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

REGIONAL BENCH- COURT NO. 3

CUSTOMS Appeal No. 10177 of 2021- DB

(Arising out of OIA-MUN-CUSTM-000-APP-134-135-20-21 dated 03/12/2020 passed by Commissioner of CUSTOMS-MUNDRA)

D P CHOCOLATES **.....Appellant**
Plot No 166 Apparel
Park Cum Industrial
Area Katha Bhatolu Baddi Dist Solan
Himachal Pradesh

VERSUS

Commissioner of Customs - Mundra **.....Respondent**
Office of The Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra,
Kutch, Gujarat-370421

With

CUSTOMS Appeal No. 10178 of 2021- DB

(Arising out of OIA-MUN-CUSTM-000-APP-134-135-20-21 dated 03/12/2020 passed by Commissioner of CUSTOMS-MUNDRA)

D P CHOCOLATES **.....Appellant**
Plot No 166 Apparel
Park Cum Industrial
Area Katha Bhatolu Baddi Dist Solan
Himachal Pradesh

VERSUS

Commissioner of Customs - Mundra **.....Respondent**
Office of The Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra,
Kutch, Gujarat-370421

And

CUSTOMS Appeal No. 10321 of 2020- DB

(Arising out of OIO-MUN-CUSTM-000-COM-11-19-20 dated 11/12/2019 passed by Commissioner of Central Excise, Customs and Service Tax-MUNDRA)

D P CHOCOLATES **.....Appellant**
Plot No. 166, Apparel Park Cum Industrial Area,
Katha Bhatolu, Baddi
Solan, Himachal Pradesh

VERSUS

Commissioner of Customs - Mundra **.....Respondent**
Office of The Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra,
Kutch, Gujarat-370421

APPEARANCE:
Shri N.A.J.V. Shyam Babu, Advocate for the Appellant
Shri Rajesh Nathan, Assistant Commissioner(AR) for the Respondent

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

FINAL ORDER NO. 11617-11619/2024

DATE OF HEARING: 05.04.2024
DATE OF DECISION: 23.07.2024

RAMESH NAIR

The brief facts of the case are that the appellant have imported Alkalised Cocoa Powder and filed bills of entry. The goods are from Malaysia under Custom Tariff Head 1805. The appellant claimed the benefit of Notification No. 46/2011-Cus dated 01.06.2011 and Notification No. 53/2011-Cus dated 01.07.2011 under FTA benefit on import of Cocoa powder from Malaysia. Show cause notices dated 19.06.2019, 26.09.2019 & 27.08.2019 came to be issued for allegedly wrongly availing custom duty benefit. The adjudicating authority passed the Orders-In-Original dated 11.12.2019, 13.12.2019, 16.12.2019 whereby the differential duties were confirmed and penalties were imposed. Being aggrieved by the said orders-in-original, appellant preferred appeals before the Commissioner (Appeals) who vide impugned orders dated 11.12.2019 & 03.12.2020 rejected the appeals, therefore, the present appeals filed by the appellant.

2. Shri N.A.J.V. Shyam Babu, learned counsel appearing on behalf of the appellant, at the outset, submits that the identical cases were made out against many importers of cocoa powder from Malaysia who had availed the FTA benefit under Notification 46/2011-Cus dated 01.06.2011. In all the cases, the dispute raised by the department is that the value addition of 35% condition was not complied with. It is his submission that the certificate of origin was not discarded, no independent verification was carried out in the present case in case of common doubt by the custom authority. Therefore, the certificate of origin cannot be doubted with. Hence, the benefit was wrongly denied.

