सीमा शुल्क आयुक्त का कार्यालय, एनएस-III
OFFICE OF THE COMMISSIONER OF CUSTOMS, NS-III
केंद्रीकृत अधिनिर्णयन प्रकोष्ठ, जवाहरलाल नेहरू सीमा शुल्क भवन
CENTRALIZED ADJUDICATION CELL, JAWAHARLAL NEHRU CUSTOM HOUSE,
न्हावा शेवा, तालुका-उरण, जिला- रायगढ़, महाराष्ट्र -400 707
NHAVA SHEVA, TALUKA-URAN, DIST- RAIGAD, MAHARASHTRA-400707

File No: **S/10-577/2018-19/ Commr/NS-III/CAC /JNCH** Date : 28.10.2025
SCN No: **S/26-Misc-480/18-19/Gr.IV/JNCH dated 06.09.2018**

DIN**:**
20251078NX0000888F35

	आदेश की तिथि Date of Order	: 27.10.2025
	जारी किए जाने की तिथि Date of Issue	: 28.10.2025
आदेश सं. Order No.	:	244/2025-26/आयुक्त/एनएस-III/ सीएसी/जेएनसीएच 244/2025-26 /Commr./NS-III /CAC/JNCH
पारितकर्ता Passed by	:	श्री विजय रिशी SH. VIJAY RISI आयुक्त, सीमाशुल्क (एनएस-3), जेएनसीएच, न्हावा शेवा Commissioner of Customs (NS-III), JNCH, Nhava Sheva
पक्षकार (पार्टी)/ नोटिसी का नाम Name of Party/ Noticee	:	**मेसर्स पर्सन्सग अलॉयज़** M/s. PERSANSG ALLOYS

मूलआदेश

ORDER-IN-ORIGINAL

1. इस आदेश की मूल प्रति की प्रतिलिपि जिस व्यक्तिको जारी की जाती है, उसके उपयोग के लिए नि:शुल्क दी जाती है।
   The copy of this order in original is granted free of charge for the use of the person to whom it is issued.
2. इस आदेश से व्यथित कोई भी व्यक्ति सीमाशुल्क अधिनियम १९६२ की धारा १२९(ए (के तहत इस आदेश के विरुद्ध सी ई एस टी ए टी, पश्चिमी प्रादेशिक न्यायपीठ (वेस्ट रीज़नल बेंच(, ३४, पी .डी .मेलोरोड,

मस्जिद (पूर्व(, मुंबई– ४०० ००९ को अपील कर सकता है, जो उक्तअधिकरण के सहायक रजिस्ट्रार को संबोधित होगी।

Any Person aggrieved by this order can file an Appeal against this order to CESTAT, West Regional Bench, 34, P D Mello Road, Masjid (East), Mumbai - 400009 addressed to the Assistant Registrar of the said Tribunal under Section 129 A of the Customs Act, 1962.

3. अपील दाखिल करने संबंधी मुख्य मुद्दे:-

Main points in relation to filing an appeal:-

फार्म **Form**	:	फार्म न .सीए ३, चार प्रतियों में तथा उस आदेश की चार प्रतियाँ, जिसके खिलाफ अपील की गयी है (इन चार प्रतियों में से कमसे कम एक प्रति प्रमाणित होनी चाहिए) Form No. CA3 in quadruplicate and four copies of the order appealed against (at least one of which should be certified copy)
समय सीमा **Time Limit**	:	इस आदेश की सूचना की तारीख से ३ महीने के भीतर Within 3 months from the date of communication of this order.
फीस **Fee**	:	(क) एक हजार रुपये–जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्तिकी रकम ५ लाख रुपये या उस से कम है। (a) Rs. One Thousand - Where amount of duty & interest demanded & penalty imposed is Rs. 5 Lakh or less. (ख) पाँच हजार रुपये– जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्तिकी रकम ५ लाख रुपये से अधिक परंतु ५० लाख रुपये से कम है। (b) Rs. Five Thousand - Where amount of duty & interest demanded & penalty imposed is more than Rs. 5 Lakh but not exceeding Rs. 50 lakh (ग) दस हजार रुपये–जहाँ माँगे गये शुल्क एवं ब्याज की तथा लगायी गयी शास्तिकी रकम ५० लाख रुपये से अधिक है। (c) Rs. Ten Thousand - Where amount of duty & interest demanded & penalty imposed is more than Rs. 50 Lakh.
भुगतान की रीति **Mode of Payment**	:	क्रॉस बैंक ड्राफ्ट, जो राष्ट्रीयकृत बैंक द्वारा सहायक रजिस्ट्रार, सी ई एस टी ए टी, मुंबई के पक्षमें जारी किया गया हो तथा मुंबई में देय हो। A crossed Bank draft, in favour of the Asstt. Registrar, CESTAT, Mumbai payable at Mumbai from a nationalized Bank.
सामान्य **General**	:	विधि के उपबंधों के लिए तथा ऊपर यथा संदर्भित एवं अन्य संबंधित मामलों के लिए, सीमाशुल्क अधिनियम, १९९२, सीमाशुल्क (अपील) नियम, १९८२ सीमाशुल्क, उत्पादन शुल्क एवं सेवा कर अपील अधिकरण (प्रक्रिया) नियम, १९८२ का संदर्भ लिया जाए। For the provision of law & from as referred to above & other related matters, Customs Act, 1962, Customs (Appeal) Rules, 1982, Customs, Excise and Service Tax

	Appellate Tribunal (Procedure) Rules, 1982 may be referred.

4. इस आदेश के विरुद्ध अपील करने के लिए इच्छुक व्यक्ति अपील अनिर्णीत रहने तक उस में माँगे गये शुल्क अथवा उद्गृहीत शास्ति का ७.५ % जमा करेगा और ऐसे भुगतान का प्रमाण प्रस्तुत करेगा, ऐसा न किये जाने पर अपील सीमाशुल्क अधिनियम, १९६२ की धारा १२८ के उपबंधों की अनुपालना न किये जाने के लिए नामंजूर किये जाने की दायी होगी ।

Any person desirous of appealing against this order shall, pending the appeal, deposit 7.5% of duty demanded or penalty levied therein and produce proof of such payment along with the appeal, failing which the appeal is liable to be rejected for non-compliance with the provisions of Section 129 of the Customs Act 1962.

BRIEF FACTS

A Show cause notice no. F.No.S/26-Misc- 480 / 18.19 Gr.IV dated 16.09.2018 was issued to M/S PERSANG ALLOY INDUSTRIES PVT LTD, having their office address at 353,BIDC ESTATE, WAGHODIA, VADODARA- 391760 filed 07 Bills of Entry as mentioned in the Annexure enclosed herewith for imploration of 'Tin Ingots' from their abroad suppliers M/S. SIZER METALS PTE LTD. SINGAPORE and M/S. WHITE GOLD PTE LTD., SINGAPORE. The "Country of Origin" declared in all the said Bills of Entry was Malaysia, and COO Certificate on which basis concessional BCD (0%) was claimed by the importer, was issued by "M/s Malaysia Smelting Corporation, BERH 27, Jalan Pantai, 12000 Butterworth, Penang, Malaysia".

1.1 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%.

1.2 In all the bills of entry the importer had claimed concessional duty of Nil BCD benefit under SI. No 1002 (I) of Notification No. 046/2011-Customs, dated 01.06.2011 and paid total duty Rs. 23367877/- on the strength of duty structure of BCD (0%)+CVD(12% or 12.5 %) +CESS (2+1)% + SAD (4%) (effectively 16.8544% in case CVD @ 12% or 17.39% in case CVD 12.5%) whereas the actual duty required to be paid has been found to be Rs. 31684836/- under duty structure BCD (5%)+ CVD (12% or 12.5 %) +CESS (2+1)% + SAD (4%) (effectively 22.85312% in case CVD @ 12% or 23.4145% in case CVD 12.5%). Due to which there has been a short levy of duty to the tune of Rs. 8316959/-- The duty details have been worked out in the Annexure A below:-

ANNEXURE

Sr No.	BE. No	Date	Importer	Supplier	COO	AV (in Rs.)	Duty collected @ 0% BCD under Not. No. 043/2011+12.5 or 12% CVD+CESS+4%ACD(SAD) (effectively 16.8544% in case CVD @ 12% or 17.39% in case CVD 12.5%) (In Rs.)	Duty Leviable @5% BCD+12 or 12.5% CVD+CESS+4%ACD(SAD) (effectively 22.85312% in case CVD @ 12% or 23.4145% in case CVD 12.5%) (in Rs.)	Duty difference/duty short levied (in Rs.)
1	3378178	26.09.2013	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. SIZER METALS PTE LTD. SINGAPORE	Malaysia	36574362	6164389	8358383	2193994
2	3795733	13.11.2013	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. SIZER METALS PTE LTD. SINGAPORE	Malaysia	38479670	6485518	8793805	2308288
3	4316741	10.01.2014	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. SIZER METALS PTE LTD. SINGAPORE	Malaysia	37392822	6302336	8545426	2243091
4	6823519	20.09.2014	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. TRAXYS EUROPE S.A, UK	Malaysia	14330338	2415292	3274929	859637
5	6541494	25.08.2014	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. WHITE GOLD PTE LTD., SINGAPORE	Malaysia	1764920	297467	403339	105873
6	6541675	25.08.2014	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. WHITE GOLD PTE LTD., SINGAPORE	Malaysia	8257884	1391817	1887184	495367
7	6541681	25.08.2014	M/S PERSANG ALLOY INDUSTRIES PVT LTD	M/S. WHITE GOLD PTE LTD., SINGAPORE	Malaysia	1845563	311059	421769	110710
TOTAL						138645559	23367877	31684836	8316959

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

3.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%.

4. 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.

4.1 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 subheading (CTSH) level i.e. at six digit of the Harmonized System:

4.2 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.

4.3 As per clause -7 of the Annexure -III of the "Rules of Origin" regarding issuance of AIFTA COO, the certificate shall comprise one original and three copies and each certificate of origin (COO) shall bear reference number, as given separately by each place or office of issuance. Clause -7 of said Annexure -III reads as follows:-

"7. ISSUANCE OF AIFTA CERTIFICATE OF ORIGIN

a. *The AIFTA Certificate of Origin shall be in International Organisation for Standardisation (ISO) A4 size, and white paper in conformity with the specimen as in the Attachment to these Operational Certification Procedures. It shall be made in English. The AIFTA Certificate of Origin shall comprise one (1) original and three (3) copies. Each AIFTA Certificate of Origin shall bear a reference number as given separately by each place or office of issuance.*
b. *The original copy shall be forwarded, together with the triplicate, by the exporter to the importer. Only the original copy will be submitted by the importer to the Customs Authority at the port or place of importation. The duplicate shall be retained by the Issuing Authority in the exporting party. The triplicate shall be retained by the importer. The quadruplicate shall be retained by the exporter.*
c. *In cases where an AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party, such AIFTA Certificate of Origin shall be marked accordingly in box 4 and the original AIFTA Certificate of Origin shall be returned to the Issuing Authority within a reasonable period but not to exceed two months. The Issuing Authority shall be duly notified of the grounds for the denial of preferential tariff treatment."*

4.4 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, the origin criteria met, in the manner shown in the following table:-

Table

Circumstances of production of manufacture I nih first country named in Box11 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*

4.5 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.

4.6 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 the some importers of tin ingots 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.

5. 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 Al) 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)."

5. 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(ili) 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 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 per. ad of six months from the date when the verification visit was conducted.

6. 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.

7. 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 terins 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.

8. 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-IlI of the Notification No. 189/2009-Cus. (NT), dated 31.12.2009 and Rule 10(5) of Annexure-Ill 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 [RUD-2].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 Manufacturers on the basis of job wokrs/work contracts basis by MSC, on behalf of the other trades/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

9. Aforesaid communication dated 10th May 2018 by CBIC to the Issuing Authority of COOs i.e. MITI, Malaysia is conclusive evidence non availability of benefit of exemption of duty / concessional rate of duty availed vide Notification No. 46/2011-Cus dated 01.06.2011 availed on the basis of COO issued where supplier was exporter 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 M/s PERSANG ALLOY INDUSTRIES PVT LTD for the goods covered vide 07 bills of entry as detailed in the said Annexure appeared to be not admissible and are liable to be rejected and the differential duty involved in the cases covered vide the said 07 Bills of Entry are recoverable under the provisions of the Customs Act, 1962. The Importers M/s PERSANG ALLOY INDUSTRIES PVT LTD are liable to pay the differential duty of Rs. 8316959/-along with the applicable interest.

10. The Notification No. 46/2011-Cus dated 01.06.2011 provide for exemption from the whole of the duty of Customs leviable which is specified in the firs. 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% valued addition where actual value addition was much less than 35%. Thus, all the COOs issued by MITI and submitted before the Customs authorities in the instant cases with an 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.

11. M/S PERSANG ALLOY INDUSTRIES PVT LTD was 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 PERSANG ALLOY INDUSTRIES PVT 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. SIZER METALS PTE LTD. SINGAPORE and M/S. WHITE GOLD PTE LTD., SINGAPORE) affected within 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

12. Further, based on such fraudulently obtained Country of Origin certificate by MSC, Malaysia, all the imports of tin ingot, form 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

13. The said consignments, were imported by importer by mis-declaring the facts as discussed in paras above and wrongly availed benefit of Notification No. 46/2011-Cus dated 01.06.2011, hence they appeared 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.

13.1 Non-observance of provisions of Section 46 (4) by the importer has resulted into mis-declaration in the particular of the said bill of entry thereby has rendered the goods of declared value Rs. 13,86,45,559/- 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 ransshipment, with the declaration for ransshipment 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)

13.2 It also appeared that M/S PERSANG ALLOY INDUSTRIES PVT 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 misstatement 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 appears that importer has knowingly and intentionally caused declaration to be made signed and used which was false and incorrect, he appears liable to a penalty under Section 114AA of the Act.

APPLICABILITY OF PENALTY ON IMPORTER (SECTION 114A)

13.3 Further, consequent upon amendment to the Section 17 of the Customs Act, 1962 vide Finance Act, 2011, 'Self-Assessment' has been introduced in Customs. Section17 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, 20€1 (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.

13.4 In the instant case, M/S PERSANG ALLOY INDUSTRIES PVT 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 misstatement and suppression of facts. He has also resorted to mis-declaration of facts with intent to evade duty of Customs as discussed in this show cause notice. Since the duty in this case is not be paid correctly by reason of willful mis-statement to suppression of facts, importer, who is liable to pay duty under section 28 (4) and interest also appeared, liable to penalty under section 114A of the Customs Act, 1962.

14. **Therefore, the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD were called upon to Show Cause to the Commissioner of Customs (NS-III) C-Wing, 6nd floor, Jawaharlal Nehru Custom House, Nhava Sheva, Taluka - Uran, Dist: Raigad, Maharashtra - 400 707 within 30 days of the receipt of this Notice as to why:-**

(i) The differential duty amounting to Rs.**83,16,959/-** should not be recovered under Section 28(4) of the Customs Act 1962 in respect of 07 Bills of Entry mentioned in the enclosed Annexure 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 recovered under Section 28 AA of the Customs Act 1962 in respect of duty demand as mentioned in Para (i) above.

(iii) The goods of value Rs. 13,86,45,559/-covered by the said 07 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 the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD under Section 114AA of the Customs Act, 1962 for act of omission and commission as discussed above.

(v) Penalty should not be imposed on the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD under Section 114A of the Customs Act, as mentioned in paras above.

(vi) Penalty should not be imposed on the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD under Section 112 (a) of the Customs Act, 1962 for act of omission and commission as discussed above.

WRITTEN SUBMISSION

15. Noticee submitted the following through his written submissions dated 02.04.2019, 05.04.2019 and 06.10.2025:-

- Noticee contends that the Show Cause Notice dated 06.09.2018 issued under Section 28(4) is without authority of law, as the verification of the Certificate of Origin (COO) by the Directorate of Revenue Intelligence (DRI) was contrary to the prescribed procedure under the ASEAN–India Free Trade Agreement (AIFTA) Rules of Origin, notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009. They argue that only the issuing authority of the exporting country (MITI, Malaysia) is competent to verify the COO, not DRI.
- Noticee submitted that the DRI's verification was undertaken without proper

authorization or notification from the Government of India and contrary to Para 16 and 17 of Annexure III of the Rules of Origin. The verification visit was allegedly done to protect domestic industry, not to validate origin, and thus lacks legal validity.

- Noticee submitted that there is no evidence to show that the Regional Value Content (RVC) was below 35%. The Department relied on an old cost sheet of July–September 2013, which, according to the noticee, validly covered imports during 2013–2014. They assert that there were no major changes in sourcing mix during that period, and hence the 2013 cost data remains relevant.
- Noticee submitted that the importer maintains that they cannot be held responsible for any inaccuracy in the COO issued by MITI, Malaysia. They emphasize that they merely relied on official documents, and any misstatement or false certification, if at all, is attributable to the issuing authority, not the importer.
- Noticee submitted that there is no violation of Sections 17, 46(4), 111(m), or 111(o) of the Customs Act, 1962, since all Bills of Entry were duly filed with correct particulars, invoices, and COOs verified by the proper officer at the time of assessment. Once the proper officer accepted the COOs and allowed clearance, the importer cannot be faulted later.
- Noticee submitted that differential duty cannot be demanded merely on the basis of a verification report, and that confiscation under Sections 111(m) and 111(o) is untenable since the goods are no longer physically available and no condition of the notification was violated.
- Noticee submitted that penalty under Section 114A cannot be imposed unless fraud, suppression, or wilful misstatement by the importer is established. They state that there is no evidence of such conduct, and mere reliance on government-issued COOs does not constitute suppression or misdeclaration.
- Noticee submitted that SCN is time-barred, as the imports pertain to 2013–2014, and the notice was issued in 2018. They further claim that the Order-in-Original is delayed, violating adjudication time limits under Section 28(9).
- Noticee submitted that DRI has no jurisdiction to initiate or conduct verification of origin or RVC under the AIFTA framework. Such authority, they argue, vests solely with the competent authority of the exporting country (MITI), and DRI's actions are contrary to CBIC's Instruction No. 31/2016-Cus. dated 12.09.2016**.**
- Noticee submitted that there is no wilfull misstatement or suppression of facts, asserting that identical consignments were cleared in the past after due verification by customs, and that this is a policy-motivated verification to protect domestic industry rather than a genuine case of evasion.
- The Noticee submitted that the SCN to be dropped.

PERSONAL HEARING

16. Consultant Shri HK Hirani appeared before the adjudicating authority on 06.10.2025.

- He reiterated the written submission dated 02.04.2019, 05.09.2019 and 06.10.2025 submitted by the Noticee.

- He informed that he has attended personal hearing before the erstwhile adjudicating authority on 11.09.2019 and 02.04.2019 and requested that to be taken on record.
- He contended that SCN is time barred, OIO is also time barred and DRI has no authority to investigate RVC as per ASEAN Rules.

16.1 Consultant Shri HK Hirani appeared before the adjudicating authority on 11.09.2019 and submitted the following:-

- Rules of Origin Notification were followed completely while rejecting the PTA's Claim.
- Goods are not available for confiscation hence no penalty under section 112(a) is applicable.
- Section 114AA is not applicable as there is no suppression of facts or willful misstatement.
- No evidences have been produced to invoke section 28(4).

16.2 Consultant Shri HK Hirani appeared before the adjudicating authority on 02.04.2019 and submitted the following:-

- The allegation by the department of RVC was mis declared to be more than 35% is without any basis as verification report was not given.
- For implementation of Rules of Origin Under FTA and verification of preferential certificates of origin, CBEC circular no. 31/2016 -Customs dt. 12.09.2016 is relevant.
- There is no mis statement or collusion by the present noticee and extended period for issuing SCN under 28(4) is not available with the department.
- Goods are not liable for confiscation and penalty under 112(a) is not imposable as noticee has no role with issuance of COO issuing by the issuing party.

DISCUSSIONS AND FINDINGS

Principles of natural justice

17. Before going into the merits of the case, I find that in the instant case, in compliance of the provisions of Section 28(8) read with Section 122A of the Customs Act, 1962 and in terms of the principle of natural justice, personal hearing in this matter was granted to the Noticee and Consultant Shri HK Hirani appeared on the behalf of the noticee on 06.10.2025, 11.09.2019 and 02.04.2019 submitted the following:-

- He reiterated the written submission dated 02.04.2019, 05.09.2019 and 06.10.2025 submitted by the Noticee.
- He informed that he has attended personal hearing before the erstwhile adjudicating authority on 11.09.2019 and 02.04.2019 and requested that to be taken on record.
- He contended that SCN is time barred, OIO is also time barred and DRI has no authority to investigate RVC as per ASEAN Rules.

I thus find that the principle of natural justice has been followed and I can proceed ahead with the adjudication process. I also refer to the following case laws on this aspect-

- Sumit Wool Processors Vs. CC, Nhava Sheva [2014 (312) E.L.T. 401 (Tri. - Mumbai)]
- Modipon Ltd. Vs. CCE, Meerut [reported in 2002 (144) ELT 267 (All.)]

FRAMING OF ISSUES

Pursuant to a meticulous examination of the Show Cause Notice and a thorough review of the case records, the following pivotal issues have been identified as requisite for determination and adjudication:

i. **As to whether duty exemption benefit claimed under Notification No. 46/2011-Cus dated 01.06.2011 be denied.**
ii. **As to whether the differential duty amounting to Rs. 83,16,959/- should be recovered under Section 28(4) of the Customs Act 1962 along with applicable interest under section 28 AA of the Customs Act, 1962 in respect of 07 Bills of Entry as mentioned in Annexure A above.**
iii. **As to whether contention of the noticee has merit.**
iv. **As to whether goods valued at Rs. 13,86,45,559/- imported vide 07 Bills of Entry as mentioned in Annexure A above should be held liable for confiscation under section 111(m) &(o) of Customs Act, 1962.**
v. **As to whether Penalty should be imposed on the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD under Section 112(a) and114A of the Customs Act.**
vi. **As to whether Penalty should be imposed on the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD under Section 114AA of the Customs Act.**

A. **Now I take up the first question as to whether duty exemption benefit claimed under Notification No. 46/2011-Cus dated 01.06.2011 be denied.**

17.1 I observe that M/S PERSANG ALLOY INDUSTRIES PVT LTD, having their office address at 353, BIDC ESTATE, WAGHODIA, VADODARA- 391760 filed 07 Bills of Entry as mentioned in the Annexure enclosed herewith for imploration of 'Tin Ingots' from their abroad suppliers M/S. SIZER METALS PTE LTD. SINGAPORE and M/S. WHITE GOLD PTE LTD., SINGAPORE. The "Country of Origin" declared in all the said Bills of Entry was Malaysia, and COO Certificate on which basis concessional BCD (0%) was claimed by the importer, was issued by "M/s Malaysia Smelting Corporation, BERH 27, Jalan Pantai, 12000 Butterworth, Penang, Malaysia".

