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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 21, 2016

Decision on: April 26, 2016

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W.P.(C) 10538/2015 & CM APPL 26588/2015

**THE BULLION AND JEWELLERS ASSOCIATION
(REGD.)**

..... Petitioner

Through: Mr. P. Chidambaram, Senior Advocate
with Mr. Tarun Gulati with Mr. Kishore Kunal, Mr.
Manish Rastogi, Mr. Shashi Mathew, Mr. Sparsh
Bhargava and Mr. Rony O. John, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Arjun Mitra and Ms. Pallavi Shali,
Advocates for R-1 and R-4.
Mr. S.K. Dubey and Mr. Udit Malik, Advocates for
DRI.

And

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W.P.(C) 936/2016 & CM APPL 4066/2016

J B OVERSEAS

..... Petitioner

Through: Mr. P. Chidambaram, Senior Advocate
with Mr. Tarun Gulati with Mr. Kishore Kunal, Mr.
Manish Rastogi, Mr. Shashi Mathew, Mr. Sparsh
Bhargava and Mr. Rony O. John, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Satish Kumar, Sr. Standing counsel for
R-2 & R-3.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

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26.04.2016

Dr. S. Muralidhar, J.:

W.P. (Civil) No. 10538/2015

1. Writ Petition (Civil) No. 10538 of 2015 by the Bullion and Jewellers Association (Regd.) [‘Association’] challenges the Circular dated 6th October 2015 issued by the Central Board of Excise and Customs (‘CBEC’), Department of Revenue, Ministry of Finance, Government of India, New Delhi stating *inter alia* that the gold jewellery imported by the members of the Petitioner Association from Indonesia do not satisfy the original criteria and should be denied the benefit of preferential custom duty. The impugned Circular directs the Assessing Authority to disregard certificates issued by the statutory authorities in Indonesia and the confirmation given by the government-owned companies in Indonesia.

2. While issuing notice in this writ petition, the Court by its order dated 6th November 2015 directed the Respondents to clear the consignments of gold imported from Indonesia provisionally in accordance with law and, in particular, the Customs (Provisional Duty Assessment) Regulations, 2011 (‘CPDA Regulations’). By a further order dated 14th December 2015, the Court directed that in respect of the demand-cum-show cause notices (SCNs) issued to the gold importers including M/s. J.B. Overseas [the Petitioner in W.P. (C) No. 936 of 2016], the dates for personal hearing would be fixed by the Custom authorities after the next date of hearing in the writ petition. The said interim order has been continued since then.

W.P. (Civil) No. 936/2016

3. Writ Petition (Civil) No. 936 of 2016 is by M/s. J.B. Overseas, a partnership

firm, through its partner Mr. Naresh Sharma. It seeks to challenge the further Circular dated 20th January 2016 issued by the CBEC giving directions to the Assessing Officer ('AO') to follow the circular dated 6th October 2015 issued by the CBEC and to make provisional assessments in respect of the gold jewellery imported from Indonesia by demanding a bank guarantee (BG) for 100% of the duty differential.

4. Further, by the letter dated 22nd January 2016 issued by Respondent No. 2, the Assistant Commissioner of Customs, in the Office of the Principal Commissioner of Customs (Import), New Delhi, J B Overseas was asked to furnish a bank guarantee for 100% of the duty differential involved for the clearance of gold jewellery in terms of the directions given by the CBEC in its Circular dated 20th January 2016.

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 jewelleries 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 dores 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 Metallaiks 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 in 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 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*):

“[W]henver 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 abovementioned 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 an 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.

S. MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 26, 2016

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