He placed reliance on the various judgments on the identical issue as under:-

- M/s. Unik Traders Vs. Directorate of Revenue Intelligence, Chennai- 2019 (367) ELT 353 (Madras)
- Anant Wines and Spirits Vs. Commissioner of Customs, Amritsar- 2016 (342) ELT 419 (Tri-Chand.)
- Commissioner of Customs (Imports), Mumbai Vs. Hindustan Gas and Industries Ltd.
- Ramwin and Industries Pvt. Ltd Vs. Commissioner of Customs (Preventive), Jamnagar
- Lubi Industires LLP Vs. Union of India- 2016 (337) ELT 179 (Guj.)
- Vinay Royal Plasi Coats Pvt. Ltd. Vs. Union of India- 2010 (258) ELT (Guj.)
- Bharathi Hexacom India Ltd. Vs. Commissioner of Central Excise, Jaipur-1 – 2007(7) STR 438 (Tri.-Del.)
- Al-Falah (Exports) Vs. Commissioner of Central Excise-2006 (198) ELT 343 (Tri.-LB)
- Shirazee Traders-Final Order No. 12060 of 2023 dated 15.09.2023
- Romil Jewelry- Final Order No. 86251-86265/2023 dated 29.08.23
- Bullion and Jewellers 2016 (335) ELT 639 (Del.)
- Riddi Siddhi Bullions Ltd. 2017 (355) ELT 585 (Hyd.)
- Global Exim - Final Order No. 10141 of 2024 dated 11.01.2024

3. Shri Rajesh Nathan, Learned Assistant Commissioner (Authorised Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of the records, we find that the benefit of Notification issued under FTA was denied by the Custom only on the ground that there was an intelligence that the value addition of 35% in respect of cocoa powder supplied from Malaysia is not fulfilled however to support this allegation no verification was carried out by the department. All the cases were made out on the basis of one case i.e. Morde Foods Pvt Ltd. Vide Order No. 126/2016-17/CC/NS-I/JNCH dated 02.02.2017. However, subsequently not only the case of Morde Foods Pvt Ltd. all the other cases made out on the same line has been decided in favour of

the assessee by extending the benefit of Notification 46/2011. Therefore, the issue is no longer res-integra. Some the judgments are cited below:

- **Shriazee Traders Final Order No. 12060 of 2023 dated 15.09.2023**

> *"The matter in this case pertains to import made by the appellants of cocoa powder which at the relevant time was covered under free trade agreement. The same as per certificate of origin produced before us was wholly obtained in Malaysia. The Customs Authority after going through the documents at Mundra port allowed clearance on 07.12.2014. In the subsequent investigation done by the department on the basis of a DRI communication in relation to some other exporters wherein it found that in their case, goods were exported from Ghana and at least 35% of material/manufacturing was of Ghana origin. Authorities therefore suspected those certificates to be incorrect and made reference to Malaysian authorities about the authenticity of the certificates issued in those cases. On verification, in those cases Malaysian Customs Authorities expressed their inability because of non disclosure of cost data by the manufacturer to authenticate those certificates. In the present instance, show cause notice has been issued and stands confirmed by lower authorities on the basis that what transpired in those cases might have happened in this case also. There is nothing on the record to show that in present instance, the certificate of origin was sent to Malaysian Customs Authority for verification or that the goods in any case were concerned with the same set of suppliers in Malaysia as well as Ghana.*
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> *2. In view of the foregoing, the Learned Advocate pleads that the whole case of the department is based on presumptions and assumptions that all the above might have transpired in their cases also vis-a-vis the cases which were investigated by the DRI. Specifically his submission is that the confirmation of any duty on the basis of such presumption and assumption is not maintainable in law. Learned Advocate further points that even those cases were DRI conducted investigation the proceedings were eventually dropped as exhibited in order No. 126/2016-17/CC/NS-I/JNCH pertaining to M/s. Morde Foods Pvt. Ltd. delivered on 2nd February, 2017.*
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> *3. Learned AR confronted with the position fairly reiterates the order of the Commissioner (Appeals) as well as the lower authority.*
>
> *4. Considered, we find that in the present case, the lower authorities have confirmed order simply on the basis of a communication of DRI whichpertained to different parties about which verification was done. In the present instance, there is no evidence of department having conducted any verification of the certificate of origin as is the requirement under AnnexureIII the Customs Tariff (determination of Origin of Goods under the Preferential Trade Agreement between the Governments of the Republic of India and Malaysia) Rules, 2011. The relevant Clause of Annexure-III (see under rule-14) is reproduced below:-*
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> > *"9. **Origin verification**.- (1) The customs authority of the importing Party may request the Issuing Authority of the exporting Party to perform a retroactive check at random or when it has reasonable doubt as to the authenticity of the certificate of origin or as to the accuracy of the information regarding the true origin of the goods in question or of certain parts thereof. (2) The request for a retroactive check shall be accompanied with the relevant certificate of origin and shall specify the reasons and any additional information suggesting that the particulars given on the said certificate of origin may*