17.2 I observe that in all the 07 Bills of Entry the importer had claimed concessional duty of Nil BCD benefit under SI. No 1002 (I) of Notification No. 046/2011-Customs, dated 01.06.2011 and paid total duty Rs. 23367877/- on the strength of duty structure of BCD (0%) + CVD (12% or 12.5 %) +CESS (2+1) % + SAD (4%) (effectively 16.8544% in case CVD @ 12% or 17.39% in case CVD 12.5%) whereas the actual duty required to be paid has been found to be Rs. 31684836/- under duty structure

BCD (5%) + CVD (12% or 12.5 %) +CESS (2+1) % + SAD (4%) (effectively 22.85312% in case CVD @ 12% or 23.4145% in case CVD 12.5%). Due to which there has been a short levy of duty to the tune of Rs. 8316959/- The duty details have been worked out in the Annexure enclosed herewith.

17.3 I observe that representations were made by domestic industries regarding 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), by availing the 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%.

17.4 I further observe that 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'] which were notified vide Notification No. 189/2009-Cus. (N.T.), dated 31-12-2009 and India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011).

17.5 I further observe that Rule-5 read with Rule-3 of the said "Rules of Origin" read with India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011) 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% Regional Value Content (RVC) or Value Addition 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" and India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011) are reproduced below: -

> *"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 subheading (CTSH) level i.e. at six digits of the Harmonized System:"

17.6 I further observe 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. 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.

17.7 I further observe that as per clause -7 of the Annexure -III of the "Rules of Origin" regarding issuance of AIFTA COO, the certificate shall comprise one original and three copies and each certificate of origin (COO) shall bear reference number, as given separately by each place or office of issuance, Clause -7 of said Annexure -III is reproduced below:-

"7. *ISSUANCE OF AIFTA CERTIFICATE OF ORIGIN*

a. *The AIFTA Certificate of Origin shall be in International Organization for Standardization (ISO) A4 size, and white paper in conformity with the specimen as in the Attachment to these Operational Certification Procedures. It shall be made in English. The AIFTA Certificate of Origin shall comprise one (1) original and three (3) copies. Each AIFTA Certificate of Origin shall bear a reference number as given separately by each place or office of issuance.*
b. *The original copy shall be forwarded, together with the triplicate, by the exporter to the importer. Only the original copy will be submitted by the importer to the Customs Authority at the port or place of importation. The duplicate shall be retained by the Issuing Authority in the exporting party. The triplicate shall be retained by the importer. The quadruplicate shall be retained by the exporter.*
c. *In cases where an AIFTA Certificate of Origin is not accepted by the Customs Authority of the importing party, such AIFTA Certificate of Origin shall be marked accordingly in box 4 and the original AIFTA Certificate of Origin shall be returned to the Issuing Authority within a reasonable period but not to exceed two months. The Issuing Authority shall be duly notified of the grounds for the denial of preferential tariff treatment."*

17.8 I further observe that Form AI is a 'Combined Declaration and Certificate' issued

under the ASEAN–India Free Trade Agreement (AIFTA) for claiming preferential tariff treatment under Notification No. 46/2011-Cus. dated 01.06.2011 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 nih first country named in Box11 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*

17.09 I observe that each import of goods of Malaysia origin eligible for concession in India and are 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.

17.10 I observe that Tin Ingots falling under Tariff item 80011090 imported from any ASEAN 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 tin ingots has to have RVC of 35% or above to be termed as 'deemed originating'. I observe that intelligence indicated some importers of tin ingots 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.

17.11 **The verification Process as prescribed under AIFTA Rules:-**

I observe that DRI has reasonable doubt about true origin of the goods and RVC and the matter was taken up for investigation and accordingly initiated process for "retroactive check" in accordance with paragraph 16 of Annexure-III of Rules of Origin (Notification No. 189/2009-Cus (NT) dated 31.12.2009) and Paragraph 9 of Annecure – III of and India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011) and 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)."

Para 9 Annexure III

Origin verification.- *(1) The customs authority of the importing Party may request the Issuing Authority of the exporting Party to perform a retroactive check at random or when it has reasonable doubt as to the authenticity certificate of origin or as to the accuracy of the information regarding the true origin of the goods in question or of certain parts thereof.*

(2) The request for a retroactive check shall be accompanied with the relevant certificate of origin and shall specify the reasons and any additional information suggesting that the particulars given on the said certificate of be inaccurate, unless the retroactive check is requested on a random basis.

(3) The Issuing Authority of the exporting Party shall, on receipt of such request, conduct a retroactive check on the cost statement of the exporter or the producer based on the current cost and prices and shall send a reply customs authority of the importing Party within three months of the date of receipt of request.

(4) The retroactive check process, including the actual process and the determination of whether the subject goods are originating or not, should be completed and the result should be communicated to the importer within months of the date of

presentation of the certificate of origin to the customs authority of the importing Party.

17.12 I observe that owing to lack of response from Malaysia to the requests for these retroactive checks, a team of DRI 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) are reproduced below:-

"*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(ili) 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 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 per. ad of six months from the date when the verification visit was conducted.

In view of the above provisions for verification of COO, I find that the subject verification by DRI, Mumbai was conducted strictly as per the provisions of AIFTA "Rules of Origin" (Notification No. 189/2009-Cus (NT) dated 31.12.2009) read with India Malaysia Preferential Trade

Agreement Rules, 2011 (Notification No 43/2011).

17.13 **Usage of old Cost Sheet:-**

I observe that 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. I further observe that 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 was observed that RVC for qualifying the origin criteria in Form AI (COO) has been claimed in the range above 70%, which was exorbitantly higher.

17.14 **Investigation revealed that RVC was equal to only Job Work Smelting Charges:-**

I observe that investigation 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. It was further 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/supplier's invoices to Indian importers. The said invoices were being submitted by MSC along with the cost data sheet of 2013 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.

17.15 **MITI, Malaysia vide letter dated 10.05.2018 confirmed the findings of DRI Investigation about i) Illegal Usage of an old Cost Sheet and Non-Fulfilment of RVC:-**

I observe that as per verification report submitted by verification team, which contains relevant facts 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-Ill 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. The main content of said letter is reproduced below: -

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 Manufacturers on the basis of job wokrs/work contracts basis by MSC, on behalf of the other trades/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".

17.15.1 The above letter by the official COO issuing Authority MITI, Malaysia establishes beyond any doubt that the subject COOs were obtained fraudulently on the basis of an old and irrelevant Cost Sheet without meeting the mandatory condition of at least 35% RVC or value addition in the ASEAN Region.

17.16 **The benefit of Customs Exemption Notification No. 46/2011-Cus. dated 01.06.2011 cannot be availed without meeting the mandatory condition: -**

In view of the above I find that M/S PERSANG ALLOY INDUSTRIES PVT LTD HAS imported Tin Ingots from their overseas suppliers, declaring the country of origin as Malaysia, and claimed the benefit of Nil Basic Customs Duty under Serial No. 1002(I) of Notification No. 46/2011-Cus. dated 01.06.2011 as amended by notification no. 64/2012 Customs dated 31.12.2012 on the strength of Certificates of Origin (Form AI) issued by M/s Malaysia Smelting Corporation (MSC), Malaysia, and certified by the Ministry of International Trade and Industry (MITI), Malaysia. The said notification provides for exemption from Basic Customs Duty to goods imported from member states of the Association of South East Asian Nations (ASEAN), subject to fulfillment of the origin criteria prescribed under the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Member States of ASEAN and the Republic of India) Rules, 2009 issued vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009.

The relevant portion of Notification No. 46/2011-Cus. reads as follows:

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in

the public interest so to do, hereby exempts goods of the description specified in column (3) of the Table annexed hereto, when imported into India from a member State of the Association of South East Asian Nations (ASEAN), from so much of the duty of customs leviable thereon as is in excess of the rate specified in column (4) thereof, subject to the condition that the importer proves to the satisfaction of the Assistant Commissioner or Deputy Commissioner of Customs that the goods in question are of the origin of the exporting ASEAN member state, in accordance with the provisions of the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Member States of ASEAN and the Republic of India) Rules, 2009."

990	*8001 to 8003*	*All goods*	*3.0*	*4.0*

Appendix I

S.No.	*Name of the Country*
1	*Malaysia*
2	*Singapore*
3	*Thailand*
4	*Vietnam*
5	*Myanmar*
6	*Indonesia*
7	*Brunei Darussalam*
8	*Lao People's Democratic Republic*

The above said notification was further amended bynotification no. 64/2012 Customs dated 31.12.2012 which is reproduced below: -

G.S.R. 949 (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962),the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.46/2011-Customs, dated the 1 st June, 2011 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (i), vide number G.S.R. 423 (E), dated the 1 st June, 2011, namely:-In the said notification, for the Table, the following Table shall be substituted, namely:-

1002	*8001 to 8003*	*All Goods*	*0.0*	*3.0*

17.17 In view of the above , it is evident that the availability of concessional duty depends entirely on the importer's ability to demonstrate that the goods are of the origin of the exporting ASEAN member country as per the prescribed Rules of Origin. In this regard, I reproduce the relevant Rule 3 and Rule 5 of the said Rules of Origin as notified under Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009 read with and India Malaysia Preferential Trade Agreement Rules, 2011 issued vide notification no. 43/2011 dated 01.07.2011 which lay down the essential origin criteria:

*"*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 Rule 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 thirty-five per cent of the FOB value; and***
(ii) the non-originating materials have undergone at least a change in tariff sub-heading (CTSH) level, that is to say, at the six-digit level of the Harmonized System."

In view of the above it is evident that for any product which is not wholly produced or obtained in the exporting country, the goods can be treated as originating only if the Regional Value Content (RVC) is not less than 35% of the FOB value and the non-originating materials have undergone a CTH at the six-digit level. Unless these two conditions are satisfied, the goods cannot be deemed to originate from the exporting country and cannot qualify for preferential tariff treatment under the Notification.

17.18 I find that the Directorate of Revenue Intelligence (DRI), upon receipt of credible intelligence and representations from domestic industry regarding alleged misuse of preferential tariff benefits in the import of Tin Ingots from Malaysia, initiated a retroactive verification under Paragraph 16 of Annexure III to the Rules of Origin. When no response was received from the Malaysian authorities, a verification visit was carried out at the premises of M/s Malaysia Smelting Corporation (MSC), Malaysia, in accordance with Paragraph 17 of Annexure III of the AIFTA Rules and Paragraph 10 of Annexure III of the India–Malaysia Preferential Trade Agreement Rules, 2011 notified under Notification No. 43/2011-Cus. (N.T.) dated 01.07.2011.

17.19 I find that during this verification it was revealed that M/s MSC had used a cost sheet prepared for the period July–September 2013 to compute the RVC and to obtain Certificates of Origin (Form AI) over an extended period of subsequent years. The Ministry of International Trade and Industry (MITI), Malaysia, confirmed that the same cost data had been used repeatedly for issuance of COOs, without reflecting the current cost or sourcing pattern at the time of export. It was also established that in several cases, MSC had performed only smelting operations on tin ore supplied free of cost (FOC) by unrelated traders/suppliers on a job-work basis. The raw material in such cases was of non-ASEAN origin, and the only value addition in Malaysia comprised of conversion or smelting charges, which, when compared to the FOB value of the exported goods, amounted to significantly less than 35%. Accordingly, the Tin Ingots exported by MSC did not fulfill the origin criteria laid down under Rule 5 of the Rules of Origin. Consequent to this verification visit, the CBIC vide letter dated 10.05.2018 has informed MITI, Malaysia that the cost data used by MSC was outdated and that the goods exported on job-work basis could not satisfy the RVC

condition. It was clearly stated that the Certificates of Origin issued to MSC were invalid for the purpose of claiming preferential duty under the AIFTA, and preferential benefits in respect of such COOs were to be denied.

17.20 These findings conclusively establish that the *Tin Ingots* exported by MSC and imported by the noticee **cannot be treated as originating goods of Malaysian origin**, and therefore, the **benefit of Notification No. 46/2011-Cus. dated 01.06.2011 is not admissible**.

PROVISIONS REGARDING VERIFICATION VISIT

I observe that noticee has contended that DRI Investigation in the matter was conducted without any authority of law. The noticee has also claimed that Investigation has provided no evidence that RVC is below 35%. However, I find no meri in the said contention of the noticee because of following reasons:-

17.21 I observe that the verification of Certificates of Origin (COO) for goods imported under preferential trade agreements is governed by:

- The Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Member States of ASEAN and the Republic of India) Rules, 2009, notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009, and
- The India–Malaysia Preferential Trade Agreement Rules, 2011, notified vide Notification No. 43/2011-Cus. (N.T.) dated 01.07.2011.

17.21.1 A per Paragraph 16 of Annexure III of Notification No. 189/2009-Cus. (N.T.), the importing authority may request a retroactive check of the Certificate of Origin when it has reasonable doubt regarding:

- (a) the authenticity of the COO, or
- (b) the accuracy of the information relating to the true origin of the goods.

17.21.2 Where the outcome of the retroactive check is unsatisfactory, Paragraph 17 of Annexure III empowers the importing authority, under exceptional circumstances, to conduct a verification visit to the premises of the exporter or producer in the exporting country to verify the origin and value addition.

17.21.3 Similarly Paragraph 10 of Annexure III of the India–Malaysia Preferential Trade Agreement Rules, 2011 (Notification No. 43/2011-Cus. (N.T.)) provides for the same verification visit procedure when the customs authority of the importing country is not satisfied with the results of the retroactive check or has reasonable doubt about the declared origin.

17.21.4 In view of the above provisions for verification of COO, I find that the subject verification by DRI, Mumbai was conducted strictly as per the provisions of AIFTA "Rules of Origin" (Notification No. 189/2009-Cus (NT) dated 31.12.2009) read with India Malaysia Preferential Trade Agreement Rules, 2011 (Notification No 43/2011).

FINDINGS OF THE VERIFICATION VISIT THAT RVC WAS BELOW 35%

17.22 I find that, since the Malaysian authorities did not respond to the retroactive check initiated under Paragraph 16 of Annexure III to the Rules of Origin, the matter was taken up for verification in terms of Paragraph 17(e) of Annexure III of the Rules of Origin, read with Paragraph 10 of Annexure III to the India–Malaysia Preferential Trade Agreement Rules, 2011, notified under Notification No. 43/2011-Cus. (N.T.) dated 01.07.2011**.** In accordance with these provisions, a verification visit was undertaken by the officers of the Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit, to the premises of M/s Malaysia Smelting Corporation, Malaysia, after obtaining due approval from the competent authorities and notifying the Government of Malaysia.

17.23 I find that during this verification visit, the team examined the cost structure, production process, and source of raw materials used for manufacture of the Tin Ingots exported to India. The officers found that the cost data relied upon by MSC to obtain Certificates of Origin (Form AI) were based on a cost sheet prepared only for a limited period (July – September 2013), and the same cost data had been used repeatedly for issuance of COOs for prospective period. The said cost sheet is not applicable on any of the Bills of Entry filed by the importer as mentioned in Annexure A. The Ministry of International Trade and Industry (MITI), Malaysia, confirmed that this 2013 cost sheet had been used for a prolonged period. The verification also revealed that MSC manufactured tin ingots on a job-work/conversion basis for traders who supplied tin ore of non-ASEAN origin free of cost. In such cases, the only value addition in Malaysia comprised smelting charges, which represented a negligible portion of the FOB value and was far below the 35 % Regional Value Content (RVC) prescribed under Rule 5 of the Rules of Origin.

17.24 I find that a detailed verification report was communicated to the issuing authority in Malaysia. On the basis of this report, the CBIC, vide its letter dated 10.05.2018 informed MITI**,** Malaysia, that the Certificates of Origin issued to MSC did not reflect contemporaneous cost data and that the goods exported to India did not meet the origin criteria under the AIFTA. Consequently, the Board directed denial of preferential tariff benefits in respect of all COOs issued by MSC during the relevant period. It clearly establishes that not only the verification was conducted as per the provisions of AIFTA Rules of Origin, the findings of such verification were duly endorsed by MITI Malaysia.

17.25 In view of the above it has been undisputedly established that the goods exported by M/s Malaysia Smelting Corporation and imported by M/S PERSANG ALLOY INDUSTRIES PVT LTD were not originating goods within the meaning of the Rules of Origin.

17.26 I further find that as per Section 28DA of the Customs Act, 1962, an importer claiming preferential rate of duty on the basis of a COO is required to possess and produce such certificate, make a true declaration regarding its accuracy, and cooperate in any verification of its authenticity or correctness undertaken by the proper officer. These provisions collectively ensure that preferential duty benefits under Notification No. 46/2011-Cus. dated 01.06.2011 are extended only to goods whose originating

status has been duly verified and confirmed. Where verification establishes that the COO is incorrect or invalid, the claim for preferential duty becomes inadmissible, and the goods are assessable at the normal rate of customs duty.

17.27 I further observe that 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. I find that during verification, the RVC was computed by applying the above direct method, based on the cost data and invoices furnished by MSC at the time of the verification visit. It was observed that the proportion of value addition achieved in Malaysia, represented mainly by the smelting/conversion charges, was substantially low and did not meet the minimum 35% threshold prescribed under Rule 5(1)(i). The cost structure indicated that the major portion of the input value was attributable to tin ore of non-ASEAN origin, which was supplied free of cost by third-party traders. Consequently, even on application of the direct method as per **Rule 5(2)**, the RVC worked out to a figure significantly below 35%, thereby confirming that the goods did not qualify as *originating goods* under the Rules of Origin.

17.28 In view of the above verification report it has been undisputedly established that that the *Tin Ingots* exported by MSC and imported by the noticee **cannot be treated as originating goods of Malaysian origin**, and therefore, the **benefit of Notification No. 46/2011-Cus. dated 01.06.2011 is not admissible**.

17.28.1 In this regard, I find that in the 5 Judge Bench Judgment in Dilip Kumar & Co. [2018] 9 SCC 1, it was held that Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.[Para 22]. I find in the instant case even no ambiguity is available to the notice as it has been established beyond any doubt that RVC was deliberately overstated by way of showing the value of Tin Ingot/Ores as nil. This fact has not only been clearly revealed in the investigation but also has been duly endorsed by MITI, Malysia who are the official COO issuing authority. The said endorsement renders the subject COOs themselves as Illegal having no value in the eyes of law. The noticee can not be allowed to use such illegal COO Certificates in order to claim the benefits of the exemption notification.

17.29 **Violation of provisions of Section 17 and Section 46(4) by way of false declaration towards the veracity of the contents in the subject BOEs while failure to make correct self-assessment:-**

17.30 I find that under self-assessment as per Section 17 of the Customs Act, 1962 every importer is required to correctly assess the duty leviable on the imported goods and to make a true, complete, and accurate declaration of all relevant particulars at the

time of filing the Bill of Entry. Further, as per Section 46(4) of the Customs Act the importer at the time of filing the Bill of Entry has to declare the truth of the contents of such entry and the authenticity of the documents attached. The importer is thus legally bound to ensure that the declared description, classification, country of origin, and applicable rate of duty are correct and in conformity with the law. In the present case, M/S PERSANG ALLOY INDUSTRIES PVT LTD, while filing the Bills of Entry, claimed Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011 on the strength of Certificates of Origin that have been proved invalid. The importer failed to verify the correctness of the origin and the Regional Value Content (RVC) as required under the Rules of Origin and has furnished no evidence to substantiate eligibility for preferential treatment. By declaring the goods as of Malaysian origin and availing an exemption not lawfully due, the importer mis declared material particulars and incorrectly self-assessed the goods, in contravention of Sections 17 and 46(4) of the Customs Act, 1962. Such misdeclaration directly resulted in short-payment of duty and renders the importer liable to demand of duty under Section 28(4) and to consequential penal action under the provisions of the Act.

17.31 I find that I find that under the provisions of Section 46 of the Customs Act, 1962, read with the Customs (Electronic Declaration and Processing) Regulations, 2011 every importer is required to file a Bill of Entry electronically before clearance of imported goods for home consumption or warehousing. These regulations mandates that the importer or his authorised agent shall make an electronic integrated declaration containing true, complete, and correct particulars of the goods, including their description, classification, value, quantity, country of origin, and exemption notifications claimed, and shall upload all supporting documents electronically for verification by the proper officer. In the present case, the importer M/S PERSANG ALLOY INDUSTRIES PVT LTD electronically filed the Bills of Entry declaring the goods as of Malaysian origin and claimed Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011, on the basis of Certificates of Origin (Form AI). However, subsequent verification, it was found that the certificates were invalid and based on incorrect data, and that the goods did not meet the prescribed Regional Value Content (RVC) of 35%. Thus, the importer's electronic declarations were factually incorrect and misleading, constituting misdeclaration of material particulars in violation of Regulation 3 of the said Regulations read with Sections 17 and 46(4) of the Customs Act, 1962. Such failure to make a true and complete electronic declaration renders the importer liable to the consequences of incorrect self-assessment.

17.32 In this background of Concessional NIL rate of BCD on Stainless Steel circles imported from ASEAN Countries including Malaysia, and Concessional NIL rate of BCD on Stainless Steel welded pipes imported from ASEAN Countries including Malaysia, the Importer in total has filed 06 Bill of Entry while claiming concessional NIL rate of BCD on the basis of Importer's declaration in the subject Bills of entries:- ***"We declare that content of invoice and other relating documents pertaining to the subject goods including the COO certificate are true and correct in every aspect."*** The Importer have accordingly declared in the all said Bill of entries confirming to the veracity and genuineness of all the documents. In addition to the afore said the Importer has also declared in all the said 04 Bill of entries the said goods ***'qualify as originating goods for preferential rate of duty under the Customs Tariff***

(Determination of Origin of goods under the Preferential trade agreement between the Government of member states of ASEAN and Republic of India) Rules, 2009 vide notification no. 189/2009-Customs (NT) date 31.12.2009'.

In view of the above, I observe that inescapable and definitive responsibility for producing a genuine and truthfull Country of Origin certificate has been placed on Importer in case of claiming benefit of concessional rates of NIL BCD on import of subject from Malaysia.

17.33 In view of the above, I find that the verification visit conducted under Paragraph 17(e) of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009 and Paragraph 10 of Annexure III to the India–Malaysia Preferential Trade Agreement Rules, 2011 (Notification No. 43/2011-Cus. (N.T.) dated 01.07.2011), conclusively established that the Tin Ingots exported by M/s Malaysia Smelting Corporation and imported by M/S PERSANG ALLOY INDUSTRIES PVT LTD did not satisfy the origin criteria prescribed under Rule 5 of the said Rules of Origin. The Certificates of Origin (Form AI) used to claim preferential duty were found to be incorrect, outdated, and invalid, as the Regional Value Content (RVC) was substantially below the prescribed 35%. Accordingly, the importer's claim of Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011 stands inadmissible. Consequent to such findings, the verification was duly undertaken as per Section 28DA of the Customs Act, 1962, which mandates the importer to possess a valid Certificate of Origin, make a true declaration of its correctness, and cooperate in its verification. The importer failed to comply with these statutory obligations and, therefore, the preferential claim became invalid ab initio. As a result, the short payment of duty that ensued is attributable to wilful misstatement and suppression of facts, squarely attracting the provisions of Section 28(4) for recovery of duty and interest.

17.34 I further find that as per Section 17 of the Customs Act, 1962, the importer is required to self-assess the duty correctly, and under Section 46(4), to declare the truth of the contents of the Bill of Entry and ensure that all particulars furnished are accurate. By filing electronic Bills of Entry declaring the goods as of Malaysian origin and claiming exemption under Notification No. 46/2011-Cus. without verifying the correctness of the Certificates of Origin or the value addition details, the importer failed to properly self-assess the goods and misdeclared the goods.

17.35 The Noticee's failure in discharging burden of possessing sufficient information and ensuring reasonable care under Section 28DA:-

17.35.1 I observe that noticee has contended that they can not be held responsible for any defects in COO. However, I find no merit in such contention of the notice because of following reasons:-

I observe that the law enshrined in Section 28DA has prescribed clearly made the notice responsible for possessing sufficient information and ensuring reasonable care while claiming preferential rate of duty under AIFTA. The provisions of Section 28DA are reproduces below;

"Section 28DA. Procedure regarding claim of preferential rate of duty. -

(1) An importer making claim for preferential rate of duty, in terms of any trade agreement, shall -

(i) ***make a declaration that goods qualify as originating goods for preferential rate of duty under such agreement;***

(ii) ***possess sufficient information as regards the manner in which country of origin criteria, including the regional value content and product specific criteria, specified in the rules of origin in the trade agreement, are satisfied;***

(iii) furnish such information in such manner as may be provided by rules;

(iv) ***Section 28DA. Procedure regarding claim of preferential rate of duty. -***

(1) An importer making claim for preferential rate of duty, in terms of any trade agreement, shall -

(i) make a declaration that goods qualify as originating goods for preferential rate of duty under such agreement;

(ii) possess sufficient information as regards the manner in which country of origin criteria, including the regional value content and product specific criteria, specified in the rules of origin in the trade agreement, are satisfied;

(iii) furnish such information in such manner as may be provided by rules;

(iv) ***exercise reasonable care as to the accuracy and truthfulness of the information furnished.***

However, the DRI investigation, which was carried out as per the provisions of AIFTA Rules, has clearly and unambiguously revealed beyond any doubt that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. I find that consequent to non-fulfilment of obligations under Section 28DA, the preferential rate of duty claimed under the said notification becomes inadmissible, and the goods are liable to assessment at the normal rate of Basic Customs Duty. The short-payment of duty resulting therefrom has arisen on account of the importer's wilful misstatement and suppression of material facts relating to the true origin and value content of the goods. Therefore, the case squarely attracts the provisions of Section 28(4) of the Customs Act, 1962, which provides for demand of duty not levied or

short-levied by reason of collusion, wilful misstatement, or suppression of facts.

17.35 In view of the above, I find that thescope of Notification No. 46/2011-Cus. dated 01.06.2011 is not applicable to the present imports, and the concessional rate of Nil Basic Customs Duty claimed by M/S PERSANG ALLOY INDUSTRIES PVT LTD is denied.

B. **<u>As to whether the differential duty amounting to Rs. 83,16,959/- should be recovered under Section 28(4) of the Customs Act 1962 along with applicable interest under section 28 AA of the Customs Act, 1962 in respect of 07 Bills of Entry as mentioned in Annexure A above.</u>**

18. I observe that the Show Cause Notice proposed the demand and recovery of differential duty of amount **Rs. 83,16,959/-** based on ineligible Basic Customs Duty exemption benefit under section 28(4) of the Customs Act, 1962 along with applicable interest under section 28AA of the Customs Act, 1962.

The relevant legal provision is as under

> *SECTION 28(4) of the Customs Act 1962.*
> *Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. –*
> *(4) Where any duty has not been [levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -*
> *(a) Collusion; or*
> *(b) Any noticee mis-statement; or*
> *I Suppression of facts,*
> *by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.*

18.1 I reiterate my findings at para 17 above wherein it has been undisputedly established that the goods imported by M/S Persang Alloy Industries Pvt Ltd, namely Tin Ingots declared as of Malaysian origin, do not fulfill the origin criteria prescribed under Rule 5 of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009 read with and India Malaysia Preferential Trade Agreement Rules, 2011 notified vide notification no. 43/2011 dated 01.07.2011. The investigation and verification conducted under Paragraphs 16 and 17 of Annexure III of the AIFTA Rules and Paragraph 10 of the India - Malaysia Preferential Trade Agreement Rules, 2011, have clearly established that the Certificates of Origin (Form AI) relied upon were issued on the basis of outdated cost data and incorrect computation of the Regional Value Content (RVC). The goods, therefore, cannot be considered as originating goods of Malaysia. Accordingly, the Importer claimed Nil Basic Customs

Duty under Notification No. 46/2011-Cus. dated 01.06.2011 and the goods are liable to assessment at the rate of duty of BCD @ 5% along with CVD.

18.1.1 The DRI investigation, which was carried out as per the provisions of AIFTA Rules, has clearly and unambiguously revealed beyond any doubt that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA)1)(i) and Section 46(4). They also failed to correctly self assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they can not now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. I find that consequent to non-fulfilment of obligations under Section 28DA, the preferential rate of duty claimed under the said notification becomes inadmissible, and the goods are liable to assessment at the normal rate of Basic Customs Duty. The short-payment of duty resulting therefrom has arisen on account of the importer's wilful misstatement and suppression of material facts relating to the true origin and value content of the goods. Therefore, the case squarely attracts the provisions of Section 28(4) and Section 28AA of the Customs Act, 1962, which provides for demand of duty and interest not levied or short-levied by reason of collusion, wilful misstatement, or suppression of facts.

18.2 I reiterate my findings at para 17 above, wherein that the importer, while filing the Bills of Entry under self-assessment in terms of Section 17 of the Customs Act, 1962, claimed exemption under Notification No. 46/2011-Cus. solely on the basis of Certificates of Origin later found invalid. Under Sections 17 and 46(4), the importer is obligated to make a true and complete declaration of all particulars and to correctly assess the duty leviable. Further, as per Section 28DA, the importer claiming preferential duty must ensure the authenticity of the Certificate of Origin and cooperate in its verification. The importer failed to discharge these obligations, resulting in incorrect self-assessment and short-payment of customs duty**.**

18.3In view of the above, I find that the differential customs duty amounting to Rs. 83,16,959/- is recoverable from M/S Persang Alloy Industries Pvt Ltd under Section 28(4) of the Customs Act, 1962, being duty short-levied by reason of incorrect claim of exemption under Notification No. 46/2011-Cus. dated 01.06.2011.

18.4 Further, the noticee is also liable to pay applicable interest under the provisions of Section 28AA of the Customs Act, 1962. The relevant provision as under:

Section 28AA.

Interest on delayed payment of duty—
(1) Notwithstanding anything contained in any judgment, decree, order or

direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.

(2) Interest at such rate not below ten per cent. And not exceeding thirty-six per cent. Per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such erroneous refund, as the case may be, up to the date of payment of such duty.

In this regard, the ratio laid down by Hon'ble Supreme Court in the case of CCE, **Pune V/s. SKF India Ltd. [2009 (239) ELT 385 (SC)]** wherein the Apex Court has upheld the applicability of interest on payment of differential duty at later date in the case of short payment of duty though completely unintended and without element of deceit. The Court has held that

"....It is thus to be seen that unlike penalty that, is attracted to the category of cases in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four Sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons."

Thus, interest leviable on delayed or deferred payment of duty for whatever reasons, is aptly applicable in the instant case.

18.5 In view of the facts and findings in above paras, I hold that total differential duty of Rs. 83,16,959/- should be demanded under Section 28 (4) of the Customs Act, 1962 and the same should be recovered from M/s Persang Alloy Industries Pvt Ltd along with applicable interest in terms of section 28AA of the Customs Act, 1962 as proposed in the Show Cause Notice.

18.6 In this regard, I find that in the 5 Judge Bench Judgment in Dilip Kumar & Co. [2018] 9 SCC 1, it was held that Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue. [Para 22]. I find in the instant case even no ambiguity is available to the notice as it has been established beyond any doubt that RVC was deliberately overstated by way of showing the value of Tin Ingot/Ores as nil. This fact has not only been clearly revealed in the investigation but also has been duly endorsed by MITI, Malysia who are the official COO issuing authority. The

said endorsement renders the subject COOs themselves as Illegal having no value in the eyes of law. The noticee can not be allowed to use such illegal COO Certificates in order to claim the benefits of the exemption notification.

C. **<u>As to whether contention of the noticee has any merit</u>**

18.7 I reiterate my findings at para 17 above, wherein it has been undisputedly established that the goods imported by M/s Persang Alloy Industries Pvt Ltd declaring them as of Malaysian origin, do not satisfy the origin criteria prescribed under Rule 5 of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009. The verification conducted by the DRI in terms ofParagraphs 16 and 17 of Annexure III of the AIFTA Rules and Paragraph 10 of the India–Malaysia Preferential Trade Agreement Rules, 2011 revealed that the Certificates of Origin (Form AI) were obtained on the basis of outdated cost data and inflated value-addition figures. It was further confirmed by the Malaysian authorities that the manufacturing process undertaken by M/s Malaysia Smelting Corporation (MSC) was limited to smelting tin ore supplied free of cost by traders from non-ASEAN countries, thereby failing to meet the required 35% Regional Value Content (RVC) condition. Accordingly, the goods imported cannot be regarded as originating goods of Malaysia and are not entitled to the benefit of Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011. Under Section 17 of the Customs Act, 1962, the importer is obligated to self-assess duty correctly and furnish accurate particulars, and under Section 28DA, to possess and declare authentic Certificates of Origin and cooperate in their verification. The importer has failed to discharge these statutory obligations and has made an incorrect claim of exemption, thereby rendering the goods liable to action under the Act.

