the formula for calculating the 35 per cent. AIFTA content is as follows:

(i) Direct Method

(ii) Indirect Method

(3) The parties are free to adopt the method of calculating the AIFTA content, whether it is the direct or indirect method and any verification of the AIFTA content by the importing party shall be done on the basis of the method used by the exporting party.

(4) Each party shall adhere to one method of calculating AIFTA content to promote transparency, consistency and certainty:

Provided that any change in the method of calculation shall be notified to all the parties at least six months prior to the adoption of the new method.

(5) The value of the non-originating materials shall be -

(i) the CIF value at the time of importation of the materials, parts or produce; or

(ii) the earliest ascertained price paid for the materials, parts or produce of undetermined origin in the territory of the party where the working or processing takes place.

(6) The method of calculating for AIFTA content is as set out in Annexure I annexed to these rules.

I further find that as per **Annexure-III** of the said "Rules of Origin", it is stipulated that for exporting of the products under preferential tariff treatment the exporter shall submit a written application for the AIFTA Country of Origin (COO) together with appropriate supporting documents proving that the products to be exported qualify for issuance of AIFTA COO.

22.4. **Form AI** is a 'Combined Declaration and Certificate' wherein the declaration is made by the exporter which includes declaration of origin criteria and certificate is to be done by the issuing authority of the exporting country. As per **Note-2(iii) of overleaf of the COO** to enjoy preferential tariff under AIFTA, goods must comply with the origin criteria in the Rules and as per **Note No. 2(iii) of overleaf of COO**, for goods that meet the origin criteria, the exporter and /or producer must indicate in box-8 of this Form.

22.5. In view of the above, Tin Ingots falling under Tariff item 8001 1090 imported from any ASIAN countries , including Malaysia, would have to satisfy the condition of 'deemed originating goods' to made it eligible for concessional rate of Customs duty. Therefore, I find that the facts of the present case and those in the cases cited and relied upon by the noticees in support of their defence submissions are different. The noticees have cited some of the following major judgments:-

(i) Continental Foundation Jt. Venture – 2017(216)ELT 177 (SC)

(ii) CC Mumbai A.S. Muloobhoy & Sons – 2015(318)ELT 576(SC)

(iii) Zuari Industries Ltd. Vs. Commissioner of C. Ex. & Customs [2007(210) E.L.T. 648(S.C.)].

(iv) Commissioner of Customs (Import) Vs. Wings Electronics [(2015)63 taxmann.com 356(SC)].

(v) Commissioner of Customs(Imports), Mumbai Vs. Tullow India Operations Ltd. [2005(189) E.L.T. 401(S.C.)].

(vi) Padmini Products Vs. CCE – 1989(43) E.L.T. 195(S.C.).

(vii) CCE Vs. Chemphar Drugs and Liniments – 1989(40) E.L.T. 276 (S.C.).

(viii) CC, Calcutta Vs. G.C. Jain – 2011(269)ELT 307 (S.C.)

(ix) Aban Lloyd Chiles Offshore Ltd. Vs. Commissioner of Customs [2006(200) E.L.T. 370(S.C.)].

(x) Commissioner Vs. Sutures India Pvt.Ltd. – 2010(255) ELT A85(SC).

Commissioner of Customs V. Rajnarayan Jwalaprasad [2014(306)E.L.T. 592 (Guj.)].

I find that they have cited these judgments with the contention that there is no positive and cogent evidence to prove any of the ingredients of Section 28(4), 114A,114AA and 112 of the Customs Act, 1962. Claiming the benefit of exemption notification cannot prove misstatement or suppression and cannot entail penal consequences. Without bringing on record and considering all the evidences pertaining to the alleged violation of Country of Origin the SCN issued on the basis of administrative instructions are void ab initio. Penalty under Section 114AA of the Customs Act, 1962 is not imposable on them as they did not knowingly or intentionally make or sign or use any declaration, statement or document which is false or incorrect in any material particular. The proceedings under customs act are in excess of

jurisdiction. Central Government / Supreme Court confirmed that certificates issued under treaties are sufficient evidence.