be inaccurate, unless the retroactive check is requested on a random basis. (3) The Issuing Authority of the exporting Party shall, on receipt of such request, conduct a retroactive check on the cost statement of the exporter or the producer based on the current cost and prices and shall send a reply to the customs authority of the importing Party within three months of the date of receipt of request. (4) The retroactive check process, including the actual process and the determination of whether the subject goods are originating or not, should be completed and the result should be communicated to the importer within six months of the date of presentation of the certificate of origin to the customs authority of the importing Party."

4.1 We find that to displace the certificate of origin issued by the Malaysian authority, which is in the nature of documentary evidence, the verification process by the Customs Authorities of India reference to issuing authorities to do a retroactive check is required. In the present instance no such request for verification report in respect of the appellant has been brought on record. We find that this fails to comply with the requirement of the Annexure-III (ibid) of the relevant free trade agreement.

5. We are accordingly inclined to allow the appeal with consequential relief. Appeal is allowed."

- **Global Exim Tribunal vide Final Order No. 10141 of 2024 dated 11.01.2024**

"Brief facts of the case are that M/s. Global Exim (appellant herein) imported Alkalised Cocoa Powder claiming FTA benefits on imports of Cocoa Powder (CTH 18050000) from Malaysia under Custom Notification No. 46/2011-Cus dated 01.06.2011 and Notification No. 53/2011-Cus dated 01.07.2011. The Bill of Entry was finally assessed and the goods were allowed to be cleared extending the benefit of the above notifications. The Appellant had produced, inter alia, certificate of origin provided by the supplier in Form A-1, which was accepted by the proper officer without demur.

1.1. On a purported review of the said Bill of Entry, it is claimed that investigation conducted revealed that based on certificate of origin issued for the said product, the goods were derived from Cocoa beans of Ghana origin and in such cases, based on the prevalent International price as well as information available on supplier website, it appeared that the regional value addition would only be in the region of 13-17% as against minimum qualifying value addition of 35%. Consequently, a Show Cause Notice dated-30.04.2019 came to be issued to the Appellant proposing demand of differential customs duty of Rs. 26,54,934/- attributable to the concessional rate of Custom duties based upon wrong availment of Country of Origin benefit by the importer under Notification No. 53/2011-Cus dated 01.07.2011 should not be demanded and recovered from them in terms of Section 28 (4) of the Customs Act, 1962, along with applicable interest under Section 28AA of the Customs Act, 1962, by re-assessing the aforesaid BE after amendment under Section 149 of the Custom Act, 1962 and by denying concessional rate of Custom duty benefit based upon the country of origin of imported goods. The said SCN also proposed to demand penalty under Section 112(a) and 114A, 114AA of Customs Act, 1962.

1.2. The submissions made by the appellant were rejected vide Order-in Original No. MCH/ADC/AK/89/2019-20 dated 07.01.2020 and confirmed the demand of duty with interest and further imposed penalty under section 114A of the Customs Act, 1962. The subsequent appeal filed by the appellant also came to be rejected by the Appellate

Commissioner vide impugned OIA No. MUN-CUSTM-000- APP-171-20-21 dated 09.03.2021. The appellant is therefore before this Hon'ble Appellate Tribunal contesting the said Order-inAppeal on various grounds.