18.8 The DRI investigation, which was carried out as per the provisions of AIFTA Rules, has clearly and unambiguously revealed beyond any doubt that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. I find that consequent to non-fulfilment of obligations under Section 28DA, the preferential rate of duty claimed under the said notification becomes inadmissible, and the goods are liable to assessment at the normal rate of Basic Customs Duty. The short-payment of duty resulting therefrom has arisen on account of the importer's wilful misstatement and suppression of material facts relating to the true origin and value content of the goods. Therefore, the case squarely attracts the provisions of Section 28(4) of the Customs Act, 1962, which provides for demand of duty not levied or short-levied by reason of

collusion, wilful misstatement, or suppression of facts.

18.9 I reiterate my findings at para 18 to 18.5 above, wherein the differential customs duty of **Rs.83,16,959/-** has been correctly levied and is recoverable from the importer under Section 28(4) of the Customs Act, 1962, along with interest under Section 28AA, as the short-levy of duty has arisen on account of misdeclaration and suppression of material facts. The importer had misrepresented the origin of the goods and claimed an exemption that was not legally admissible. Therefore, the duty demand so confirmed is sustainable in law.

18.10 I find that noticee has contended that, under the ASEAN rules, Directorate of Revenue Intelligence (DRI) has no jurisdiction to investigate or verify the Regional Value Content (RVC) of the goods.

I find no merit in the contention of the notice because of the following reason:-

- Firstly, under the Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Member States of ASEAN and the Republic of India) Rules, 2009 notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009, the importing party's customs authority is empowered to initiate verification when there exists reasonable doubt regarding the authenticity or accuracy of a Certificate of Origin. Specifically, Paragraph 16 of Annexure III allows the importing party to request a retroactive check, and Paragraph 17 of Annexure III authorizes it, in exceptional circumstances, to conduct a verification visit to the premises of the exporter or producer in the exporting country when the retroactive check yields unsatisfactory results. Similarly, Paragraph 10 of Annexure III to the India–Malaysia Preferential Trade Agreement Rules, 2011, notified vide Notification No. 43/2011-Cus. (N.T.) dated 01.07.2011 also allows verification visit by the Importing Party's Customs Authorities.
- As per Section 28DA of the Customs Act, 1962 when a preferential rate of duty is claimed on the basis of a Certificate of Origin, the proper officer of customs is empowered to verify the authenticity or accuracy of such certificate or any information contained therein. The DRI officers, being part of the Indian Customs under the Central Board of Indirect Taxes and Customs (CBIC), are duly authorized and empowered to act as **proper officers** for the purpose of conducting such verification and investigation.
- Further the contention that DRI officers lack jurisdiction stands negated by the settled legal position laid down in Canon India Pvt. Ltd. v. Commissioner of Customs, 2021 (376) E.L.T. 3 (S.C.), wherein the Hon'ble Supreme Court held that the term "proper officer" under Section 2(34) of the Customs Act refers to an officer assigned specific functions of assessment or related duties by the Board or the Commissioner of Customs. In the present case, the verification and investigation into the origin and value content of the imported goods were carried out by DRI officers under authorization from CBIC, which is the competent authority representing the importing party under the ASEAN–India FTA framework. Accordingly, the DRI officers acted well within their jurisdiction as "proper officers" under the Customs Act, 1962.

18.11 I find that notices has contended that the Show Cause Notice is time-barred, as the relevant Bills of Entry were filed during 2013–2014.

I find no merit in the contention of the notice because of the following reasons: -

- The present case involves clear willful misstatement and suppression of material facts by the importer in order to avail an inadmissible exemption under Notification No. 46/2011-Cus. dated 01.06.2011. The importer knowingly filed Bills of Entry declaring the goods as of Malaysian origin and claimed Nil Basic Customs Duty on the basis of Certificates of Origin (Form AI) which were found to be fake based on false RVC value. The short-levy of duty thus arose by reason of suppression and misdeclaration, squarely attracting the provisions of Section 28(4) of the Customs Act, 1962.
- As per Section 28(4), the proper officer may serve notice within five years from the relevant date where duty has not been levied or has been short-levied by reason of collusion, willful misstatement or suppression of facts. In the present matter, the investigation and verification establishing the falsity of the COOs were completed only in 2017–2018, and the Show Cause Notice was accordingly issued in 2018 well within the extended five-year period permissible under Section 28(4).

18.12 I find that noticee has contended that OIO is hit by limitation of time

I find that the contention that the OIO is time barred as per the provisions of section 28(9) of the Customs Act, 1962 which is reproduced below:-

SECTION 28 Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —

(9} the *proper officer* shall determine the amount *of* duty *or* interest under sub-section *(8),* —

(a} within *six* months *from the date of* notice, in *respect of cases falling under clause (a) of sub-section (1);*

(b) within one *year from* the *date of* notice, in *respect of cases falling under* sub-section *(4}.*

Provided that where the *proper officer fails to So* determine within the *specified period,* any *officer senior* in rank to the *proper officer may,* having *regard to* the circumstances under which the *proper officer was prevented from* determining the amount *of duty* or interest under sub-section *(8}, extend* the *period specified in clause (a) to a further period of six* months and the *period specified* in *clause (b) to a further period of* one *year :*

Provided further that where the *proper officer fails to* determine within such *extended period,* such *proceeding* shrill *be* deemed to huge concluded *as if no* notice had been *issued.*

[(9-A) Notwithstanding anything contained in sub-section (9), where the proper officer is unable to determine the amount of duty or interest under sub-section (8) for the reason that- (a) an appeal in a similar matter of the same person or any other person is pending before the Appellate Tribunal or the High Court or the Supreme Court; or (b) an interim order of stay has been issued by the Appellate Tribunal or the High Court or the Supreme (c) Court; or the Board has, in a similar matter, issued specific direction or order to keep such matter pending; (d) or the Settlement Commission has admitted an application made by the person concerned.

The movement of file is summarized in the table below:-

Sr.No	Date	Remarks
1	06.09.2018	THE said SCN was issued.
2	07.08.2019	Extension of 6 months was granted by Chief Commissioner of Customs, JNCH.
3	2019 – 31.08.2025	The case was kept in call book.
4	01.09.2025	The case was taken out of Call book.

18.13 The time mentioned at sr. no 03 above had been excluded from the limitation of time frame defined under section 28(9) of the Customs Act, 1962. By the authority of Section 28(9A) (a) of the Customs Act, 1962 the last date of Adjudication is 31.08.2026 and therefore there is no dispute that case is being adjudicated within the specified time as prescribed.

18.14 I find that Noticee has contended that Cost sheet is of the period July-September 2013 and it is valid for the goods exported by M/s MSC in the year 2013-2014.

I find no merit in the contention of the Noticee because of the following reasons:-

- As per Rule 5(2) of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009, the RVC must be calculated on the basis of the actual FOB value and cost of non-originating materials prevailing at the time of manufacture and export of each consignment. The verification carried out under Paragraph 17 of Annexure III established that the same cost sheet of July–September 2013 was used repeatedly for obtaining COOs for several years thereafter, irrespective of changes in sourcing mix or input prices. The Ministry of International Trade and Industry (MITI) itself confirmed that MSC had continued to use this 2013 cost data for subsequent exports as well.
- This confirmation shows that the cost sheet was not prepared specifically for the September 2013 export consignment, but was a generic and outdated document applied across multiple shipments without re-computation of actual RVC for each export. The use of such a non-contemporaneous cost sheet defeats the intent of Rule 5(2), which requires a fresh determination of value addition based

on current cost and price data. Accordingly, the cost sheet relied upon by MSC cannot be accepted as valid evidence of RVC even for the September 2013 import, and the corresponding COO is rendered incorrect and ineligible for preferential treatment under Notification No. 46/2011-Cus. dated 01.06.2011**.**

D. **<u>As to whether goods valued at Rs.138645559/- imported vide 07 Bills of Entry as mentioned in Annexure A above should be held liable for confiscation under section 111(m) &(o) of Customs Act, 1962.</u>**

19.I reiterate my findings at para 17 above, wherein it has been undisputedly established that the goods imported by M/s Persang Alloy Industries Pvt Ltd declaring them as of Malaysian origin, do not satisfy the origin criteria prescribed under Rule 5 of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009 read with and India Malaysia Preferential Trade Agreement Rules, 2011 notified vide Notification No 43/2011 dated 01.07.2011. The verification conducted by the DRI in terms of Paragraphs 16 and 17 of Annexure III of the AIFTA Rules and Paragraph 10 of the India–Malaysia Preferential Trade Agreement Rules, 2011 revealed that the Certificates of Origin (Form AI) were obtained on the basis of outdated cost data and inflated value-addition figures. It was further confirmed by the Malaysian authorities that the manufacturing process undertaken by M/s Malaysia Smelting Corporation (MSC) was limited to smelting tin ore supplied free of cost by traders from non-ASEAN countries, thereby failing to meet the required 35% Regional Value Content (RVC) condition. Accordingly, the goods imported cannot be regarded as originating goods of Malaysia and are not entitled to the benefit of Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011. Under Section 17 of the Customs Act, 1962, the importer is obligated to self-assess duty correctly and furnish accurate particulars, and under Section 28DA, to possess and declare authentic Certificates of Origin and cooperate in their verification. The importer has failed to discharge these statutory obligations and has made an incorrect claim of exemption, thereby rendering the goods liable to action under the Act.

19.1 I reiterate my findings at para 18 above, wherein the differential customs duty of Rs. 83,16,959**/-** has been correctly levied and is recoverable from the importer under Section 28(4) of the Customs Act, 1962, along with interest under Section 28AA, as the short-levy of duty has arisen on account of misdeclaration and suppression of material facts. The importer had misrepresented the origin of the goods and claimed an exemption that was not legally admissible. Therefore, the duty demand so confirmed is sustainable in law.

19.2The DRI investigation, which was carried out as per the provisions of AIFTA Rules, has clearly and unambiguously revealed beyond any doubt that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of

Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. I find that consequent to non-fulfilment of obligations under Section 28DA, the preferential rate of duty claimed under the said notification becomes inadmissible, and the goods are liable to assessment at the normal rate of Basic Customs Duty. The short-payment of duty resulting therefrom has arisen on account of the importer's wilful misstatement and suppression of material facts relating to the true origin and value content of the goods. Therefore, the case squarely attracts the provisions of Section 28(4) of the Customs Act, 1962, which provides for demand of duty not levied or short-levied by reason of collusion, wilful misstatement, or suppression of facts.

19.3In view of the above, I find that imported goods are liable toconfiscation under Sections 111(m) and 111(o) of the Customs Act, 1962.

Section 111(m) and 111(o) are reproduced below:-

111. The following goods brought from a place outside India shall be liable to confiscation:—

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 [16][in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54];

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

19.4 **Section 111(m) -** I reiterate my findings in para 20 above which clearly establish that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that noticee has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. Therefore, I find that the imported goods attract confiscation under Section 111(m) as the declaration made in the Bills of Entry regarding the "country of origin" and the eligibility for preferential duty was false and misleading. The importer declared the goods as originating from Malaysia, whereas the investigation has

conclusively established that the goods were not of Malaysian origin and that the Certificates of Origin relied upon were invalid. Such false declaration of material particulars at the time of importation amounts to misdeclaration of goods within the meaning of Section 111(m).

19.5**Section 111(o)** – I find that the goods are also liable to confiscation under Section 111(o) as the benefit of exemption under Notification No. 46/2011-Cus. was availed subject to fulfilment of specified conditions — namely, that the goods must originate from an ASEAN member country in accordance with the prescribed Rules of Origin. Since the importer failed to fulfil these conditions and nevertheless availed the exemption, the goods have become liable to confiscation under Section 111(o) of the Act, which specifically covers goods imported in violation of a condition of exemption granted under Section 25 of the Act.

19.6 I also find that the case is established on documentary evidences as detailed in Paras above in respect of past imports, though the department is not required to prove the case with mathematical precision but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of the facts in issue [as observed by the Hon'ble Supreme Courtin CC Madras V/s D Bhuramal – [1983 (13) ELT 1546 (SC)]. Further in the case of K.I. International Vs Commissioner of Customs, Chennai reported in 2012 (282) E.L.T. 67 (Tri. – Chennai) the Hon'ble CESTAT, South Zonal Bench, Chennai has held as under: -

> *"Enactments like Customs Act, 1962, and Customs Tariff Act, 1975, are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives. Evidence Act not being applicable to quasi-judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. Revenue discharged its onus of proof and burden of proof remained un-discharged by appellants. They failed to lead their evidence to rule out their role in the offence committed and prove their case with clean hands. No evidence gathered by Revenue were demolished by appellants by any means. '*

19.7 I therefore hold that the said imported goods are liable for confiscation under the provisions of Section 111(m) and 111(o) of the Customs Act, 1962, as proposed in the Show Cause Notice. The subject goods imported are not available for confiscation, but I rely upon the order of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.) wherein the Hon'ble Madras High Court held in para 23 of the judgment as below:

> *"**23.** The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting*

the goods to payment of duty and other charges, the improper and irregular importation is sought to be oticeati, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is oticeat by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the oticeation of confiscation of goods provided for under Section 111 of the Act. When once power of oticeation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii)."

19.8 I further find that the above view of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.), has been cited by Hon'ble Gujarat High Court in case of M/s Synergy Fertichem Pvt. Ltd reported in 2020 (33) G.S.T.L. 513 (Guj.).

19.9 I also find that the decision of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.) and the decision of Hon'ble Gujarat High Court in case of M/s Synergy Fertichem Pvt. Ltd reported in 2020 (33) G.S.T.L. 513 (Guj.) have not been challenged by any of the parties and are in operation.

19.10 It is established under the law that the declaration under section 17 of the Customs Act, 1962 made by the importer at the time of filing Bills of Entry is to be considered as an undertaking which appears as good as conditional release. I further find that there are various orders passed by the Hon'ble CESTAT, High Court and Supreme Court, wherein it is held that the goods cleared on execution of Undertaking/ Bond are liable for confiscation under Section 111 of the Customs Act, 1962 and Redemption Fine is imposable on them under provisions of Section 125 of the Customs Act, 1962. A few such cases are detailed below:

a. M/s Dadha Pharma h/t. Ltd. Vs. Secretary to the Govt. of India, as in 2000 (126) ELT 535 (Chennai High Court);
b. M/s Sangeeta Metals (India) Vs. Commissioner of Customs (Import) Sheva, as reported in 2015 (315) ELT 74 (Tri-Mumbai);
c. M/s SacchaSaudhaPedhi Vs. Commissioner of Customs (Import), Mu reported in 2015 (328) ELT 609 (Tri-Mumbai);
d. M/s Unimark Remedies Ltd. Versus. Commissioner of Customs (Export Promotion), Mumbai reported in 2017(335) ELT (193) (Bom)
e. M/s Weston Components Ltd. Vs. Commissioner of Customs, New Delhi reported in 2000 (115) ELT 278 (S.C.) wherein it has been held that:

"if subsequent to release of goods import was found not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods – Section 125 of Customs Act, 1962, then the mere fact that the goods were released on the bond would not take away the power of the Customs Authorities to levy redemption fine."

- Commissioner of Customs, Chennai Vs. M/s Madras Petrochem Ltd. As reported in 2020 (372) E.L.T. 652 (Mad.) wherein it has been held as under:

"We find from the aforesaid observation of the Learned Tribunal as quoted above that the Learned Tribunal has erred in holding that the cited case of the Hon'ble Supreme Court in the case of Weston Components, referred to above is distinguishable. This observation written by hand by the Learned Members of the Tribunal, bearing their initials, appears to be made without giving any reasons and details. The said observation of the Learned Tribunal, with great respect, is in conflict with the observation of the Hon'ble Supreme Court in the case of Weston Components."

19.11 In view of the above, I find that the decision of Hon'ble Madras High Court in case of M/s Visteon Automotive Systems India Limited reported in 2018 (9) G.S.T.L. 142 (Mad.), which has been passed after observing decision of Hon'ble Bombay High Court in case of M/s Finesse Creations Inc reported vide 2009 (248) ELT 122 (Bom)- upheld by Hon'ble Supreme Court in 2010(255) ELT A. 120 (SC), is squarely applicable in the present case.

19.12 In view of above facts, findings and legal provisions, I find that it is an admitted fact that the noticee had colluded with the overseas suppliers to suppress the true country of origin of the impugned goods. Therefore, I hold that the acts and omissions of the importer, by way of collusion and wilful mis-statement of the imported goods, have rendered the goods liable to confiscation under section 111(m) and 111(o) of the Customs Act, 1962. Accordingly, I observe that the present case also merits imposition of Redemption Fine, regardless of the physical availability, once the goods are held liable for confiscation.

E. <u>As to whether Penalty should be imposed on the importer M/S Persang Alloy Industries Pvt Ltd under Section 112(a) and114A of the Customs Act</u>

20. I reiterate my findings at para 17 above, wherein it has been undisputedly established that the goods imported by M/s Persang Alloy Industries Pvt Ltd declaring them as of Malaysian origin, do not satisfy the origin criteria prescribed under Rule 5 of the Rules of Origin notified vide Notification No. 189/2009-Cus. (N.T.) dated 31.12.2009 and India Malaysia Preferential Trade Agreement Rules, 2011 notified vide Notification No 43/2011 dated 01.07.2011. The verification conducted by the DRI in terms of Paragraphs 16 and 17 of Annexure III of the AIFTA Rules and Paragraph 10 of the India–Malaysia Preferential Trade Agreement Rules, 2011 revealed that the Certificates of Origin (Form AI) were obtained on the basis of

outdated cost data and inflated value-addition figures. It was further confirmed by the Malaysian authorities that the manufacturing process undertaken by M/s Malaysia Smelting Corporation (MSC) was limited to smelting tin ore supplied free of cost by traders from non-ASEAN countries, thereby failing to meet the required 35% Regional Value Content (RVC) condition. Accordingly, the goods imported cannot be regarded as originating goods of Malaysia and are not entitled to the benefit of Nil Basic Customs Duty under Notification No. 46/2011-Cus. dated 01.06.2011. Under Section 17 of the Customs Act, 1962, the importer is obligated to self-assess duty correctly and furnish accurate particulars, and under Section 28DA, to possess and declare authentic Certificates of Origin and cooperate in their verification. The importer has failed to discharge these statutory obligations and has made an incorrect claim of exemption, thereby rendering the goods liable to action under the Act. The DRI investigation has clearly established that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA)1)(i) and Section 46(4). They also failed to correctly self assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they can not now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs

20.1 I reiterate my findings at para 18 above, wherein the differential customs duty of Rs. 83,16,959/- has been correctly levied and is recoverable from the importer under Section 28(4) of the Customs Act, 1962, along with interest under Section 28AA, as the short-levy of duty has arisen on account of misdeclaration and suppression of material facts. The importer had misrepresented the origin of the goods and claimed an exemption that was not legally admissible. Therefore, the duty demand so confirmed is sustainable in law.

20.2 I reiterate my finding at para 19 above, wherein the imported goods have been held liable for confiscation under Sections 111(m) and 111(o) of the Customs Act, 1962, for having been imported through false declaration of origin and for non-fulfilment of the conditions of Notification No. 46/2011-Cus. The act of making a false declaration to claim an ineligible exemption is not an inadvertent error but a deliberate misstatement, resulting in wrongful availment of duty concession.

20.3 I find that show cause notice has proposed penalty under section 112(a) and 114A of the Customs Act, 1962 the same are reproduced below:-

Section 114A. Penalty for short-levy or non-levy of duty in certain cases. –

> *Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the*

case may be, as determined under [sub-section (8) of section 28] shall also be liable to pay a penalty equal to the duty or interest so determined:

*[**Provided** that where such duty or interest, as the case may be, as determined under [sub-section (8) of section 28], and the interest payable thereon under section [28AA], is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:*

***Provided** further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :*

***Provided** also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:*

***Provided** also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section [28AA], and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :*

***Provided** also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.*

***Explanation** .– For the removal of doubts, it is hereby declared that –*

4. *the provisions of this section shall also apply to cases in which the order determining the duty or interest 3 [sub-section (8) of section 28] relates to notices issued prior to the date* on which the Finance Act, 2000 receives the assent of the President;*

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

***SECTION 112. Penalty for improper importation of goods, etc. — Any person**, -*

a. *who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the*

doing or omission of such an act, or

20.4 It is a settled law that fraud and justice never dwell together (Frauset Jus nunquam cohabitant). Lord Denning had observed that "no judgement of a court, no order of a minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" there are numerous judicial pronouncements wherein it has been held that no court would allow getting any advantage which was obtained by fraud. The Hon'ble Supreme Court in case of CC, Kandla vs. Essar Oils Ltd. Reported as 2004 (172) ELT 433 SC at paras 31 and 32 held as follows:

"31. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. ***It is also well settled that misrepresentation itself amounts to fraud.*** *Indeed, innocent misrepresentation may also give reason to claim relief against fraud.* ***A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood.*** *It is a fraud in law if a party makes representations, which he knows to be false, although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (Ram Chandra Singh v. Savitri Devi and Ors.[2003 (8) SCC 319].*

32. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. Principle Bench of Tribunal at New Delhi extensively dealt with the issue of Fraud while delivering judgment in Samsung Electronics India Ltd. Vs commissioner of Customs, New Delhi reported in 2014(307)ELT 160(Tri. Del). In Samsung case, Hon'ble Tribunal held as under.

"If a party makes representations which he knows to be false and injury ensues there from although the motive from which the representations proceeded may not have been bad is considered to be fraud in the eyes of law. It is also well settled that misrepresentation itself amounts to fraud when that results in deceiving and leading a man into damage by wilfully or recklessly causing him to believe on falsehood. Of course, innocent misrepresentation may give reason to claim relief against fraud. In the case of Commissioner of Customs, Kandla vs. Essar Oil Ltd.– 2004 (172) E.L.T. 433 (S.C.) it has been held that by "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. "Fraud" involves two elements, deceit and injury to the deceived.

Undue advantage obtained by the deceiver will almost always cause loss or detriment to the deceived. Similarly a "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (Ref: S.P. Changalvaraya Naidu v. Jagannath [1994 (1) SCC 1: AIR 1994

S.C. 853]. It is said to be made when it appears that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly and carelessly whether it be true or false [Ref :RoshanDeenv. PreetiLal [(2002) 1 SCC 100], Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education [(2003) 8 SCC 311], Ram Chandra Singh's case (supra) and Ashok Leyland Ltd. V. State of T.N. and Another [(2004) 3 SCC 1].

Suppression of a material fact would also amount to a fraud on the court [(Ref: Gowrishankarv. Joshi Amha Shankar Family Trust, (1996) 3 SCC 310 and S.P. Chengalvaraya Naidu's case (AIR 1994 S.C. 853)]. No judgment of a Court can be allowed to stand if it has been obtained by fraud. Fraud unravels everything and fraud vitiates all transactions known to the law of however high a degree of solemnity. When fraud is established that unravels all. [Ref: UOI v. Jain Shudh Vanaspati Ltd.– 1996 (86) E.L.T. 460 (S.C.) and in Delhi Development Authority v. Skipper Construction Company (P) Ltd.– AIR 1996 SC 2005]. Any undue gain made at the cost of Revenue is to be restored back to the treasury since fraud committed against Revenue voids all judicial acts, ecclesiastical or temporal and DEPB scrip obtained playing fraud against the public authorities are non est. So also no Court in this country can allow any benefit of fraud to be enjoyed by anybody as is held by Apex Court in the case of Chengalvaraya Naidu reported in (1994) 1 SCC I : AIR 1994 SC 853. Ram Preeti Yadav v. U.P. Board High School and Inter Mediate Education (2003) 8 SCC 311.

A person whose case is based on falsehood has no right to seek relief in equity [Ref: S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 S.C. 853]. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues there from although the motive from which the representations proceeded may not have been bad. [Ref: Commissioner of Customs v. Essar Oil Ltd., (2004) 11 SCC 364 = 2004 (172) E.L.T. 433 (S.C.)].

When material evidence establishes fraud against Revenue, white collar crimes committed under absolute secrecy shall not be exonerated as has been held by Apex Court judgment in the case of K.I. Pavunnyv.AC, Cochin– 1997 (90) E.L.T. 241 (S.C.). No adjudication is barred under Section 28 of the Customs Act, 1962 if Revenue is defrauded for the reason that enactments like Customs Act, 1962, and Customs Tariff Act, 1975 are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives.

It is a cardinal principle of law enshrined in Section 17 of Limitation Act that fraud nullifies everything for which plea of time bar is untenable following the ratio laid down by Apex Court in the case of CC. v. Candid Enterprises– 2001 (130) E.L.T. 404 (S.C.). Non est instruments at all times are void and void instrument in the eyes of law are no instruments. Unlawful gain is thus debarred."

20.5 In view of these facts, I hold that the provisions of Section 114A of the Customs Act, 1962 are clearly attracted in this case. The said section provides that *"where any duty of customs has not been levied or has been short-levied by reason of collusion or*

any wilful misstatement or suppression of facts by the person who is liable to pay such duty, such person shall also be liable to a penalty equal to the duty so determined." The investigation has undisputedly established that the importer wilfully misdeclared the origin of goods and suppressed the material fact that the Regional Value Content (RVC) was below the prescribed limit of 35%. The misstatement was made with full knowledge that the claim of preferential duty under Notification No. 46/2011-Cus. was not legally admissible. The short-levy of duty, therefore, has directly resulted from wilful misstatement and suppression of facts within the meaning of Section 114A.

20.6 Since I will be imposing penalty on the importer under Section 114A, I shall refrain from imposing Penalty under Section 112(a) of the Act on the importer, M/s Persang Alloy Industries Pvt Ltd in terms of the fifth proviso to Section 114A of the Act ibid.

F <u>As to whether Penalty should be imposed on the importer M/s Persang Alloy Industries Pvt Ltd under Section 114AA of the Customs Act.</u>

21. The DRI investigation has clearly established that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs; v) in view of findings at point i) to iv) the notice intentionally and deliberately made falls declaration in the subject BOE and used a fraudulently obtained COO Certificates in order to wrongly claim exemption benefits. Further, notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs I find that Penal Action under Section 114 AA of the Customs Act has also been proposed on M/s Persang Alloy Industries Pvt Ltd. **The relevant provision of the Section 114AA of the Custom Act, 1962 is as under:-**

114AA Penalty for use of false and incorrect material –

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.

21.1 I note that, The Hon'ble CESTAT, New Delhi in the case of M/s S.D. Overseas vs The Joint Commissioner of Customs in Customs Appeal No. 50712 OF 2019 had dismissed the appeal of the petitioner while upholding the imposition of penalty under

Section 114 AA of the Customs Act, wherein it had held as under:

> *28. As far as the penalty under Section 114AA is concerned, it is imposable if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act. We find that the appellant has misdeclared the value of the imported goods which were only a fraction of a price the goods as per the manufacturer's price lists and, therefore, we find no reason to interfere with the penalty imposed under Section 114AA.*

21.2 There are several judicial decisions in which penalty on Companies under section 114AA of the Customs Act, 1962 has been upheld. Following decisions are relied upon on the issue,-

i. M/s ABB Ltd. Vs Commissioner (2017-TIOL-3589-CESTAT-DEL)
ii. Sesa Sterlite Ltd. Vs Commissioner (2019-TIOL-1181-CESTAT-MUM)
iii. Indusind Media and Communications Ltd. Vs Commissioner (2019-TIOL-441-SC-CUS)

21.3 As observed in above paras, in the instant case, there is clear evidence of conspiracy, fraud and suppression of facts. The Importer M/s Persang Alloy Industries Pvt Ltd cleared the imported goods by knowingly and intentionally resorting to use of false and incorrect declaration, statement and manipulated Country of Origin Certificates etc. Therefore, I hold that the Importer M/s Persang Alloy Industries Pvt Ltd is liable for imposition of penalty under Section 114AA ibid.

21.4 In this regard, I find that in the 5 Judge Bench Judgment in Dilip Kumar & Co. [2018] 9 SCC 1, it was held that Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.[Para 22]. I find in the instant case even no ambiguity is available to the notice as it has been established beyond any doubt that RVC was deliberately overstated by way of showing the value of Tin Ingot/Ores as nil. This fact has not only been clearly revealed in the investigation but also has been duly endorsed by MITI, Malysia who are the official COO issuing authority. The said endorsement renders the subject COOs themselves as Illegal having no value in the eyes of law. The noticee can not be allowed to use such illegal COO Certificates in order to claim the benefits of the exemption notification.

21.5 Further, Law enshrine in Section 17, Section 46(4) and Section 28DA very categorically puts the duty to exercise due diligence on the importer. Without prejudice to what has been stated herein above, it is beyond doubt that the noticee is the beneficiary from the fraud committed by them. One defence that has been taken by the importer is that the COO was supplied by the overseas

supplier and they have role to play in this. They have submitted that the COO was supplied to them by the overseas supplier of goods and they were not in the knowledge of the same. However, I find that this argument is fraught with many loopholes the noticee being the actual beneficiary. In Texport Overseas Pvt. Ltd. V. Commissioner of Customs, 2015 (319) E.L.T. 70 (SC), the Supreme Court held that importers bear the burden of proving the authenticity of documents when claiming duty exemptions.

21.5The DRI investigation, which was carried out as per the provisions of AIFTA Rules, has clearly and unambiguously revealed beyond any doubt that; i) old and irrelevant cost sheets of 2013 were being used; ii)the value of Tin Ingot/Ore was being deliberately shown as nil in order to proclaim an inflated RVC; iii) the actual RVC was equal to only Job Work Smelting charges which much below the requisite limit of 35%; iv) the aforesaid facts have been duly verified by the MITI Malaysia who are the official authority in the matter who initially issued the subject COOs. Therefore, I find that notice has failed to discharge their burden **of possessing sufficient information and ensuring reasonable care under Section 28DA**. They have also failed to discharge their burden of making a true and correct declaration in terms of Section 28DA(1)(i) and Section 46(4). They also failed to correctly self-assess the duty as required under Section 17(1). Since the Noticee are the only beneficiary of the whole fraudulent arrangement, they cannot now claim that they are not responsible for the said defects and fraudulent nature of the subject COOs. I find that consequent to non-fulfilment of obligations under Section 28DA, the preferential rate of duty claimed under the said notification becomes inadmissible, and the goods are liable to assessment at the normal rate of Basic Customs Duty. The short-payment of duty resulting therefrom has arisen on account of the importer's wilful misstatement and suppression of material facts relating to the true origin and value content of the goods. Therefore, the case squarely attracts the provisions of Section 28AA, 114A and 114AA of the Customs Act, 1962, which provides for demand of duty and interest not levied or short-levied by reason of collusion, wilful misstatement, or suppression of facts.

22. In view of the above I pass the following order:-

ORDER

i. I deny the Basic Customs Duty exemption benefit claimed under Notification No. 46/2011-Cus dated 01.06.2011 by M/s Persang Alloy Industries Pvt Ltd.
ii. I confirm the demand of differential duty of Rs. 83,16,959/- (Rupees Eighty-Three Lakh Sixteen Thousand Nine Hundred Fifty-Nine Only) in respect of 07 Bills of Entry as mentioned in Annexure A above to be recovered from M/s Persang Alloy Industries Pvt Ltd under Section 28(4) of the Customs Act 1962 along with applicable interest on dunder section 28 AA of the Customs Act, 1962.
iii. I confiscate the goods valued at Rs. 13,86,45,559/- (Rupees Thirteen Crore Eighty-Six Lakh Forty-Five Thousand Five Hundred Fifty-Nine Only) imported vide 07 Bills of Entry as mentioned in Annexure A above under section 111(m) & (o) of Customs Act, 1962. However, I impose a redemption fine of Rs 3,50,00,000/- (Rupees Three Crore fifty lakh Only) on M/s Persang Alloy

Industries Pvt Ltd in lieu of confiscation under Section 125(1) of the Customs Act, 1962.

iv. I impose a penalty equivalent to differential duty of Rs. 83,16,959/- (Rupees Eighty Three Lakh Sixteen Thousand Nine Hundred Fifty Nine Only) along with interest accrued there upon on the importing firm, M/s Persang Alloy Industries Pvt Ltd under Section 114A of the Customs Act, 1962.

In terms of the first and second proviso to Section 114A ibid, if duty and interest is paid within thirty days from the date of the communication of this order, the amount of penalty liable to be paid shall be twenty-five per cent of the duty and interest, subject to the condition that the amount of penalty is also paid within the period of thirty days of communication of this order.

v. I impose a penalty of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs only) on M/s Persang Alloy Industries Pvt Ltd under Section 114 AA of the Customs Act, 1962.

Digitally signed by
Vijay Risi
Date: 27-10-2025
15:32:25

(Vijay Risi)

Commissioner of Customs

NS-III, JNCH, Nhav Sheva

To,

M/s Persang Alloy Industries Pvt Ltd,
353, BIDC ESTATE, WAGHODIA
VADODARA - 391760

Copy to:-

1. AC/DC, Group – IV, JNCH.
2. The Asstt / Dy. Commissioner of Customs, SIIB (Import), JNCH, Nhava Sheva - to upload the OIO in DIGIT.
3. AC/DC, Chief Commissioner's Office, JNCH.
4. AC/DC, Centralized Revenue Recovery Cell, JNCH.
5. Superintendent (P), CHS Section, JNCH – For display on JNCH Notice Board.
6. Office Copy.