IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2831 OF 2018

Purple Products Pvt. Ltd. .. Petitioner
v/s.
Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 3023 OF 2018

Sri. Bhavani Metals Pvt. Ltd. .. Petitioner
v/s.
Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 3474 OF 2018

Sizer Metals Pvt. Ltd. .. Petitioner
v/s.
Union of India & Ors. .. Respondents

WITH
WRIT PETITION NO. 2491 OF 2018

Kothari Metals Ltd. .. Petitioner
v/s.
Union of India & Ors. .. Respondents

Mr. Vikram Nankani, Senior Counsel a/w Mr. Prithviraj Chaudhari I/b P.K. Shetty for the petitioner/s
Mr. V.H. Kantharia a/w Mr. J.B. Mishra for the respondent nos. 1 and 2

CORAM : M.S. SANKLECHA &
M.S. SONAK, J.J.

DATED : 9th JULY, 2019

P.C.

1. These petitions under Article 226 of the Constitution of India essentially challenge the show-cause cum demand notices issued by the Officers of Customs under Section 28 of the Customs Act, 1962 (Act). The impugned notices in all these petitions seek benefit of Customs Notification No.46/11 dated 1st June, 2011 in respect of import of Tin Ingot imported from Malaysia. The respondent has filed its affidavit in reply in Writ Petition No.2491 of 2018 and state that it be treated as common response to all the four petitions.

2. It is agreed between the parties that Writ Petition No.2831 of 2018 be taken as the lead petition for the purposes of reciting facts. It is further agreed between the parties that the view taken by us on the facts and the law in Writ Petition No.2831 of 2018 would equally apply to the other three petitions.

3. The petitioner in Writ Petition No. 2831 of 2018 was issued a show-cause notice dated 30th August, 2018 by the Joint Commissioner of Customs seeking to recover certain duty on import of Tin Ingots from Malaysia under six Bills of Entry in the years 2013-14 seeking to deny the concessional duty benefit under Notification No.46/2011 dated 1st June, 2011 claimed while importing the Tin Ingots. This Notification

No.46/2011 incorporated in it the conditions of Notification No.189/2009 (N.T.) dated 31st December, 2009. This Notification No. 189/2009 *inter alia* provides Rules for determination of origin of the goods in terms of the Preferential Trade Agreement between the members States of Association of South East Asia Nations (ASEAN) and Republic of India. Notification No.46/2011 provides for preferential rate of duty in respect of the goods imported from ASEAN countries that includes Malaysia, subject to satisfaction of Deputy / Assistant Commissioner of Customs that the imported goods satisfy Notification No.189/2009 to determine the country of origin from where the goods are imported.

4. The show-cause notice is based on the following facts as stated therein:- Representations were received from domestic industries regarding violation of the rules of origin in the import of Tin Ingots sourced from M/s. Malaysia Smelting Corporation (MSC) by certain importers. This by misrepresenting that the Regional Value Content (RVC) in the tin ingots was in excess of 35%. On the basis of the above, the DRI sought co-operation from the Malaysian Authorities for retroactive checks of the content. However, as the same was not forthcoming, in terms of Rule 17 of the rules of origin (No. 189/2009) the Officers of the DRI visited Malaysia for verification at MSC and

found that RVC content is less than 35%. Thus, the Government of India stated that the data submitted by MSC to the Ministry of Industrial Trade and Industry (MITI) Malaysia to obtain the Country of Origin Certificate (COC) was not correct. The same was even communicated to MITI Malaysia and also the Government of Malaysia. The notice further alleges that the petitioners had not exercised due diligence and proceeded to claim exemption on fraudulently obtained Certificates.

5. Mr. Nankani, learned Senior Counsel for the petitioners invited our attention to the agreement dated 30th August, 2009 between the Republic of India and the Association of South East Asia Countries (ASEAN) (Treaty), Malaysia is amongst one of the ASEAN countries. The treaty *inter alia* provides for the manner in which the certificate of value addition issued by the country exporting the goods could be subjected to challenge. The Rules of Country of origin being Annexure-II of the Treaty and Annexure D thereof *inter alia* provides the certification procedure for the Rules of origin of goods imported under the Treaty. The Rules provide that the certificate of origin issued by the appropriate Authority in the exporting country would be acceptable in the importing country. However, in case there is any dispute with regard to the determination of the origin of the product, then, Article 24

provides for a dispute settlement procedure which is to be invoked by the Governmental Authority in the importing and exporting countries.

6. Mr. Nankani, learned Senior Counsel appearing in support of the petition submits that even though the Government of India disputed the validity of the COO Certificate issued by MITI, Malaysia in respect of tin ingots manufactured M/s. MSC, the Malaysian Government have continued to stand by the COO certificate issued by the MITI, Malaysia. Thus, leading to a dispute between the two Governments. Therefore, in terms of Article 24 of the Appendix D to the Treaty, the same has to be resolved by the Dispute Settlement Mechanism (DSM) of an Arbitral Tribunal. This by the Government of India invoking the DSM. Therefore, till such time, the dispute is not resolved under Article 24, the certificate which has been issued by the MITI continues to be a binding certificate and the Customs Authorities cannot ignore the same. It is submitted that even though, the Rules issued under Notification No.189/2009 are identical to Annexure D of the Treaty save and except, the fact that the Article 24 as provided in the Treaty, is not found in the Rules of origin as set out in Notification No.189/2009 dated 31st December, 2009. Nevertheless, it is submitted that, while interpreting a municipal law, the Treaty agreement between the two countries have to be taken into account and read into the municipal law while

implementing the same. Thus, the impugned show cause notice is without jurisdiction. In support thereof, he placed reliance upon the decisions of the Supreme Court in the case ***Gramaphone Co. of India Ltd. Vs. Birendra Bahadur Pandey, (1984) 2 SCC 534*** and ***Commissioner of Customs, Banglore Vs. G.M. Exports (2015) 324 ELT 209.*** Secondly, it is submitted that the certificate issued by MITI continues to be binding upon the Customs Authorities for the purposes of extending the benefit of Notification No.46 of 2011 dated 1st June, 2011. This on the ground that the Customs Authorities are bound by the certificates of the designated authority and cannot go behind the same as held by this Court in ***Bombay Chemicals v/s. Union of India 10 ELT 171***. It was lastly submitted that the proceedings before the Customs Authorities would be a useless/empty formality. This in view of the fact that the affidavit in reply dated 7th September, 2018 filed by the respondent no.3 in Writ Petition No.2491 of 2018 states that the Central Board of Indirect Taxes and Customs (CBIC) has accepted the verification report of the DRI made on visit to Malaysia. Further, it had issued directions to the office of the Deputy Director General of Revenue Intelligence by letter dated 11th March, 2017 to which was annexed a copy of letter dated 21st March, 2017 which *inter alia* recorded that as the desired response has not been received from the country of origin, the benefit under the Notification for preferential treatment could be denied by invoking Rule 16A of the Notification No.189/2009. In further support, he placed reliance upon a communication dated 12th July, 2018 addressed by the CBIC to the Malaysian Authorities wherein the board has informed the Malaysia Authorities that the justification provided by the exporter i.e. M/s. MSC in support of the certificate issued by the appropriate Authority i.e. MITI were not found reasonable and, therefore, not acceptable. Therefore, in the aforesaid circumstances, it was submitted that the adjudication of the show-cause notice is an empty formality as at the highest level, the issue stands concluded against the Petitioner. Therefore, this Court should exercise its writ jurisdiction and quash the impugned show-cause notice.

7. Mr. Jetly, learned Counsel appearing on behalf of the respondent submits that all the issues are open for consideration before the adjudicating Authority who has issued the show-cause notice. It is further submitted in support, that the show-cause notice alleges mis-statements, suppression of facts and fraud in obtaining the COO. Therefore, this issue can be best decided by the adjudicating Authority after granting a personal hearing to the petitioner.

8. We are of the view that the issues raised in the petition could be

appropriately addressed in adjudication proceedings while responding to the show-cause notice. The issue of application of interpreting the Customs Notification, keeping in view the provisions of Treaty, is an issue which could be raised/ urged before the authorities. So also, the certificate issued by the competent authority, cannot be disputed by the Customs Authorities on the basis of decisions of this Court, is also an issue which could be decided by the authority under the Act. We are certain that the adjudicating Authority would adjudicate upon the show-cause notice without in any manner being influenced by or controlled by the prima facie view taken by the CBIC while communicating with the Malaysian Authorities. There is no reason at this stage to suspect that the adjudicating Authority would not grant a fair and reasonable hearing to the petitioner or not decide the show-cause notice fairly taking into account the petitioner's contentions. The various communications of the CBIC which have been referred to by the Petitioner as creating an apprehension in the mind of the petitioner that the adjudication proceedings would be an empty formality, as the CBIC has already taken a view against the petitioner is not justified. The view taken by CBIC is only a prima facie view, in having directed the authority to issue a show cause notice. This only to consider whether the prima facie view is correct or not after getting the response from the petitioner. It is the show-cause notice which has been issued to the petitioner and it is the response of the party to the show-cause notice which would determine the fate of the show-cause notice. Moreover, the *prima facie* view taken by the CBIC as communicated the Malaysian Authority or in its communication to the DRI would not govern the adjudication proceedings before the Commissioner. Last but not the least, there are allegations in the notice of the certificate having been obtained by fraud. This issue of fraud is a subject matter of adjudication and cannot be decided in a writ proceedings. For all the aforesaid reasons, we decline to entertain these Petitions. We have not expressed by view on the merits of the Revenue's case and/or the Petitioner's submission, so as not to influence the adjudicating authority.

9. Accordingly, the petition is dismissed.

(M.S. SONAK, J.) **(M.S. SANKLECHA, J.)**