2. Shri Hardik Modh, learned Advocate appearing on behalf of the appellant submits that, the demand of Custom Duty with interest is beyond the limitation period as stipulated under proviso to Section 28(1)(a) under Customs Act,1962. All the facts relevant for the purpose of assessment are known to the department and the proper officer allowed the exemption. The allegation that the appellant has deliberately mis-declared country of origin as Malaysia is ex-facie arbitrary, illegal and without any basis. Therefore, the extended period of limitation under proviso to Section 28 (4) is not invokable.

2.1. It is submitted that the country of origin criteria as specified under Rule 3 (b) of Customs Notification No. 189/2009 - Cus (NT) dated 31.12.2009 also cover products not wholly produced or obtained in the exporting party provided that the said products are eligible under Rule 5 or 6. For the purpose of clause (b) of Rule 3, a product shall be inter alia deemed to be originating if the AIFTA content is not less than 35% of the FOB value. It is submitted that the imported goods are Alkalised Cocoa powder satisfies the country of origin criteria and therefore are eligible for concessional duty under Notification No . 46 of 2011-Cus.

2.2. He submits that ground on which benefit of exemption under custom Notification No.46/2011-Cus dated 01.06.2011 and Notification No. 53/2011/ Cus dated 01.07.2011 is denied on the assumption that value of addition by the supplier was less than 35%. Admittedly, the appellant had produced the valid COO'S issued by the competent authority in terms of the notifications. Considering the submissions that, there is no powers with the customs authority to reject COO given by the concerned contracting State issuing authority. Therefore, COO issued by the designated authority cannot be dishonored unless the same is cancelled by the same authority. It is not the case here.

2.3. He further submits that, before the process of retroactive check regards provided under Article 16. Firstly, the same was not fully complied with. Secondly, exporting country has not held COO invalid, in such circumstances also COO cannot be rejected. In support he placed reliance on the Judgments:

- *M/s. BDB Exports Pvt. Ltd Vs. CC, Kolkata, 2016 (9) TMI 1087 - CESTAT Kolkata*
- *Commissioner of Customs, Hyderabad vs. Riddi Siddhil Bullions Ltd, 2017 (355) E.L.T. 585 (Tri. - Hyd.)*
- *R.S. Industries (Rolling Mills) Ltd. Vs. CCE, Jaipur, 2018 (359) E.L.T. 698 (Tri. - Del.)*
- *Bullion and Jewellers Association Vs. Union of India, 2016 (335) E.L.T. 639 (Del.)*
- *Romil Jewelry 125 Niraj Industrial Estate, Opp: Sun Pharma Off: Mahakali Caves Road, Andheri (E), Mumbai 400093 Vs Commissioner Of Customs Air Cargo Complex Sahar, Andheri (E), Mumbai - 400099 - 2023-TIOL-839-CESTAT*

3. On the other hand Shri A R Kanani, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that even though the appellant has made strong prima facie case on the merit but appeal can be disposed of on the threshold point of the time bar. We find that the certificate of origin was provided by the exporting Country i.e. Malaysia. For which the appellant have no control. It is Governmental Authority of

exporting country who after consideration of various aspects of value addition issued country of origin certificate.

4.1. The facts behind issuance of country of origin neither the appellant are aware of the fact nor they are legally suppose to know the same. At the time of filing the Bill of Entry the appellant have to submit the documents including the country of origin certificate which the appellant have scrupulously complied. If there is doubt in the mind of customs they could have issued show cause notice within the normal period of limitation, as per proviso to Section 28 (4) of Customs Act. However, in the present case the show cause notice was issued beyond the normal period of limitation.

5. Moreover, on the merit also there is no strict compliance of retroactive check and conclusion thereof was made by the Custom Authority. Therefore, no mala fide can be attributed to the appellant in the given facts of the present case. Therefore, we are of the considered view, that the demand is hit by the limitation. Accordingly on the ground of limitation alone the impugned order is set aside. Appeal is allowed."

In view of above judgments, since the facts and charges levelled in those cases and in the present case are identical, the ratio of the above decisions are directly applicable in the present case. Therefore, following the above decisions, in the present case also, the impugned orders are not sustainable. Accordingly, the same are set aside. Appeals are allowed.

(*Order pronounced in the open court on* 23.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha