

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

CUSTOMS APPEAL NO. 12738 OF 2019 - DB

(Arising out of OIA-AHD-CUSTM-000-APP-349-19-20 dated 17/09/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

UNI COLLOIDS IMPEX PVT LTD

.....Appellant

110, Readymoney Premises Chs Ltd,
Ready Money Terrace, 167, Block B,
Dr. Annie Besant Road, Worli Naka
Mumbai, Maharashtra

Versus

C.C.-AHMEDABAD

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

With

CUSTOMS APPEAL NO. 10023 of 2021 - DB

(Arising out of OIO-AHM-CUSTM-000-COM-010-20-21 dated 12/10/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

C.C.-AHMEDABAD

.....Appellant

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

Versus

UNI COLLOIDS IMPEX PVT LTD

.....Respondent

110, Readymoney Premises Chs Ltd,
Ready Money Terrace, 167, Block B,
Dr. Annie Besant Road, Worli Naka
Mumbai, Maharashtra

APPEARANCE:

Shri Sanjay Singhal, Advocate for the Appellant
Shri P Ganesan, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. 11453-11454/2024

DATE OF HEARING: **02/04/2024**
DATE OF DECISION: **28.06.2024**

RAMESH NAIR

1. M/s Uni Colloids Impex Pvt Ltd, 110, Readymoney Premises CHS Ltd Readymoney terrace, 167, 1 floor, block-B, Dr. Annie Besant Road, Worli Naka Mumbai-400018 (hereinafter referred to as "the Importer") through their CHA M/s. JASVANT B.SHAH, Ahmedabad has filed the Bill of Entry No. 9248573 dt. 14.12.2018 for clearance of 600 bags of Cocoa Powder from Malaysia, availing the benefit of Notification No. 46/2011 item sl 155(1) of the Notification as per the Invoice.

2. During the assessment of said Bill of Entry No. 9248573 dtd. 14.12.2018, Bill of Lading No: EGLV097830007159 dtd 17.11.2018, it was revealed that the importer has imported the Majulah brand 10-12% Fat Content Alkalized Cocoa Powder Type 11 MK- 380, imported vide above B/E availing the benefit of Notification No. 46/2011, mentioned at Serial Number 155(1) falling under CTH 18050000. The B/E was self assessed by the importer and availed the benefit of Notification No. 46/2011 dt. 01.06.2011. The said Sr. No. under Appendix -1 of the Notification attracts NIL rate of duty. However as per the letter of Board bearing F. No. 456/12/2013- Cus. V dated 07.05.2014 regarding Import of Cocoa From Malaysia under FTAs, submitted through letter F. NO. S/2-Gen-PCA-87/2017-18/JNCH Dated 17.09.2018 regarding Theme based audit, action in respect of theme allocated to Nhava Sheva Audit Import of Cocoa Powder under FTAs, issued by the Commissioner of Customs NS-IV, Nhava Seva JNCH, Addressed to the Principal Commissioner of Customs Sabarmati Ahmedabad states that the Board has decided to deny the preferential benefit under Notification No. 46/2011-Cus & notification No. 53/2011-Cus, in case of import of Cocoa Powder from Malaysia.

3. When this attention was drawn to the importer, the query was raised to importer for denial of the benefit of the Notification No. 46/2011 dated 01.06.2011 in the system quoting both the letter nos mentioned above.

Subsequently the CHA/ Importer has requested to provide the copies of both the letters, which have been provided to the CHA/ Importer. Therefore, the CHA/Importer replied in writing vide their letter dtd 20.12.2018 & 02.01.2019 interalia stated that in view of the prevailing delay by the Customs, please allow us assessment of the B/E and let us know the rate of duty applicable on the subject goods which will be paid under protest to clear the same and avoid further detention and demurrage. Kindly issue speaking order for change of assessment", that they do not want personal hearing and requested to issue a speaking order so that they can take up the matter with the higher authorities.

The Adjudicating Authority thereafter issued detailed speaking order whereby it was held that benefit in the same matter is not available to the appellant as decided by the board vide it's letter dated 07.05 2015 and it was directed that the board mentioned as Majula brand 10-12% Alkenised Cocoa Powder Type 11 MK- 380 under CTH 1805 0000 are appropriately be cleared under full rate of duty as prescribed under Custom Tariff Act, 1970 and the exemption Notification No. 46/ 2011-Cus dated 01.06.2011 was denied. Being aggrieved by the said order dated 23.01.2019 the appellant filed appeal before the Commissioner (Appeal) who concurring with view of the adjudicating authority dismissed the appeal. Therefore the present appeals filed by the appellant.

2. Shri Sanjay Singhal learned Counsel appearing on behalf of the appellant made following submissions:-

1. The Board does not have the power to recommend stopping of extension of benefit of notification, as assumed by the reviewing committee. Hon'ble Delhi High Court in the case of The Bullion and Jewellers Association [Regd] & Anr Vs UOI [2016 (4) TM 1032 (Del)] has quashed the Board's Circular issued under Section 151A which whittled down the scope of exemption for goods imported

from Indonesia merely because the COO certificates could not be verified.

2. Board's letter of 2014 cannot be applied for all times to come.

3. Board letter has simply stated that where the supplier does not supply information as to value addition, benefit of notification cannot be extended. In present instance, as rightly held by the AA in Para 4.91 of his order, the goods being "wholly obtained" and not das processed in Malaysia, Board's letter does not apply at all.

4. Board's letter is specific to two suppliers of Malaysia who refused to give details of value addition. It cannot be applied across all exporters of Malaysia as assumed by the Committee. No such conclusion can be drawn from the letter that it applies to all imports of Cocoa from Malaysia.

5. In fact, if the contention is correct, then the notification itself would have been amended to remove heading 1805 therefrom, whereas it continues to this day.

6. It is false that the respondent failed to satisfy that the goods are of Malaysian Origin. AA in Para 5 of his order has held that the respondent has supplied copies of Certificates of Origin in all cases which showed that the goods are wholly obtained in Malaysia.

7. The AA has not only relied upon the supplier website but also the trade statistics of Malaysian government to arrive at the conclusion that the Cocoa is of wholly Malaysian origin.

8. The very same Nava Sheva Custom House, who advised issuance of Show Cause Notice, has itself extended benefit of notification vide Order-in- Original No. 885/2020-21/AC/NS-I/Gr 1 & IA/JNCH dated 08.12.2020 in remand proceedings. No Appeal has been filed against the said Order.

9. If there was a doubt on the correctness of the COO Certificate, Board vide Instruction No. 31/2016-Cus dated 12.09.2016 had recommended that such cases ought to be referred to it. But no such exercise was undertaken.

10. Hon'ble Tribunal in the following similar cases has held that unless it is shown that the COO certificates are invalid, benefit of notification cannot be denied.

i. RS Industries (Rolling Mills) Ltd & Ors Vs CCE [2017 (11) TMI 1256 (Del)]

ii. BDB Exports Pvt Ltd & Or Vs CC [2016 (9) TMI 1087 (Kol)]

iii. Alfakrina Exports Vs CC [2023 (9) TM1 86 (Amd)]

iv. CC Vs Riddhi Siddhi Builions Ltd [2017 (9) TM1 398 (Hyd)]

MJ Gold Pvt Ltd Vs CC [2022 (10) TMI 292 (Del)]

vi. Romil Jewelry & Ors Vs CC [2023 (9) TMI 462 (Bom)]

11. Finally, the whole of the demand is barred by limitation as there is no mis-declaration or suppression of facts.

He also placed Reliance on the following Judgments:-

- Kiara Ingredients Inc Vs CC [2024 (2) TMI 740]
- MR Scientific Suppliers Vs CC [2024 (2) TMI 741]
- Global Exim Vs CC [2024 (1) TMI 901]
- Shirazee Traders Vs CC [2024 (1) TMI 781]
- Sympony International Vs CC [2-24 (1) TMI 988]

3. Shri P. Ganesan, Superintendent (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the record. We find that the preferential Notification No. 46/2011-Cus was denied by the revenue only on the basis of board circular without carrying out any independent inquiry from the originating country i.e. Malaysia. The certificate of origin cannot be disputed. In case of any doubt about the genuineness of the certificate the proper procedure is prescribed under custom tariff (determination of origin of goods under the preferential trade agreement between the Government of republic of India and Malaysia) Rules , 2011. The relevant Rule 9 of Rules 2011 is reproduced below :-

9. Direct consignment Originating goods shall be deemed to be directly consigned from the territory of the exporting Party to the territory of the importing Party if-

(a) The goods are transported without passing through the territory of any non-Party, or,

(b) The goods are transported through the territory of any non-Party where:-

(i) The transit entry is justified for geographical reasons or transport requirements:

(ii) The goods have not entered into trade or consumption in the territory of such non-Party:

(iii) The goods have not undergone any operation in the territory of such non-Party other than unloading and reloading or any operation required to keep the goods in good condition; and

(iv) The goods have remained under the control of the customs authority of such non-Party."

From the above rule it is mandatory that in case of any doubt about certificate of origin Custom Authority as Government of India must Request the Country Of Origin Certificate issuing authority i.e. in the present case Malai chamber of commerce Malaysia to check the certificate of origin. However in

the present case admittedly without carrying out any such retroactive check merely on the basis of board circular the benefit of notification has been denied Which is absolutely illegal and incorrect. The identical issue has been considered in various judgments and in the event of no inquiry about the authenticity of the certificate the Tribunal held that certificate cannot be discarded and consequently benefit also cannot be denied. Some judgments are given as under :-

- The bullion and jewelers association (regd) & Anr Vs. UOI [2016 (4) TMI 1032 (Del)]

"5. On 3rd February 2016 notice was issued in this writ petition and an interim order was passed restraining the Respondents from giving effect to the impugned Circular dated 20th January 2016 and the letter dated 22nd January 2016. The said interim order has continued since then.

Background facts

6. The background facts are that the members of the Association are engaged in the business of import/export and trading of assorted gold jewellery. Each of the members has been issued an Importer-Exporter Certificate Code issued under the Customs Act, 1962 ("Act"). It is stated that during the period 2012-2015, the members of the Association regularly imported assorted gold jewellery from Indonesia classifiable under Tariff Heading 7113 19 10 of the Customs Tariff Act, 1975 ("CT Act") inter alia, from the Indonesian Supplier-PT Antam (Pesero) Tbk, Logam Mulia, Pulogadung, Jakarta (hereafter 'PT-Antam'), which is owned by the Government of Indonesia, by filing Bills of Entries ("B/Es"). It is further stated that PT-Antam is engaged in mining, refining, and manufacturing jewellery and minted coins in Indonesia. PT-Antam is stated to have been accredited with the status of London Good Delivery Bars by the London Bullion Market Association ("LBMA") which is stated to be the highest accreditation authority for the world bullion market. The shares of PT-Antam are also traded on the Indonesian Stock Exchange as well as the Australian Stock Exchange.

7. The Union of India through Ministry of Commerce and Industry (Respondent No. 4) entered into an Agreement on Trade in Goods under the Framework Agreement on the Comprehensive Economic Cooperation ('FTA') with the Association of Southeast Asian Nations ("ASEAN"), which includes the Government of Indonesia. In terms of the said FTA which was signed on 13th August 2009, the parties were to give preferential tariff treatment to products conforming with the origin requirements specified in the FTA.

8. In terms of the FTA, the Customs Tariff (Determination of Origin of Goods under Preferential Trade Agreement between the Government of Members States of the Association of South-East Asian Nations (ASEAN) and the Republic of India), Rules 2009 ("Customs Tariff Origin Rules") were notified on 31st December 2009. In exercise of the powers under the said Origin Rules, Exemption Notification No. 46/2011-Cus dated 1st June 2011 and Notification No. 12/2012-CE dated 7th March 2012 (amended) (hereinafter referred to "Exemption Notification") were issued. In terms of the Exemption Notification Nos. 46/2011-Cus and 12/2012-CE, the benefit of "NIL" rate of Customs Duty was granted to the goods imported by the members of the Association classifiable under Tariff Heading CTH 7113 19 10 if the goods are imported into India from a country listed in Appendix-I to the said notifications. Indonesia is one of the countries listed in Appendix-I. The exemption was granted in respect of specified goods, subject to the importer proving to the

satisfaction of the Deputy Commissioner or Assistant Commissioner of Customs, as the case may be, that the goods in respect of which the benefit is being claimed are of the origin from the countries as mentioned in Appendix-I, in accordance with the Origin Rules.

9. Under Rule 3 of the Customs Tariff Origin Rules, the origin criteria has been stipulated. It states that 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 contingencies, namely (a) products which are wholly obtained or produced in the exporting party in terms of Rule 4 or (b) products not wholly produced or obtained in the exporting party provided that the said products are eligible under Rules 5 or 6.

10. The products wholly produced or obtained are specified in Rule 4 which reads as under:

“4. Wholly produced or obtained products – For the purpose of clause (a) of Rule 3, the following shall be considered as wholly produced or obtained in a party :-

(a) plant and plant products grown and harvested in the party; Explanation.- For the purpose of this clause, "plant" means all plant life, including forestry products, fruit, flowers, vegetables, trees, seaweed, fungi and live plants;

(b) live animals born and raised in the party;

(c) products obtained from live animals referred to in clause (b);

Explanation 1.- For the purpose of clauses (b) and (c), "animals" means all animal life, including mammals, birds, fish, crustaceans, molluscs, reptiles, and living organisms.

Explanation 2.- For the purpose of this clause, "products" means those obtained from live animals without further processing, including milk, eggs, natural honey, hair, wool, semen and dung;

(d) products obtained from hunting, trapping, fishing, aquaculture, gathering or capturing conducted in the party;

(e) minerals and other naturally occurring substances, not included in clauses (a) to (d), extracted or taken from the party's soil, water, seabed or beneath the seabed;

(f) products taken from the water, seabed or beneath the seabed outside the territorial water of the party, provided that that party has the right to exploit such water, seabed and beneath the seabed in accordance with the United Nations Convention on the Law of the Sea, 1982;

(g) products of sea-fishing and other marine products taken from the high seas by vessels registered with the party and entitled to fly the flag of that party;

(h) products processed and/or made on board factory ships registered with the party and entitled to fly the flag of that party, exclusively from products referred to in clause (g);

(i) articles collected in the party which can no longer perform their original purpose nor are capable of being restored or repaired and are fit only for disposal or recovery of parts of raw materials, or for recycling purposes; and

Explanation.- For the purpose of this clause, "article" means all scrap and waste including scrap and waste resulting from manufacturing or processing operations or consumption in the same country, scrap machinery, discarded packaging and all products that can no longer perform the purpose for which they were produced and are fit only for disposal for the recovery of raw materials and such manufacturing .or processing operations shall include all types of processing, not only industrial or chemical but also mining, agriculture, construction, refining, incineration and sewage treatment operations;

(j) products obtained or produced in the party solely from products referred to in clauses (a) to (i)."

11. Rule 5 talks of products not wholly produced or obtained. It provides that the same shall be deemed to be originating from the exporting country if the AIFTA ("ASEAN – India Free Trade Area") content is not less than 35% of the FOB ("Free on Board") value. Annexure I thereof sets out the method of calculation for the AIFTA content.

12. Rule 13 of the Customs Tariff Origin Rules states that any claim of eligibility shall be accepted which is supported by a Country of Origin Certificates ("COO Certificates") as per the specimen attached to the Customs Tariff Origin Rules. It has, however, to be issued by the government authorities (Issuing Authority) of the exporting party and notified to the other parties in accordance with the Operation Certification Procedures as set out in Annexure III thereof.

13. According to the Petitioner Association, its members had submitted COO Certificates and the entire set of documents which established the genuineness of the goods imported by them and the declarations on the invoices and supporting documents with the Bills of Entry which has also substantiated that the goods of Indonesian Origin have been imported from Indonesia only. According to the Petitioner, it is also relevant that the COO Certificates also bear a specific certification from the concerned statutory authorities in Indonesia to the effect that the declaration made by the exporter that the goods are of Indonesia Origin is correct. Notwithstanding that the above certificates were produced, the Respondents appear to have approached the concerned authorities in Indonesia to check the same in terms of Article 16 of the Operational Certification Procedure as set out in Annexure III of the Customs Tariff Origin Rules. Articles 16 and 17 thereof reads as under:

"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).

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

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

- 1. the producer/exporter whose premises are to be visited;*
- 2. the Issuing Authority of the party in the territory of which the verification visit is to occur;*
- 3. the competent authority of the party in the territory of which the verification visit is to occur; and*
- 4. the importer of the goods subject to the verification visit;*

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

- 1. the name of the competent authority issuing the notification;*
- 2. the name of the producer/exporter whose premises are to be visited;*
- 3. the proposed date of the verification visit;*
- 4. the coverage scope or purpose of the proposed verification visit, including reference to the goods subject to the verification; and*
- 5. the names and designation of the officials performing the verification visit;*

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

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

(v) the Issuing Authority receiving the notification may postpone the proposed verification visit and notify the importing party of such intention within fifteen days from the date of receipt of the notification.

Notwithstanding any postponement, any verification visit shall be carried out within sixty days from the date of such receipt, or for such longer period as the parties may agree.

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

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

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

determination issued by the importing party shall be communicated to the Issuing Authority within thirty days from the date of receipt of the comments/additional information from the producer/exporter.

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

14. It is stated that in response to the said request, the Municipality of Cakung, Indonesia issued clarifications dated 12th June 2015 as well as 30th September 2015 clarifying that the said COO Certificates were issued by them and that the gold jewellery imported from PT-Antam were of Indonesian origin.

15. It is stated that despite the categorical explanations furnished in the letter dated 30th September 2015 along with communications exchanged with the Indian Embassy in Indonesia, the Respondents proceeded to issue the impugned Circular dated 6th October 2015 denying the preferential customs duty benefit to the members of the Petitioner Association. The second Circular dated 20th January 2016 was issued to direct the Assessing Authority to not only follow the earlier circular but further demand a bank guarantee of 100% of the duty differential while making such provisional assessment. Both these Circulars are under challenge in the present writ petitions.

Confirmation from Cakung Municipality

16. At this stage a reference may be made to the correspondence exchanged between the CBEC and the Embassy of India on the one hand and the Municipality Office in Cakung, Indonesia on the other hand. On 30th September 2015, in response to a letter dated 22nd August 2015 issued by the Embassy of India in Jakarta, the Municipality Office in Cakung, Indonesia confirmed that the COO certificates had been issued in compliance with the prevailing regulations, including the regulations of the Trade Ministry of Indonesia. It also confirmed that the COO certificates were genuine and had been issued in accordance with Rule 13 of the ASEAN-India Free Trade Agreement. The letter clarified that P-Antam is also engaged in refining of gold dore bars which are of Indonesia origin only and thus 100% of gold refined is of Indonesian Origin. It confirmed that no gold dore bars were imported from any country. Further P-Antam also imported refined gold “on need basis”, the inventory of which was recorded separately from the gold bars refined by P-Antam using Indonesian mined gold dore bars. It was confirmed that they keep an overall control in this regard wherein it issues certificate stating the percentage of gold used of Indonesian origin which is verifiable from the records. The letter further mentioned about the pre-exportation verification of the origin of the goods on 27th April 2015 and set out the findings, which are summarised as under:

(i) P-Antam is a gold mining state-owned company in Indonesia and its sources of gold originate from the seven mines spread all over Indonesia owned by the different companies which were partly (whether in majority or minority) owned by it.

(ii) It was further stated that under its Strategic Business UBPP Logam Mulia, P-Antam has been involved in the activities of refinery, and manufacturing of jewellery, minted coins since long and has been advantaged by the high accreditation of London Bullion Market Association since 1998.

(iii) P-Antam had been categorized to have complied with the Rule 2 of the ASEAN India FTA.

(iv) The brief production process was enclosed as Annexure B to the letter. The gold ingots are transferred to P-Antam’s jewellery manufacturing facility and passed into several processes, (i.e, rolling, punching, passing, finishing and investment casting process for

rings) and the jewellery products were required to pass the quality control process and thereafter shifted to India.

(v) Documentation on the refinery process was also set out in the letter. The inventory management of P-Antam was managed under the GAAP Principles of Weighted Average Method and recorded in a database program internally developed called e-MAS (electronic metal account system).

(vi) Importantly it was mentioned in the letter, as under:

“Finally, adding to our confirmation above, we further confirm that pursuant to the prevailing Indonesian regulations in mining sector, the Indonesian government has prohibited the export activities of mining ores, including gold ore thus prohibiting ANTAM from exporting mining ores from Indonesia. Being the only Indonesia company providing refinery services in producing LBMA certificated gold products, we strongly believe that significant amount of gold ores mined in Indonesia undergoes the refinery process in ANTAM’s UBPP Loga Mulia. As proof of the vast amount of gold refinery processes in the company, ANTAM has recorded last year’s processing to reach approximately 200 MT of gold dore (Please note that this is gold dore quantity and not refined gold quantity and the same communicated vide our earlier letter dated 27th April 2015 also). The jewellery exported to India which are subject matter of present response are completely manufactured by using the said 200 MT of gold dore mined in Indonesia and the same is verifiable from our records. It may please be further noted that in respect of export of all gold jewellery consignments to India, same procedure has been followed.”

The impugned Circular dated 6th October 2015

17. Within a week thereafter, on 6th October 2015, the CBEC issued the impugned Circular on the subject matter of the imports of gold jewellery both under India-ASEAN FTA as well as India-Malaysia CECA. The said Circular states that out of a large volume of 690 certificates of origin (COOs) involved, four representative COOs were picked for verification. The Circular then states that in response there to, the Issuing Authority had forwarded a letter from P-Antam that “they do not maintain any inventory to indicate the origin of the gold ore or gold dore bars, which are smelted for the purpose of producing refined gold (raw material/input for the manufacture of gold jewellery)”. The Circular further mentioned that the Issuing Authority has stated that the refinery annually produced 200 tons of refined gold “whereas the mining capacity of Indonesia as per information in the public domain is no more than 65 tons.” The Indian Embassy in Jakarta, Indonesia informed that 37 tons of gold (57%) mined in Indonesia was exported in the form of Gold Powder, Lumps and Cast Bars. It was further stated that “in other words, the gold produced by the supplier in Indonesia has been made from mixing gold dore bars of foreign origin along with domestic origin without maintaining any records of origin.” One such report received from Indonesia was enclosed as Annexures B and C to the said Circular. Since the manufacturers were using both, originating (wholly produced) and non-originating inputs in manufacture of gold jewellery and since there was an absence of accounting which would indicate the origin of gold used for exporting, it would not be possible to determine the origin of the gold ore that had gone into manufacture of jewellery imported into India. Accordingly, there was a direct non-compliance of Rule 12 and therefore, the goods could not be determined as originating in terms of Notification dated 31st December 2009 thereby qualifying for the tariff benefits under Notification No. 46 of 2011. Hence it was stated that the gold refined by P-Antam did not conform to the criteria of “wholly obtained” from Indonesia and therefore, the gold used for the manufacture of jewellery could not qualify for the benefit as “originating goods”.

Submissions of the Petitioners

18. Mr. P. Chidambaram, learned Senior counsel for the Petitioners submits that the impugned Circular dated 6th October 2015 was issued in excess of the powers under Section 151A of the Act. It was submitted that the CBEC misinterpreted the Customs Tariff Origin Rules and has

erroneously concluded that the origin of the goods cannot be determined and therefore, the preferential custom duty benefit cannot be granted. Secondly, there was an express bar under Clause (a) of the proviso to Section 151A of the Act which states that no such orders, instructions or directions shall be issued thereunder to require an Officer of the Customs to make a particular assessment or “dispose of a particular case in a particular manner.” The Circular was in violation of that express prohibition. The clarification given by the Indonesian authorities had been deliberately overlooked while issuing the impugned circular.

*19. Mr. Chidambaram submitted that the powers under Section 151A of the Act cannot be exercised to restrict or deny opportunities of fair investigation and adjudication. Inasmuch as the Circular requires an Officer of the Customs who issued show-cause notice to not issue provisional assessments and also asked the original COOs along with “appealable orders” to be sent to the CBEC, these instructions were issued in the teeth of Section 151A of the Act. Reliance was placed on the decisions in *Shiva Taxfabs Ltd. v. Union of India* 2011 (24) STR 525 (Del), *Varsha Plastics Pvt. Ltd. v. Union of India* 2009 (235) ELT 193 (SC) and *Union of India v. Karvy Stock Broking Limited* 2015 (39) STR 705 (SC). Mr. Chidambaram submitted that the consequential actions pursuant to the impugned Circular were thus legally unsustainable. There was a possibility that the adjudication proceedings consequent to the SCN issued would be a pointless exercise since the superior authority had already issued a direction without permitting the subordinate authority to exercise discretion and come to an independent conclusion. Reliance was placed on the decisions in *Filterco v. CST*, MP 1986 (24) ELT 180 (SC), *TVL Pizzeria Fast Foods Pvt. Ltd. v. CCT Ezhilagam* 2005 (192) ELT 52 (Mad) and *Vistar Construction Pvt. Ltd. v. Union of India* 2013 (31) STR 129 (Del). It was submitted that the members of the Petitioner Association had, in the present case, produced before the Respondents COOs issued by the competent authority, which had been duly accepted and verified by the Indonesian authorities. They had also furnished declarations from the exporter which confirmed that the goods were of Indonesian Origin as per the FTA.*

20. Mr. Chidambaram submitted that the impugned Circular was based on factually erroneous premises. The Circular stated that no inventory was maintained by the exporter whereas P-Antam's letter stated to the contrary. Secondly, the Circular proceeded on the presumption that the jewelleryes were manufactured by mixing gold dore bars of foreign origin with those of domestic origin when in fact the letters from P-Antam and the Issuing Authority clarified that they were was manufactured by using materials of Indonesian origin. Thirdly, there was a ban on the export of mined gold from Indonesia and therefore the inference that Indonesia did not have enough refined gold for export as jewellery to India was also erroneous. The letter issued by the Indian Embassy in Indonesia disclosed that only 1.4 tonnes of gold jewellery was exported to India in 2014. It was, therefore, clear that refined gold was available in abundance in Indonesia for fulfilling the requirements of India. Fourthly, the impugned Circular referred to Rule 12 of the Customs Tariff Origin Rules which applied to goods manufactured using both originating and non-originating goods. In view of the confirmation by the Indonesian authorities that the jewellery exported to India were manufactured entirely using gold mined in Indonesia, Rule 12 of the Customs Tariff Origin Rules did not apply.

21. It was further contended that P-Antam group owned various mines in Indonesia and received gold dore from such mines. Merely because a separate inventory of gold received from these mines was not maintained (but it was clarified that the gold used in the production and export of jewellery was mined gold only), there was no need to doubt the origin of gold. The impugned Circular proceeded on the basis that PT-Antam had stated that it had produced “200 MTs of refined gold”. However, the letter from P-Antam letter clearly stated that they had “processed about 200 MT of gold dore”. It was stated that as clarified by the Indonesian authorities, gold dore is an impure form of gold which is subjected to further refining for manufacturing refined gold. Therefore, the mischaracterisation of gold dore as refined gold was unwarranted.

22. It was submitted that the impugned Circular was also in violation of the Operational Certification Procedures agreed to between Government of India and the Government of Indonesia and provided in Annexure III to the Customs Tariff Origin Rules. The Respondents had, in terms of Article 16 of the said procedures, requested for a retroactive check to the Indonesian authorities which had already been carried out and shared with the Respondents. In terms of Article 17, where the Respondents were not satisfied with the outcome of the retroactive check,

there would be a request for verification visits. Instead, here the Respondents have disputed the explanations given by the Indonesian Authorities and not even requested for verification visits, thus not following the Operating Procedures. In any event, any issue or dispute between the two countries with respect to the correctness of explanations given by the Indonesian authorities, could not be the basis to deny preferential customs duty treatment to the members of the Petitioner Association. On their part, the members of the Petitioner Association had produced the necessary COOs which were also verified by the Respondent authorities at the time of clearance of imported goods. It was reiterated that the authenticity of the said COOs had not even been disputed by any authority. Therefore, it was irrational and unreasonable for CBEC to direct that the benefit of preferential duty should be denied to the members of the Petitioner Association.

23. Para 7.1 of the impugned Circular was assailed for requiring the importers to produce additional facts and not merely producing the COOs. It was submitted that instead of following the mandate of Customs Tariff Origin Rules, the Respondents were seeking to impose unreasonable conditions on the importers, which in any case could not be done by way of the impugned Circular. It was further submitted that the power under Section 151A of the Act for issuing of Circulars/clarifications is for a limited purpose for clarifying ambiguous provisions and/or mitigating rigours of law and for an effective administration of taxing statute. It cannot be issued to fasten liability and raise demand of tax. Reliance was placed on the decision in *UCO Bank v. Commissioner of Income Tax (1999) 237 ITR 889 (SC)*.

24. It was further submitted that the impugned Circular dated 6th October 2015 completely overlooked the facts which are specific to the trade and business of gold jewellery. There was no basis for assuming that on account of the high volume of imports of gold from Indonesia, the members of the Petitioner Association were profiteering. The additional conditions in the form of additional documents/details required from the importers were not even contemplated in the exemption notification.

25. As far as the Circular dated 20th January 2016 was concerned, it was submitted that it was ultra vires under Section 151A (b) of the Act which specifically states that there can be no circular issued which seeks to interfere with the discretion of the quasi-judicial authority.

26. It was pointed out on behalf of M/s. J.B. Overseas, that despite furnishing COOs, the impugned letter dated 22nd January 2016 was issued by the Assistant Commissioner of Customs to it on the basis of the Circular dated 20th January 2016 asking it to furnish a bank guarantee for the entire amount of differential duty. This was in the teeth of Section 151A (a) of the Act since it required the Officer of Customs to make a particular assessment or to dispose of a particular case in a particular manner. The Circular dated 20th January 2016 permitted the Respondents to demand 100% bank guarantee even in respect of those B/Es which had already been provisionally assessed under Section 18 of the Act. Reliance was placed on the decision in *TVL Pizzeria Fast Foods Pvt. Ltd. v. CCT, Ezhilagam (supra)*. It was submitted that this is also contrary to the Exemption Notification which provides for the manner in which the Customs Officers ought to exercise their satisfaction for the purpose of ascertaining the Country of Origin of the imported goods.

27. It was also pointed out that the Respondents ought to have followed the provisions of the CPDA Regulations. Regulation 2 (2) thereof provides for maximum payment of only 20% of duty differential under Provisional Assessment. Therefore, the insistence on furnishing a bank guarantee for the entire differential duty was illegal and was liable to be quashed. Reliance was placed on the decision in *Bhaiya Fibres v. ADGRI (2012) 281 ELT 396 (Del)* and *Rashmi Metallaiiks v. Union of India 2015 (316) ELT 455 (Cal)*. It was finally submitted that since the impugned SCN was on the basis of an invalid instruction, the bar of the existence of an alternative remedy would not apply. Reliance was placed on the decision of this Court in *Vistar Construction Pvt. Ltd. v. Union of India 2013 (31) STR 129 (Del)* and *Indian Institute of Aircraft Engineering v. Union of India 2013 (30) STR 689 (Del)*. It was also pointed out that the SCN dated 26th November 2015 issued to the members of the Petitioner Association is a virtual reproduction of the circular itself and therefore, there was no independent application of mind by the customs officials issuing such SCN. Reliance was placed on the decision in *Faridabad Iron & Steel Traders Association v. Union of India 2004 (178) ELT 1099 (Del)*.

Submissions of the Respondents

28. Mr. S.K. Dubey, learned Standing counsel for the DRI, first referred to the scope and ambit of Section 151A of the Act. It was stated that the Central government noticed a sudden increase in import of gold jewellery from Malaysia and Indonesia, and therefore a retroactive check was done on the representative COOs. It was only based on these reports that the Circular dated 6th October 2015 was issued. Reliance was placed on the decision in *Union of India v. Madras Steel Re-Rollers Association* 2012 (278) ELT 584 SC in support of the view that the CBEC was empowered to issue such Circulars/Letters for the guidance of quasi-judicial authorities. It was further submitted that the Circular dated 6th October 2015 only carves out a complete procedure to be followed regarding import of gold jewellery and not a direction to the quasi judicial authority to decide the issue in any particular manner as contended by the Petitioners. It was also submitted that the importer will have ample opportunity to present his case before the concerned Customs authority to prove the origin of the imported goods for availing tariff concession under India-ASEAN FTA. Reliance was placed on *CCE, Vadodara v. Dhiren Chemical Industries* (2002) 139 ELT 3 (SC) to urge that the CBEC was within its powers to disseminate interpretative findings or procedures or such other instructions to its officers for ensuring equity and uniformity in assessment practices.

29. With regard to the Circular dated 20th January 2016, it was submitted that there is no contradiction between Regulation 2(2) and Regulation 4 of the CPDA Regulations and the Circular dated 6th October 2015. According to him, the Petitioners' contention that the Circular requires furnishing a bank guarantee of 20% under Regulation 2(2) is based on a erroneous reading of the said Regulation. The Circular dated 6th October 2015 stipulating the obtaining of a bank guarantee of 100% of the duty differential emerges from the Regulation 4 so as to adequately secure the revenue and ensure uniformity of provisional assessment across all ports. There are separate requirements under Regulation 2(2) and Regulation 4.

30. Mr. Dubey then referred to the relevant rules and to the annual report of P-Antam wherein the production of gold in 2014 was noted as 2342 kg and claim 9% compared to 2013. The actual quantity of gold sales was in the range of 9978 kg. A reference was made in the additional affidavit dated 20th February 2016 of the Respondents in Writ Petition (Civil) No. 936 of 2016 to the affidavit dated 2nd November 2015 of Mr. Naresh Sharma, Director of M/s. J.B. Overseas wherein a Mr. Umed Singh was named as the other Director. Further reference was made to the statement of Mr. Umed Singh under Section 108 of the Act dated 23rd December 2015 wherein he denied knowledge of M/s. J.B. Overseas or that he was its Director. However in the reply-affidavit filed by the Petitioner in Writ Petition (Civil) No. 936 of 2016, the abovementioned statements of Mr. Naresh Sharma and Mr. Umed Singh were stated to have been retracted.

The ASEAN-FTA

31. To begin with the provisions of ASEAN FTA are required to be examined. The very purpose of the said ASEAN FTA is to establish the ASEAN India Free Trade Area covering trade in goods between the Republic of India and other South Asian countries which included Indonesia. The Preamble of the ASEAN FTA reiterates that "the importance of special and differential treatment to ensure the increasing participation to the new ASEAN Member States in economic integration and cooperation activities between India and ASEAN." The ASEAN-India Free Trade Area is also known as AIFTA which was defined in the Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and ASEAN.

32. Article 7 of the ASEAN FTA talks of "Rules of Origin" and states that the Rules of Origin ("AIFTA Origin Rules") and Operational Certification Procedures applicable to the goods covered under the said Agreement are set out in Annexure 2 as well as its Appendices. Article 14 deals with Customs Procedures and in particular Article 14 (3) (a) and (b) states that each party to the Agreement shall endeavour to "simplify its customs procedures" and "harmonise its customs procedures, to the extent possible, with relevant international standards and recommended practices such as those made under the auspices of the World Customs Organization".

Rules of Origin for the AIFTA

33. The AIFTA Origin Rules has been set out, as already noticed, in Annexure-2 to the ASEAN FTA. Rule 1 contains the “definitions”. “Originating products” has been defined in Rule 1 (d) to mean products that qualify as originating in accordance with Rule 2. The term “production” has been defined in Rule 1 (e) to mean a large range of activities including manufacturing, producing, processing or assembling a good. Rule 2 sets out the “Origin Criteria” as under:

“For the purposes of this Annex, products imported by a Party which are consigned directly within the meaning of 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 set out and defined in Rule 3; or

(b) Products not wholly produced or obtained in the exporting Party provided that the said products are eligible under Rule 4 or 5 or 6.”

34. Rule 3 set out what can be construed as “wholly produced or obtained products”. Rule 4 specifies what can be “not wholly produced or obtained products”. Under Rule 4 (a) a product shall be deemed to be originating if “the AIFTA content is not less than 35 per cent of the FOB value”; and “the non-originating materials have undergone at least a change in tariff sub-heading (CTSH) level of the harmonized system”, provided that “the final process of the manufacture is performed within the territory of the exporting party.” The formula of calculating 35 per cent AIFTA content has been set out in Rule 4 (b) of the AIFTA Origin Rules. The method of calculating the AIFTA content is also set out in Appendix A to the ASEAN-FTA.

Operational Certification Procedures for AIFTA Rules of Origin

35. Appendix D to the ASEAN FTA sets out the Operational Certification Procedures for the Rules of Origin for the AIFTA. Inter alia it envisages the pre-exportation examination and the issuance of AIFTA Certificate of Origin (Article 7 therein). Article 7 (c) and (d) which are relevant for the present purposes read as under:

“ Issuance of AIFTA Certificate of Origin Article 7

*(a) *****

*(b) *****

(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 (2) months. The Issuing Authority shall be duly notified of the grounds for the denial of preferential tariff treatment.

(d) In cases where an AIFTA Certificate of Origin is not accepted, as stated in paragraph (c), the Issuing Authority shall provide detailed, exhaustive clarification addressing the grounds for the denial of preferential tariff treatment raised by the Importing Party. The Customs Authority of the Importing Party shall accept the AIFTA Certificate of Origin and grant the preferential tariff treatment if the clarification is found satisfactory.”

36. Under Article 14 (a), the AIFTA Certificate of Origin is to be valid for a period of 12 months from the date of its issuance. Under Article 14 (b), the AIFTA certificate of origin requires to be submitted to the Customs Authority of the importing party within its validity period.

37. Article 16 provides for detailed procedure for verification. Article 16 (a) talks of the importing party requesting 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 goods in question or of certain parts thereof.

38. Article 16 (a) (i) further stipulates that the request for a retroactive check is to 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. The Issuing Authority has to respond to the request promptly and a reply within three months after receipt of the request for retroactive check. Even when there is doubt as to the authenticity of the document, the Custom Authority would 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”.

39. If the importing party is unhappy with the outcome of the retroactive check, then in terms of Article 17 (a) it may, under exceptional circumstances, request the exporting party and seek permission to make verification visits. However, prior to conducting a verification visit, the importing party has to deliver a “written notification” in terms thereof. The written notification has to be “as comprehensive as possible” and has to include the name of the customs authority issuing the notification, name of the producer/exporter whose premises are to be visited, the proposed date of the verification visit, the names and designation of the officials performing the verification visit. The very purpose of Article 17 is to give an opportunity to the country of the importing party to satisfy itself as to whether the goods are actually originating in the country of its export. Even where the goods are determined as non-originating, in terms of Article 17 (d), the producer/exporter is to be given 30 days from the date of receipt of the written determination to provide any written comments or additional information. The entire verification visit process is to be carried out and its results communicated to the Issuing Authority within a maximum period of six months from the date of conduct of the verification visit.

40. The upshot of the above analysis of the ASEAN FTA is that where doubts are raised as to the genuineness of the COOs, an elaborate verification procedure is put in place. As far as fraudulent certificates are concerned, they have been separately dealt with under Article 23. In cases of disputes concerning origin determination, classification of products or other related matters, Rule 24 (a) provides that the Government Authorities concerned “in the importing and exporting parties shall consult each other with a view to resolve the dispute, and the result communicated to the other parties”. Where no mutually satisfactory solution can be reached through consultations, then in terms of Article 24 (b), the party concerned “may invoke the dispute settlement procedures under the ASEAN-India DSM Agreement”.

Origin Rules notified by India

41. At this stage a reference requires to be made to the Customs Tariff Origin Rules. The provisions thereunder more or less mirror the provisions of the ASEAN FTA including its Annexures and Appendices. What is significant for the purpose of the present case is that Annexure I to the Customs Tariff Origin Rules sets out the method of calculation for the AIFTA content which is identical to Appendix-A to the ASEAN-FTA itself. Significant for the purpose of the present case are Rules 12 and 13 of the Customs Tariff Origin Rules which read as under:

“12. Identical and Interchangeable materials – For the purpose of determining origin of a product, when it is manufactured utilising both originating and non-originating materials, mixed or physically combined, the origin of such materials can be determined by generally accepted accounting principles of stock control applicable or inventory management practised in the exporting party.

13. Certificate of Origin – Any claim that a product shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin as per the specimen in the Attachment of the Operational Certification Procedures issued by a Government authority designated by the exporting party and notified to the other parties in accordance with the Operational Certification Procedures as set out in Annexure III annexed to these rules.”

42. Annexure III to the Customs Tariff Origin Rules sets out the Operational Certificate Procedures (“OCP”). Rule 7 (c) of the OCP mirrors what is provided in the ASEAN-FTA itself. It also sets out

more or less the same time limitation within which the disputes need to be resolved. Rule 7 (c) of the OCP reads as under:

“7 (c) In case 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.”

43. The procedure for verification stated in Rule 16 to the OCP is identical to that provided in the ASEAN-FTA. In other words there has been a whole scale adoption of the provisions set out in Appendix D to the ASEAN-FTA into the domestic law.

Failure by Respondents to resort the detailed verification procedure

44. In the present case, the customs authorities first resorted to a retroactive check in respect of some of the COOs produced by importers of gold jewellery from Indonesia. On 12th June 2015 a letter was written by the Municipality Office, Cakung to the Embassy of India in Jakarta in response to the letter dated 7th April 2015 in relation to some of the COOs issued by the Municipality office in Cakung. The letter confirmed that the said COOs were in fact issued by the said authority. The letter further stated as under:

“We have also conducted retroactive check as per Article 16 of India ASEAN FTA and our team has visited the factory of exporter on 27th April 2015. We have seen their plant and verified all the processes from Dore till jewellery manufacturing. The reply to your questionnaire has been given in the exporter’s attach letter. We have verified the contents of their letter from their records and found true and correct.

Indonesia has large mining of gold. Most of the formal mines are associated with ANTAM only. As mined gold is used in manufacturing jewellery of aforementioned COO, so the origin of goods is easily verified and hence no pre-exportation verification has been done.

It is also to inform you that the exporter is state owned company under the control of Ministry of State Owned Enterprises (Government of Indonesia) having high credentials.”

45. Along with the letter dated 12th June 2015 by the Municipality Office, Cakung, the clarifications by the exporter (P-Antam) to the questionnaire issued by the Indian side was enclosed. Inter alia it was clarified by P-Antam by its reply dated 27th April 2015 that the COOs had been issued by the competent authority at their request and were genuine. It was further stated that the said COOs were issued “as per Rule 13 of India- Asean FTA”. A brief description of the production process was enclosed. It was stated that P-Antam is a gold miner, refiner, jewellery and minted coins manufacturer. It was a state owned company with the Government of Indonesia holding majority/controlling shares. A list of mines owned by the P-Antam group was also set out. It was categorically stated that the exported goods as well as components/materials used in the production and exports of the goods are only of Indonesian origin and are not of mixed or undetermined origin. The last paragraph of the said letter was categorical that the export of mining ore from Indonesia is prohibited. It was added that P-Antam had recorded the previous processing of about 200 MT of gold dore. Therefore, a clear distinction was made from the beginning between refined gold and gold dore.

46. It appears that an erroneous interpretation of the above clarification issued by P-Antam has led to the impugned Circular dated 6th October 2015 being issued. The impugned Circular does appear to proceed on surmises which do not find support in any of the material that has been produced by the Respondents before the Court. For e.g., the impugned Circular proceeds on the basis that in the letter dated 12th June 2015 it was stated that “as mined gold is used in manufacturing jewellery of aforementioned COO, so the origin of goods is easily verified and hence no pre-exportation verification has been done.” Further, in the letter dated 27th April 2015 it was stated that “the gold has been sourced substantially from mine PT ANTAM (Pesero) Tbk

Gold Mining.” It was further stated that “once the material is arrived in refinery it becomes a single inventory and difficult to ascertain exactly the flow of gold.”

47. In the considered view of the Court, there appears to be a misunderstanding on the part of the Respondents of what was being conveyed by P-Antam in its letters to the Indian Embassy. What is evident from the said letters is that only the gold sourced from the listed mines in Indonesia had been used in the production of the gold jewellery that was exported to India. Further such gold was only of Indonesian origin and not of mixed or undetermined origin. Therefore it is inconceivable how the impugned Circular could proceed on the basis that there has been a mixture of gold dore bars of foreign origin with those of domestic origin without maintaining any records of origin. There appears to be confusion regarding gold dore bars. Gold dore bars which are an impure form of gold appear to have been thought to be refined gold. This in turn led to the needless doubt regarding the capability of P-Antam to produce goods for jewellery.

48. Further, if there was any doubt about appropriate inventory not being maintained regarding the origin of the gold, then either the verification process as set out in the Customs Tariff Origin Rules, which in turn adopted the provisions in the Appendix-D to the ASEAN-FTA, could have been undertaken or a questionnaire issued for that purpose. No recourse to such process appears to have been undertaken. The inescapable conclusion is that there was no material for the Respondents to draw the conclusions that form the factual basis of the impugned Circular.

Scope of Section 151A of the Customs Act

*49. The Court next proceeds to examine if in issuing the impugned Circular and subsequent instructions the Respondents exceeded the scope of their authority under Section 151A of the Act. The proviso (a) to Section 151A of the Act does not permit the issuance of instructions, orders, and directions which might require an Officer of Customs to make a particular assessment or to dispose of a particular case in a particular manner. This prohibition is not different from Section 119 of the Income Tax Act, 1961 (“IT Act”) and Section 37 B of the Central Excise Act, 1944 ('CE Act'). The legal position governing the above provisions of the IT Act as well as the CE Act as explained in *Faridabad Iron & Steel Traders Association v. Union of India* (supra) would apply to Section 151A of the Act as well. The decision in *Union of India v. Madras Steel Re-Rollers Association* 2012 (supra) explains that the CBEC is empowered to issue Circulars for the 'guidance of quasi-judicial authorities'. Also in *CCE, Vadodara v. Dhiren Chemical Industries* (supra) it was explained that the CBEC could disseminate interpretative findings or procedures or such other instructions to its officers for 'ensuring equity and uniformity in assessment practices'. However, on that pretext the power under Section 151A cannot be used to whittle down the scope of an exemption. This has been explained in a large number of decisions which will be discussed hereafter.*

*50. In *Union of India v. Karvy Stock Broking Limited* (supra) a circular was issued by the CBEC interpreting a notification issued by the Government exempting 'Business auxiliary services provided by a commission agent' from the levy of service tax under sub-Section (2) of Section 66 of the Finance Act, 1994. The said circular clarified that the commission received by distributors on mutual fund distribution would be liable to service tax as it would not fall within the expression 'business auxiliary services'. That circular was struck down on the ground that it “amounts to foreclosing discretion or judgment that may be exercised by the quasi-judicial authority while deciding a particular lis under particular circumstances.” It was held to be contrary to Section 37B of the CE Act.*

*51. The decision in *Union of India v. Inter Continental (India)* 2008 (226) ELT 16 (SC) reiterates the settled legal position that by issuing a circular subsequent to an exemption notification, the Department cannot add conditions restricting the scope of the exemption. In *Sandur Micro Circuits Limited v. Commissioner of Central Excise, Belgaum* 2008 (229) ELT 641 (SC) the Supreme Court explained as under:*

“5. The issue relating to effectiveness of a Circular contrary to a Notification statutorily issued has been examined by this Court in several cases. A Circular cannot take away the

effect of Notifications statutorily issued. In fact in certain cases it has been held that the Circular cannot whittle down the Exemption Notification and restrict the scope of the Exemption Notification or hit it down. In other words it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature.”

52. In *UCO Bank v. Commissioner of Income Tax, West (supra)*, it was held that –

“[S]uch circulars, however, are not meant for contradicting or nullifying any provision of the statute. They are meant for ensuring proper administration of the statute, they are designed to mitigate the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question so as to benefit the assessee and make the application of the fiscal provision, in the present case, in consonance with the concept of income and in particular, notional income as also the treatment of such notional income under accounting practice.”

53. Recently in a decision dated 1st February 2016 in Writ Petition (Civil) No. 4665 of 2014 (*Allen Diesels India Pvt. Ltd. v. Union of India*) this Court noted that Section 151A of the Act is for a very limited purpose of issuing of instructions to officers of customs for the purpose of “uniformity in the classification of goods or with respect to the levy of duty thereon”. The above provision does not envisage any amendment being made to an exemption notification that may have been issued in exercise of powers under Section 25 (1) of the Act. This Court in the above decision also referred to the decision in *Modi Rubber Limited v. The Board of Central Excise and Customs* 1978 (2) ELT 127 (Del.) wherein it was held that CBEC cannot impose any condition for availing exemption without amending the original exemption notification.

The impugned circulars are ultra vires Section 151A

54. Examined in light of the legal position explained in the above decisions, it is plain that the impugned Circulars dated 6th October 2015 and 20th January 2016 do in fact whittle down the scope of the exemption available for import of gold jewellery from Indonesia, across the board, only because, according to the Department, the COOs issued by the Issuing Authority in Indonesia could not be verified. The Circular dated 6th October 2015 requires an Officer of the Customs who has issued a SCN not to pass orders of provisional assessments. It requires the original COOs along with “appealable orders” to be sent to the CBEC. Clearly the Circular does not, as was sought to be explained by Mr Dubey, merely elaborate the procedures. It interferes with the discretion to be exercised by the customs officer who is performing a quasi-judicial function. Para 7.1 of the said Circular requires the importers to present facts in support of the COOs, which is not a requirement in the original exemption notification. There is considerable merit in the contention that this goes beyond the mandate of the Customs Tariff Origin Rules and constitutes an unreasonable and onerous condition as far as the importers are concerned.

55. As far as the circular dated 20th January 2016 is concerned, Regulation 2 (2) of the CPDA Regulations provides for a maximum payment of only 20% of duty differential in the case of a provisional assessment. The insistence on a bank guarantee for the entire differential duty appears to be contrary to Regulation 2 (2). The Court is unable to accept the plea of Mr Dubey that the above Circular emerges from the Regulation 4 and is intended to adequately secure the Revenue and ensure uniformity of provisional assessments across all ports. The said Circular does not leave the issue of what conditions should be imposed for provisional assessment to the concerned customs officer. It requires the officer to demand 100% bank guarantee even in respect of those B/Es which have been provisionally assessed under Section 18 of the Act. It certainly is contrary to proviso (a) to Section 151A inasmuch it dictates to the customs officer in what manner he should complete a provisional assessment. The consequent impugned letter dated 22nd January 2016 came to be issued to M/s. J.B. Overseas only on the basis of the said Circular.

56. The Court, therefore, holds that the impugned Circulars dated 6th October 2015 and 20th January 2016 are ultra vires Section 151A of the Act and unsustainable in law.

SCN issued to J B Overseas is invalid

57. A perusal of the SCN issued to M/s. J.B. Overseas on 26th November 2015 reveals that it is a virtual reproduction of the impugned Circular dated 6th October 2015. As held by this Court in *Faridabad Iron & Steel Traders Association v. Union of India (supra)*:

“[Whenever any authority is conferred with the power to determine certain questions in judicial and/or quasi judicial manner, the authority is required to exercise the power conferred upon him as per his own discretion. This is the essence of judicial and quasi judicial function. The authority exercising such powers cannot be influenced by any directions, instructions or the Circulars that may be issued by any other agency. Consequently, the Circular issued by the Respondents cannot be permitted to interfere with the discretion of the judicial and quasi judicial authorities.]”

58. Apart from the fact that the SCN suffers from the above fatal flaw, it has been issued overlooking the COOs produced by the said importer verified by Issuing Authority. Therefore, the said SCN and the proceedings consequent thereto are held to be invalid and unsustainable in law.

59. In view of the above conclusions and, in particular, since the SCN has been issued on the basis of an invalid Circular, relegating the Petitioners to the alternative remedy of statutory adjudication and consequent appeal would be a pointless exercise. The decisions in *Filterco v. CST (supra)*, *TVL Pizzeria Fast Foods Pvt. Ltd. v. CCT Ezhilagam (supra)* and *Vistar Construction Pvt. Ltd. v. Union of India (supra)* support the case of the Petitioners in this regard.

Conclusions

60. For all the aforesaid reasons, the Court holds that the Circular dated 6th October 2015 issued by the CBEC and the instructions issued on that basis on 20th January 2016 by the CBEC addressed to the customs officers are in violation of Section 151A of the Act and are hereby quashed.

61. The proceedings consequent thereto the above-mentioned circulars including the communication dated 22nd January 2016 issued to M/s. J.B. Overseas requiring it to furnish a bank guarantee of 100% of the duty differential while making provisional assessment are hereby set aside.

62. It is made clear that any SCN or any application for provisional release of goods by members of the Petitioner Association and similarly placed importers would be decided by the customs officers in accordance with law uninfluenced by any of the abovementioned circulars, instructions or directions.

63. The writ petitions and the pending applications are disposed of in the above terms with no orders as to costs.”

- R S INDUSTRIES (ROLLING MILLS) LTD & ORS VS. CCE [2017 (11) TMI 1256 (Del)]

“5. We have heard both the sides and perused the appeal records. We note that the denial of exemption, as claimed by the importer, is on the ground that the value addition in Sri Lanka fall below 35%. We note that the certificates of origin have been issued by Competent Authority of Sri Lankan Government. The same is not in dispute. We already note that the certificate were not recalled or cancelled by the

issuing authority. The only ground for denial of exertion is, the Zinc Ingots value subjected to assessment by Sri Lankan customs appears to be low. For this, support was drawn from LME price. We note that assessment of import of ingots was made by Sri Lanka Customs. The same cannot be varied here. We find it is not open to counterpart in India to re-assess the goods which are not imported in to India.

6. In any case, para 38.3 of the impugned order refers to non-fulfilment of condition under Rule 7 (a) of Origin Rules. Reliance was placed on reports given by Sri Lankan customs dated 31/12/2004, 08/02/2005 and 05/04/2005 to conclude that the domestic value addition is not fulfilled. We have perused all the three reports which are on record. We note that none of these reports by Sri Lankan customs give any indication about the value addition not being fulfilled by the Sri Lankan supplier. To this extent, there is no factual support for the observation made in the impugned order. Further, we note that the valuation of Zinc Ingots as ascertained by the impugned order has no relevance to question the certificate issued by the Competent Authority of Sri Lankan Government. As such, we find the non fulfilment of condition under Rule 7 (a) could not be invoked by the Original Authority, in the facts of this case. Further, it is also recorded by the Original Authority that the Director of the importing Indian company in the statements gave details which supported the allegation of incorrect data submitted by the Sri Lankan supplier. We note that there is no such admission by the Director in his statements. Even otherwise, we note that certificate of origin and the data submitted to get such certificates cannot be questioned based on statements of the importers. We find no record to the effect that the country of origin certificates issued by the Sri Lankan Government has been questioned by the Indian Authorities and follow up after import was done in order to cancel or recall the same. We note that the issue regarding country of origin certificate and questions of bonafideness was discussed in the bilateral meeting of working group between the two countries on 05/06/2002 it was agreed that no detention or hold up of cargo is to be ordered on the question of bonafideness of certificates. Verification, if any, can be done

post-lacto with the concerned local nodal focal points at the respective headquarters. This much has been recorded in the letter dated 05/10/2004 of Department of Commerce, Government of Sri Lanka addressed to Commissioner of Customs (Imports), JNPT.

7. In view of the above discussion and analysis, we find that in the presence of valid certificates of origin Issued by Competent Authority, the assessing authorities in India are not right in denying the benefit of exemption notification. Accordingly, we set aside the impugned order and allow the appeals.

- **Alfakrina Exports Vs CC [2023 (9) TMI 86 (Amd)]**

"4. We have carefully considered the submission made by both the sides and perused the record. In the present case undisputed fact is that the proper authority i.e. Malay Chamber of Commerce Malaysia has issued the certificate of origin. The authenticity of the certificate was not proved to be wrong or there is no case that the certificate of origin is fake. We do agree with the submission of Learned counsel that in case of any reasonable doubt the procedure prescribed under Rule 9 of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Government of the Republic of India and Malaysia) Rules 2011 needs to be complied with. For ease of reference the said Rule 9 of Rules 2011 is reproduced below:

"9. Direct consignment. - Originating goods shall be deemed to be directly consigned from the territory of the exporting Party to the territory of the importing Party if, -

(a) The goods are transported without passing through the territory of any non-Party; or,

(b) The goods are transported through the territory of any non-Party where, -

(i) The transit entry is justified for geographical reasons or transport requirements;

(ii) The goods have not entered into trade or consumption in the territory of such non-Party;

(iii) The goods have not undergone any operation in the territory of such non-Party other than unloading and reloading or any operation required to keep the goods in good condition; and,

(iv) The goods have remained under the control of the customs authority of such non-Party."

From the above rule it is mandatory that in case of any doubt about the authenticity of the certificate of origin. The Customs Authority of Government of India must request the Issuing Authority i.e. in the present case the Malay Chamber of Commerce Malaysia to check the authenticity of the certificate of origin.

4.1 We find that the department, when made an allegation about the country of origin did not follow the procedure prescribed under Rule 9 of Customs Tariff (Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and Malaysia) Rules 2011. Therefore, merely on the basis of the bill of lading whereby, it was inferred that the goods were originated from China cannot be accepted.

4.2 Moreover, the discrepancy was noticed only in respect of bill of lading related to 2 certificate of origin. Therefore the allegation in respect of other 3 certificates of origin is without any basis. Under the identical scheme of import of goods based on certificate of origin this tribunal in the case of M/s. BDB Exports Pvt. Ltd (supra) has taken the following view:

"4. Heard both sides and perused the records of the case. The issue involved in the present appeal is whether the main appellant is eligible to avail partial exemption under Notification No.105/99-CUS dated 10.08.1999 when read with SAPTA Rules. As per the first Proviso to this Notification, the Assistant Commissioner/Deputy Commissioner/Joint Commissioner has to be satisfied that imported goods are in accordance with the Customs Tariff

(Determination of Origin of Goods under the Agreement on SAARC Preferential Trading Arrangement) Rules, 1955- [SAPTA Rules]. As per Rule 4 of the SAPTA Rules read with its Schedule even products processed in the member countries are eligible for concessions under SAPTA Rules when the base goods are not produced/manufactured in the contracting countries. The only requirement under these Rules is that a certification of origin has to be produced for availing concessions as issued by the designated authority of Govt. of exporting contracting state and notified to the other contracting states in accordance with the certification procedures mentioned in the form annexed to SAPTA Rules. Required certificates of origin with respect to imported goods were furnished by the appellant where percentage of value addition as per SAPTA Rules was also indicated. Adjudicating authority has not accepted the value addition indicated in the certificate of origin but has gone with the investigation indigenously to allege that value addition cannot be to the extent claimed by the Appellant and also that activities undertaken by the supplier of cloves does not amount to processing of cloves. It is observed from various provisions of SAPTA Rules and Notification No.105/99-Cus dated 10.08.1999 that there is no discretion or power with the Customs authorities to reject the certificate of origin given by the concerned contracting state. Para 9 of the same Schedule does give power to the contracting states to review/modify the said Rules.

4.1 It is also observed that Hon'ble Apex Court in the case of Zuari Industries Ltd. v. CCE & Cus (Supra) held as follows:-

"9. Firstly, on the facts we find that the assessee had given to the Sponsoring Ministry its entire Project Report. In that report they had indicated that for the expansion of the fertilizer project they needed an extra item of capital goods, namely, 6MW Captive Power Plant. In their application, the assessee had made it clear that the fertilizer project was dependant on continuous flow of electricity, which could be provided by such Captive Power Plant. Therefore, it was not open to the Revenue to reject the assessee's case for nil rate of duty on the said item, particularly when the certificate says so. In the judgment of this Court in the case of Tullow India Operations Ltd. (supra), this Court held that essentiality certificate must be treated as a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of the exemption notification. We may add that, the essentiality certificate is also a proof that an item like Captive Power Plant in a given case could be treated as a capital goods for the fertilizer project. It would depend upon the facts of each case. If a project is to be installed in an area where there is shortage of electricity supply and if the project needs continuous flow of electricity and if that project is approved by the Sponsoring Ministry saying that such supply is needed then the Revenue cannot go behind such certificate and deny the benefit of exemption from payment of duty or deny nil rate of duty. To the said effect is the judgment of the Calcutta High Court in the case of Asiatic Oxygen Ltd. (supra) in which it was held that the object behind the specific Heading 98.01 in Customs Tariff Act, 1975 was to promote industrialization and, therefore, the heading was required to be interpreted liberally. It was further held that, once an essentiality certificate was issued by the Sponsoring authority, it was mandatory for the Revenue to register the contract."

4.2 Karnataka High Court in the case of Yellamma Dasappa v. Commissioner of Customs, Bangalore (supra) also observed as follows:-

"9. A valid certificate has been issued and the said certificate, even as on date, has not been withdrawn or cancelled for any alleged violation of the condition by the appellant. Unless the said certificate is cancelled, the Customs Authorities cannot impose customs duty. The seizure of the equipment is only a consequential act that would follow the cancellation of the certificate issued in favour of the appellant. So long as the certificate is not cancelled, the respondents could not, in our opinion, have initiated seizure proceedings in the case on hand. Petitioner-appellant was sent only a questionnaire and the said questionnaire has been answered by the appellant herein. No further action has been taken by the respondents. The Director General of Health Services has also not issued any cancellation of certificate as on date. In these circumstances, we are clearly of the view that without withdrawing or cancelling the certificate already issued, the present seizure cannot stand. Therefore we hold that the seizure effected by the respondents is not in accordance with law. The impugned order of the learned Single Judge, in these circumstances, requires to be set aside and accordingly the same is set aside."

4.3 CESTAT, Delhi in the case of Dhar Cement Ltd. vs.- CCE Indore(Supra) after relying upon case laws of Supreme Court and Karnataka High Court, held as follows:-

"7. We have heard both sides and examined the appeal records. This is the third round of litigation in the present case. The issue involved is the installed capacity of the appellant vis-à-vis their eligibility to Notification Nos. 24/91 and 5/93-C.E. The concession of notification is available when the installed capacity is not exceeding 1,98,000 T.P.A. It is admitted fact that the Director of Industries, Madhya Pradesh, who is designated as a competent authority in the Notification itself has more than once certified the installed capacity of the appellant to be 1,98,000/- T.P.A. As observed by the Hon'ble Supreme Court in normal circumstances

such a certificate is to be acted upon. The Hon'ble Supreme Court directed this Tribunal to examine the various material relied on by the Revenue to contest the appellant's claim for exemption. We perused of the impugned order which was passed after the specific direction of this Tribunal to approach the competent authority for re-examining all the facts, material, evidence, furnished by both the sides to certify the installed capacity. As per the direction of this Tribunal the Director of Industries was addressed by the Adjudicating Authority on 5-9-2002 along with copies of 11 documents (Para 12 of the impugned order) which are relied upon by the Revenue to contest the correctness of certificate issued by the competent authority. In response, the Commissioner of Industries vide his letter dated 17-6-2003 categorically stated that the installed capacity of the appellant unit is 1,98,000 T.P.A. during the impugned period. He also observed that with reference to the various evidences submitted by the Revenue his office is in agreement with the clarification given by the appellant that their annual installed capacity was 1,98,000 M.T. and they were capable to produce 25% extra, which comes to 2,47,500 T.P.A., for which there was no restriction from the Government end. We have noted that all the evidences available with the Department have been submitted to the Commissioner of Industries who reiterated the certificate already issued. In spite of such confirmation by Commissioner of Industries, Madhya Pradesh, the original authority examined the issue of appellants' eligibility and held that the appellants have deliberately misdeclared the installed capacity to the Central Excise Department to avail the concessional rate of duty under Notification No. 24/91. The Original Authority observed that the very basis of installed capacity certificate is not correct especially when the capacity of individual machinery/equipment and the various other documents of the appellants themselves suggest that installed capacity of their plant was much more than 1,98,000 T.P.A. Accordingly, he held the appellant is not eligible for the concession. We find that while coming to such conclusion he has acted apparently, as appellate authority with reference to certificate issued by the competent authority in terms of the notification. We find the original authority has no such legal powers to sit on judgment on the certificate issued by the competent authority designated by the Government. In case the certificate was obtained by misrepresentation or not presenting full facts the only option left to the Department is to approach the competent authority with all the evidences to modify/cancel the certificate issued already. The Department did approach not only the Director of Industries but also Commissioner of Industries with all the evidences which were examined and the certificate was reiterated by the competent authority. As already noted, no other evidence was left to be considered."

4.4 In view of the above observations and the ratios laid down by the Courts certificates of origin produced by the Appellant cannot be discounted. There is no evidence on record that designated authority of Bangladesh under SAPTA Rules was maliciously involved with the supplier of cloves and the Appellant.

5. Adjudicating Authority has relied upon some indigenous sources to conclude that neither the imported goods are "processed cloves" nor the value addition to extent claimed is justified. Appellant asked for the cross examination of Shri Sunil Doletram Chhabria, Shri C.J.Jose, Dr.J.Chakraborty and Shri Pratab Chakraborty as per para-18 of Appellants reply dated 05.12.2005 to the show cause notice dated 26.08.2005. These facts have been duly reflected in the submissions of the main appellant in the Order-in-Original dated 28.02.2007 but the request of cross examination of the witnesses has been conveniently avoided by the Adjudicating Authority and no observations are given as to why request of the appellant for cross-examination is not acceptable. In the absence of cross examination the evidentiary value of the relied upon witnesses is lost. Secondly, Shri Doletram T.Chhabria is also an exporter and importer of spices whose business is threatened by concessional rate on cloves under SAPTA Rules. Being an interested party his statement otherwise also can also not be relied upon and used against the Appellants. It is observed from the SAPTA Rules that the concessions to member countries are as a result of commitments amongst the SAARC countries for enhancing, inter alia, the trade between the members contracting countries. Great trust is imposed under SAPTA Rules upon the designated authority of Govt. of the Exporting Contracting State as per para-7 of the Schedule to SAPTA Rules. To fulfill the commitments to SAARC nations a certificate of origin given by exporting contracting state cannot be scuttled by the department by conducting some local investigation creating confusion in extending the exemption benefits. As already observed a certificate of origin issued by the designated authority cannot be dishonoured unless cancelled by the same authority.

5.1. On the issue of processing of cloves it is the case of the department that minor activities done by the supplier will not make the goods as processed cloves and that such processed cloves come into existence only when oil is extracted from natural cloves. It is correctly argued by the Senior Advocate arguing on behalf of the Appellants that "exhausted cloves" or "spent cloves", from which clove oil has been extracted, will be cheaper than the natural cloves. If the argument of the department on this account is accepted then there cannot be value addition in the making of processed cloves and Notification No.105-99-CUS dated 10.08.1999 will become redundant, so far as concession/exemption to imported cloves from SAPTA countries is concerned.

5.1.1 On this issue of processing Gauhati High Court vide Order dated 30.08.1978, in the case of Chandreswar Singh v. State of Assam [1978 (42) STC 424 (Gau.)], held that when leaves and roots are removed from the onions then such onions become processed onions. Following observations were made by Hon'ble Gauhati High Court :-

"To put the argument of the learned counsel in nutshell, his contention is that a person who sells onion produced in Assam is not a dealer inasmuch as onion is neither manufactured nor made nor processed. On this assumption, contends the learned counsel, that levy of sales tax on onion imported from outside the State of Assam is hit by article 301 of the Constitution which deals with freedom of trade, commerce and intercourse throughout the territory of India. It is argued that article 304(a) cannot come to the rescue of the State for justifying this levy inasmuch as article 304(a) provides that the legislature of a State may by law impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced. In support of this contention, the learned counsel has relied on State of Madhya Pradesh v. Bhailal Bhai, Firm A.T.B. Mehtab Majid and Company v. State of Madras and State of Rajasthan v. Ghasiram Mangilal. On the other hand, Mr. Goswami, learned counsel for the State of Assam, contends that there is no discrimination between onion imported from outside and onion grown in the State of Assam inasmuch as both are subjected to levy of sales tax. The argument in this connection has centred round the definition of the word 'processed'. It is urged by the learned counsel for the petitioner that onion cannot be processed inasmuch as it is not subjected to any mechanical process after it has been removed from the earth.

The word 'process' used as transitive word means according to Webster's New International Dictionary 'to prepare by or subject to treatment or process'. In Nilgri Ceylon Tea Co. v. State of Bombay, Shah, J. as he then was, observed as follows:

"The expression 'process' has not been defined in the Act. According to Webster's Dictionary 'process' means 'to subject to some special process or treatment, to subject (especially raw material) to a process of manufacture, development or preparation for the market, etc., to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurising, fruits and vegetables by sorting and repacking.'

(1) [1964] 15 S.T.C. 450 (S.C.); A.I.R. 1964 S.C. 1006.

(2) [1963] 14 S.T.C. 355 (S.C.); A.I.R. 1963 S.C. 928.

(3) [1969] 2. S.C.C. 710

(4) [1959] 10 S.T.C. 500.

According to Chambers's Twentieth Century Dictionary, 'process', inter alia, means to prepare, (e.g., agricultural product) for marketing. In the Oxford English Dictionary, Vol.VIII, 'process' has been defined to mean besides other things, 'to preserve fruit, vegetable, etc. by some process'. In Webster's New International Dictionary, Vol.II, besides other things, process has been defined to mean 'a course of procedure, something that occurs in the series of actions'.

Now, it is common knowledge that the onion has its roots under the earth with coats of bulbs also and its leaves sprout on the surface of the earth. It is removed along with the root, the leaves are dried up, and the main part which may be called bulb is exposed in the sunshine and after the leaves have dried up and have been removed from the bulb, the bulb, i.e., the edible round article is taken to the market for sale. From this it will be clear that the commodity is subjected to a treatment or process. It does not remain in the same condition in which it was when embedded to the earth or as initially harvested. Looked at from this angle, we are inclined to hold that onion is processed and that is why the onion grown in the State of Assam has been rightly subjected to a levy of sales tax by the Government."

5.2 In view of the above case law of Gauhati High Court department cannot sit as an Adjudicator over the certificate of origin given by the designated authority under SAPTA Rules. Only an appropriate authority of Bangladesh could have certified as to what could be the value addition, after satisfying about the nature of processing activities done by the supplier and the extent of expenses incurred by such supplier in carrying out the activities of cleaning, handling, storage, sorting, packing etc.."

B) In the case of R. S. Industries (Rolling Mills) Ltd. (supra) similar view was expressed by the coordinate bench of this Tribunal, the relevant part of the order is reproduced below:

"5. We have heard both the sides and perused the appeal records. We note that the denial of exemption, as claimed by the importer, is on the ground that the value addition in Sri Lanka fall below 35%. We note that the certificates of origin have been issued by Competent

Authority of Sri Lankan Government. The same is not in dispute. We already note that the certificate were not recalled or cancelled by the issuing authority. The only ground for denial of exemption is, the Zinc Ingots value subjected to assessment by Sri Lankan customs appears to be low. For this, support was drawn from LME price. We note that assessment of import of ingots was made by Sri Lankan Customs. The same cannot be varied here. We find it is not open to counterpart in India to reassess the goods which are not imported into India.

6. In any case, para 38.3 of the impugned order refers to non-fulfilment of condition under Rule 7(a) of Origin Rules. Reliance was placed on reports given by Sri Lankan customs dated 31-12-2004, 8-2-2005 and 5-4-2005 to conclude that the domestic value addition is not fulfilled. We have perused all the three reports which are on record. We note that none of these reports by Sri Lankan customs give any indication about the value addition not being fulfilled by the Sri Lankan supplier. To this extent, there is no factual support for the observation made in the impugned order. Further, we note that the valuation of Zinc Ingots as ascertained by the impugned order has no relevance to question the certificate issued by the Competent Authority of Sri Lankan Government. As such, we find the non-fulfilment of condition under Rule 7 (a) could not be invoked by the Original Authority, in the facts of this case. Further, it is also recorded by the Original Authority that the Director of the importing Indian company in the statements gave details which supported the allegation of incorrect data submitted by the Sri Lankan supplier. We note that there is no such admission by the Director in his statements. Even otherwise, we note that certificate of origin and the data submitted to get such certificates cannot be questioned based on statements of the importers. We find no record to the effect that the country of origin certificates issued by the Sri Lankan Government has been questioned by the Indian Authorities and follow up after import was done in order to cancel or recall the same. We note that the issue regarding country of origin certificate and questions of bonafideness was discussed in the bilateral meeting of working group between the two countries on 5-6-2002 it was agreed that no detention or hold up of cargo is to be ordered on the question of bonafideness of certificates. Verification, if any, can be done post-facto with the concerned local nodal focal points at the respective headquarters. This much has been recorded in the letter dated 5-10-2004 of Department of Commerce, Government of Sri Lanka addressed to Commissioner of Customs (Imports), JNPT.”

C) This Tribunal in the case of M/s. MJ Gold Pvt. Ltd. (supra) dealing with the similar issue, has passed the following order:

5. Having heard the rival contentions, it is observed that vide the order under challenge the appellant is denied the duty exemption benefit for importing gold jewellery from Indonesia, despite Indonesia being the country in Appendix of the Notification No. 046/2011 dated 01.06.2011 which exempts the imports from Indonesia to such amount of duty as is mentioned in 4th column of said notification. Foremost the Notification is perused. It is observed that the Notification exempts the goods of the description as is specified in Column 3 of the Table appended thereon and falling under Chapter sub heading or tariff item of the first schedule to the Customs Tariff Act, 1985 as is specified in the corresponding entry in column 2 of the said table, from so much of the duty of customs leviable thereon as is in excess of the amount collected at the rate specified in column 4 of the said table, when the goods imported into the Republic of India when the goods from a Country listed in Appendix I. As already observed above, Indonesia is one of the country from Appendix I.

6. Further perusal of the Notification shows that such benefit is available to the importer if the importer proves to the satisfaction of the Deputy Commissioner or Assistant Commissioner of Customs, or as the case may be, that the goods in respect of which the benefit of this exemption is claimed are of the origin from the countries as mentioned in Appendix I or Appendix II, as the case may be], in accordance with provisions of the Customs Tariff Determination of Origin of Goods under the Preferential Trade Agreement between the Governments of Member States of Association of Southeast Asian Nations (ASEAN) and the Republic of India] Rules, 2009, published in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 189/2009-Customs (NT), dated the 31st December 2009.

7. I further observe that this Notification is an amendment of earlier Notification No. No. 189/2009-Customs (NT), dated the 31st December 2009. Rule 13 thereof reads as follows:

“13. Certificate of Origin.- Any claim that a product shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin as per the specimen in the Attachment to the Operational Certification Procedures issued by a Government authority designated by the exporting party and notified to the other parties in accordance with the Operational Certification Procedures as set out in Annexure III annexed to these rules.”

Perusal of the said Annexure III condition No. 7 therein is with respect to the issuance of said certificate of origin. It reads as follows:-

“7. ISSUANCE OF AIFTA CERTIFICATE OF ORIGIN

(a) The AIFTA Certificate of Origin shall be in International Organization 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.

(d) In cases where an AIFTA Certificate of Origin is not accepted, as stated in paragraph (c), the Issuing Authority shall provide detailed, exhaustive clarification addressing the grounds for the denial of preferential tariff treatment raised by the importing party. The Customs Authority of the importing party shall accept the AIFTA Certificate of Origin and grant the preferential tariff treatment if the clarification is found satisfactory.”

8. Apparently and admittedly, the Customs Authority while verifying the origin of goods had issued a questionnaire and denied the benefit on the ground that the complete questionnaire was not answered by the appellant creating a doubt about the Country of origin Certificate. The perusal of the condition No. 7 (c), as above makes it clear that in case of such doubt about the authenticity of Country of origin Certificate i.e. in case where the certificate of origin is not acceptable to the Customs Authorities of the importing country, then the certificate has to be returned back to the issuing authority that too within a reasonable period duly informing the grounds for the denial of preferential tariff treatment. Admittedly and apparently, the said procedure has not been followed by the Department. Though all the questions were not answered by the appellant but perusal of the questionnaire shows that the availability of information as was required under these questions was not feasible with the appellant. More so, appellant had handed over the original copy of Country of origin Certificate. The meaning of ‘not answered the questionnaire’ becomes utmost irrelevant in the light of Certificate of origin.

9. No inquiry as mandated by the Notification was conducted with respect to Country of origin Certificate which otherwise reveal that a Certificate has been issued by the Competent Authority of one of ASEAN country as mentioned under Appendix I of the Notification No. 46/2011 dated 01.06.2011. In the given circumstances, it was highly unacceptable that the Certificate should not have been accepted. Once all documents as required under Notification No. 046/2011-Cus dated 01.06.2011 have been provided by the importer and their authenticity has not been challenged by the verifying Customs officers nor got verified from the issuing authority, there is no reason for the said Customs officer to hold that said certificate is not genuine. Demand of duty based upon reassessment ordered is actually not sustainable. I draw my support from the decision of CESTAT Hyderabad Bench in the case of Commissioner of Customs, Hyderabad vs Riddi Siddhi Bullions Ltd. reported as [2017 (355) ELT 585 (Tri-Hyd)] wherein it was held that the Adjudicating Authority cannot go beyond the provisions of Notifications that too to come to a conclusion based upon the assumptions and presumptions that the gold mined by the exporting country could not have been used by the supplier / manufacturer for producing the imported gold jewellery. It was held that the Notification provides for detailed verification process in case of reasonable doubt, it is not the case of the department that information was inconsistent with the certificate. In the absence thereof, it was held that the Adjudicating Authority could not have gone beyond the provisions of Notification.

10. I finally observe that the impugned Notification is a kind of preferential trade arrangement between States of Association of Southeast Asian Nations (ASEAN) and the Republic of India in order to facilitate free movement of trade. If the exemption sought under the applicable rules is denied on one or the other pretext that too based merely on assumptions and presumptions, it will hamper the free movement of trade between agreeing nations. Same is highly uncalled for and would rather render the entire exemption Notification otiose more so when on the face of the record, the Certificate of Origin is otherwise not disputed. Above all, the substantial benefit as that of exemption from payment of duty shall not be denied merely on procedural lapse.