22.6. I find that the present SCN has been issued for denial of exemption benefit under Notification No.46/2011-Cus dated 01.06.2011 and Not. No. 53/2011-Cus dated 01.07.2011 after necessary verification and investigation regarding authenticity of the certificates of Origin (COO) as per the procedure provided under Rules of Origin.

23. I find that the matter was taken up for investigation by DRI, Mumbai Zonal Unit (MZU), Mumbai to verify the true origin of the goods and RVC and accordingly, initiated process for "retroactive check" and in accordance with paragraph 16 of Annexure-III of Rules of Origin (Notification No. 189/2009-Cus (NT) dated 31.12.2009), request was made to the Board by DRI vide their letter F. No. DRI-HQ-Pol/XIIA/02//2017/998 dated 06.04.2017 on sample basis by sending COO certificates (Form AI) by India to Malaysia. Further, a team of DRI, MZU, Mumbai visited the unit of MSC, Malaysia to examine the value addition and also to ascertain the originating criterion for Tin Ingots exported, in terms of **Paragraph-17 of Annexure-III** of the "Rules of Origin" (Notification No. 189/2009-Cus (NT) dated 31.12.2009) and **Paragraph 10 of Annexure-III** of the India Malaysia Preferential Trade Agreement Rules, 2011.

24. I find that verification / investigation conducted in the matter has revealed that in order to justify the origin criteria of Tin Ingots manufactured by MSC, a cost sheet reflecting cost incurred in production/manufacture of tin ingots during three months period of 2013 (July-September) to calculate the FOB value and Regional Value Content (RVC) was produced by MSC. It was revealed that it was usual practice of MSC to use the same cost sheet of 2013 for obtaining COO certificate over a prolonged period of time. Ministry of International Trade and Industry (MITI) has also confirmed that the cost data sheet of 2013 has been used for issuance of COO for prolonged period of time. The cost data sheet of 2013 does not accurately reflect the RVC. Thus it is seen that RVC for qualifying the origin criteria in Form AI (COO) has been claimed in the range above 70%, which was exorbitantly higher while in reality the value addition is much less than 35%. Further, tin ingots were being exported by MSC to Indian importers after being manufactured by them on job work/ works contract basis on behalf of the other traders/ suppliers. In such cases, MSC performed conversion of "Tin Ore" into "Tin Ingots" on job charges/conversion charges basis. In such cases, "smelting charges" paid by traders/suppliers for such conversion actually reflects the "Regional Value Addition" (RVC) in Malaysia, which in percentage terms of FOB value does not fulfill the criteria of origin. The cost data sheet submitted by MSC to MITI in the application for COOs does not accurately reflect the RVC and FOB of the exported tin ingots as per "Rules of Origin"

25. I find that the outcome of the verification visit and denial of the preferential benefits in respect of all COOs issued to MSC, Malaysia was communicated by the Board to the Issuing Authority of COOs i.e. MITI, Malaysia vide letter F.No 456/25/2014/Cus.V(Pt) dated 10.05.2018

and vide para 4 of letter F.No 456/06/2014/Cus.V(Pt) dated 12.07.2018 informed MITI as follows:

"Thus, there appears to be no reason to not deny the preferential benefit. It is opined that when the producer / exporter has not provided the accurate and correct information based on which COOs were issued by the issuing authority, hence, this communication may be considered as the final written determination for denial of preferential benefit in terms of Article 17(d) of OCP for Rules of Origin for AIFTA in respect of COOs issued to the exporter M/s. Malaysia Smelting Corporation".

These facts were duly communicated to the parties and inspection of these letters was offered to the noticees vide this office letter F. No. S/10-12/Adj/ADC/Titra/2019-20 dated 09.08.2019. From the above facts and circumstances it is unambiguously proved that the importer and Ex-bonders have wrongly availed the benefit of exemption Notification No.46/2011-Cus dated 01.06.2011 on the basis of Country of Origin certificate obtained by the supplier namely MSC, Malaysia by submitting incorrect declaration.

26. I find that as per provision of Section 46(4) of Customs Act, 1962, the importer while presenting a Bill of Entry shall make and subscribe to a declaration as to the truth of the contents of such Bill of Entry and shall in support of such declaration, produce the proper officer the invoice, if any or any other documents relating to the imported goods. Section 46(4) of Customs Act, 1962 reads as follows:-

" The importer while presenting a bill of entry shall at the foot thereof made and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods".

In view of above, the importer, who presents a Bill of Entry shall ensure the accuracy and completeness of the information given, the authenticity and validity of any document supporting it and compliance with the restriction or prohibition, if any related to the goods under this Act or any other law for the time being in force. However, in the instant case, the importer failed to provide the correct Country of Origin (COO) Certificate issued on the basis of accurate authentic complete information and supporting documents submitted by the supplier/exporter as per the guidelines and provisions stipulated under Rule of Origin about the goods to avail the benefit of exemption notification No.46/2011-Cus dated 01.6.2011. Non-observance of provisions of Section 46 (4) by the importers has resulted into mis-declaration in the particular of the said bills of entry, though without intention and knowledge.

27. I find that the importers /Ex-bonders availed benefit of exemption notification on the basis of improper Country of Origin (COO) Certificate obtained by the supplier on the basis of incorrect information. Hence, the benefits of duty availed by the importers (Ex-bonders) under exemption notification No.46/2011-Cus dated 01.6.2011 on the basis of invalid Country of Origin (COO) Certificate obtained by the suppliers on the basis of inaccurate data, are required to be recovered along with interest under Section 28(4) and 28AA of the Customs Act, 1962 from them.

I find that in terms of Section 28(4) ibid, the essential ingredients to invoke extended period is that there should be

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter.

In this case there is no collusion on the part of the importers/Ex bonders. Further there is mis-statement in this case in as much as the certificate regarding country of origin is not proper. Though there is nothing on record to show that it is wilful. However, in this case the ingredient of suppression of facts can not be ruled out. Rather suppression of facts is very much explicit, clear and palpable. Had the DRI not investigated the case, the facts would have remained undetected. There was no way department could know the incorrectness of the COO certificate except for the high level investigation. From the records it is not clear whether Importers have wilfully suppressed the fact of incorrect COO. However for invoking extended period suppression of facts itself is sufficient even if it is not wilful.

On the basis of the facts discussed above, I am of the considered view that the extended period under Section 28(4) of the Customs Act, 1962 has rightly been invoked in this case. Further, the noticees are also liable to penal action under provisions of Section 114A of the Customs Act, 1962 for the same reason. Therefore, the proceedings initiated vide present notice can not be vacated merely relying on the basis of OIOs dated 04.09.2019 and 17.09.2019 passed by the Principal Commissioner of Customs (Import), ICD, Tughlakabad in such cases. For disallowing the benefit of duty exemption on the basis of invalid certificate of origin (COO), I rely upon CESTAT decision in the case of M/s. Alfa Trader Vs. Commissioner of Customs, Cochin reported at 2007(217) ELT 437(Tri. – Bang.) wherein it is held that if the certificate of origin (COO) is not correct on facts, it can be rejected and may be basis for disallowing the duty exemption. Similarly, the case law in the matter of M/s. Surya Lights Vs. Commissioner of Customs reported at 2008(226) ELT 74-Tribunal Bangalore is equally relevant. Both decisions are squarely applicable in the instant case.

28. I also find that the goods imported by the importer / Ex-bonders as such, is also liable to confiscation under Section 111(o) of the Customs Act, 1962 for non-observance of provisions / condition of the above said exemption notification and under Section 111(m) of the Customs Act, 1962 for mis-declaration while presenting the bills of entry under Section 46 (4) ibid and the importers have rendered themselves liable to penal action under provisions of Section 112 (a) of the Customs Act, 1962. However, as the same were not seized and are not available, therefore, redemption fine can not be imposed in this case.

29. I find that in this case the penalty under Section 114AA of the Customs Act, 1962 is not imposable on the importers as there is nothing on record to show that they have knowingly or intentionally submitted the incorrect Country of Origin Certificate. Moreover, the Country of Origin Certificate itself is also not fake; it has been issued by the proper authority. Though, the certificate is defective as it has been issued on the basis of inaccurate facts. Therefore, duty is recoverable along with interest and penalty under other relevant Sections.

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

ORDER

(A) In respect of Ex-bonder M/s J. Poonamchand & Sons:-

(i) I confirm and order to recover differential Customs duty amounting to Rs.8,46,287/- (Rupees Eight Lakh Forty Six Thousand Two Hundred Eighty Seven Only) from **M/s J. Poonamchand & Sons**, as detailed in the table enclosed to the SCN, under Section 28(4) of the Customs Act 1962 by denying the benefits of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) I order to charge and recover interest at appropriate rate from **M/s J. Poonamchand & Sons** on the confirmed duty as mentioned in Para (i) above under Section 28AA of the Customs Act 1962.

(iii) I hold the goods i.e. Tin Ingots valued at Rs. 1,41,07,799/-, covered in the said two Ex bond Bills of Entry , as detailed in the table enclosed to the SCN, liable for confiscation under section 111(m) & 111(o) of Customs Act, 1962. Since the goods were not seized and are not available, I refrain from imposing redemption fine under Section125 of the Customs Act, 1962.

(iv) I do not impose penalty upon **M/s J. Poonamchand & Sons** under Section 114AA of the Customs Act, 1962 in view of the facts discussed above.

(v) I impose penalty of Rs. 8,46,287/- (Rupees Eight Lakh Forty Six Thousand Two Hundred Eighty Seven Only) upon **M/s J. Poonamchand & Sons** under Section 114A of the Customs Act, 1962.

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 confirmed duty at (i) above, interest confirmed at (ii) above and the amount of 25% of penalty imposed at (v) above within 30 days of receipt of this order.

(vi) I do not impose penalty upon **M/s J. Poonamchand & Sons** under Section 112(a) of the Customs Act, 1962, in view of proviso to Section 114A of the Customs Act, 1962, as penalty has already been imposed under Section114A ibid at (v) above.

(B) In respect of Ex-bonder M/s Asia Metals & Ferro Alloys:-

(i) I confirm and order to recover differential Customs duty amounting to Rs. 4,22,088/- (Rupees Four Lakh Twenty Two Thousand Eighty Eight Only) from **M/s Asia Metals & Ferro Alloys** ,as detailed in the table enclosed to the SCN, under Section 28(4) of the Customs Act 1962 by denying the benefits of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) I order to charge and recover interest at appropriate rate from **M/s Asia Metals & Ferro Alloys** on the confirmed duty as mentioned in Para (i) above under Section 28AA of the Customs Act 1962.

(iii) I hold the goods i.e. Tin Ingots valued at Rs. 70,36,296/-, covered in the said one Ex-bond Bill of Entry , as detailed in the table enclosed to the SCN, liable for confiscation under section 111(m) & 111(o) of Customs Act, 1962. Since the goods were not seized and are not available, I refrain from imposing redemption fine under Section125 of the Customs Act, 1962.

(iv) I do not impose penalty upon **M/s Asia Metals & Ferro Alloys** under Section 114AA of the Customs Act, 1962 in view of the facts discussed above.

(v) I impose penalty of Rs. 4,22,088/- (Rupees Four Lakh Twenty Two Thousand Eighty Eight Only) upon **M/s Asia Metals & Ferro Alloys** under Section 114A of the Customs Act, 1962.

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 confirmed duty at (i) above, interest confirmed at (ii) above and the amount of 25% of penalty imposed at (v) above within 30 days of receipt of this order.

(vi) I do not impose penalty upon M/s Asia Metals & Ferro Alloys under Section 112 (a) of the Customs Act, 1962, in view of proviso to Section 114A of the Customs Act, 1962, as penalty has already been imposed under Section114A ibid at (v) above.

(C) In respect of Ex-bonder Sri Bhavani Metals P. Ltd.:-

(i) I confirm and order to recover differential Customs duty amounting to Rs. 4,20,863/- (Rupees Four Lakh Twenty Thousand Eight Hundred Sixty Three Only) from **Sri Bhavani Metals P. Ltd.**, as detailed in the table enclosed to the SCN, under Section 28(4) of the Customs Act 1962 by denying the benefits of concessional BCD claimed under Notification No. 46/2011-Cus dated 01.06.2011.

(ii) I order to charge and recover interest at appropriate rate from Sri Bhavani Metals P. Ltd. on the confirmed duty as mentioned in Para (i) above under Section 28AA of the Customs Act 1962.

(iii) I hold the goods i.e. Tin Ingots valued at Rs. 70,15,877/-, covered in the said one Ex-bond Bill of Entry , as detailed in the table enclosed to the SCN, liable for confiscation under section 111(m) & 111(o) of Customs Act, 1962. Since the goods were not seized and are not available, I refrain from imposing redemption fine under Section125 of the Customs Act, 1962.

(iv) I do not impose penalty upon **Sri Bhavani Metals P. Ltd.** under Section 114AA of the Customs Act, 1962 in view of the facts discussed above.

(v) I impose penalty of Rs. 4,20,863/- (Rupees Four Lakh Twenty Thousand Eight Hundred Sixty Three Only) upon **Sri Bhavani Metals P. Ltd.** under Section 114A of the Customs Act, 1962.

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 confirmed duty at (i) above, interest confirmed at (ii) above and the amount of 25% of penalty imposed at (v) above within 30 days of receipt of this order.

(vi) I do not impose penalty upon **Sri Bhavani Metals P. Ltd.** under Section 112 (a) of the Customs Act, 1962, in view of proviso to Section 114A of the Customs Act, 1962, as penalty has already been imposed under Section114A ibid at (v) above.

(D) In respect of importer M/s Titra Trading Pvt. Ltd.:-

(i) I do not impose penalty upon M/s **Titra Trading Pvt. Ltd.** under Section 114AA of the Customs Act, 1962 in view of the facts discussed above.

(ii) I impose penalty of Rs. 14,08,000/-(Rupees Fourteen Lakh Eight Thousand Only) upon M/s **Titra Trading Pvt. Ltd.** under Section 112 (a) of the Customs Act, 1962 for act of omission and commission as discussed above.

31. This order is issued without prejudice to any other action that may be taken against the above mentioned firms or person or any other person, in this regard, under Customs Act, 1962 or under any other law for the time being in force.

(G. C. Jain)
Additional Commissioner,
Custom House, Kandla.

F. No. S/10-12/Adj/ADC/Titra /2019-20

Dated: 29.05.2020

BY RPAD/SPEED POST

To
1. M/s J. Poonamchand & Sons,
K-2, Munisuvrat Compound,
Rehnal Village,
Bhiwandi, Maharastra-421302

2. M/s Asia Metals & Ferro Alloys,
44, Manak House, 2nd Floor,
C.P Tank Road,
Mumbai-400004

3. M/s Sri Bhavani Metals P. Ltd.,
D-152, Phase-III IDA,
Jeedimetla, Hyderabad-500055

4. M/s Titra Trading P. Ltd.,
Survey No. 236/1 & 237, Warehouse No. k 05 & 06(B),
Village Mithi Roha,
Gandhidham

Copy to:

1. The Commissioner of Customs, Kandla.
2. The Deputy Commissioner of Customs, Group-IV, Custom House, Kandla.
3. The Deputy/Assistant Commissioner(RRA/ TRC/EDI) Custom House, Kandla.
4. The Superintendent(EDI), Custom House, Kandla with a request to upload the said order on the official website of this Commissionerate.
5. Notice Board
6. Guard File