प्रधान आयुक्त का कार्यालय, सीमा शुल्क, अहमदाबाद
सीमा शुल्क भवन, आल इंडीया रेडीओ के बाजु मे, नवरंगपुरा ,अह्मदाबाद 380009
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निबन्धितपावतीडाकद्वारा / By SPEED POST A.D.

फा. सं./F.No. VIII/10-11/DRI/KZU/Commr/O&A/2021-22

DIN-20240471MN000071767B

आदेशकीतारीख/Date of Order :18.04.2024
जारीकरनेकीतारीख/Date of Issue : 18.04.2024

द्वारापारित :- **शिव कुमार शर्मा, प्रधान आयुक्त**

Passed by :- Shiv Kumar Sharma, Principal Commissioner

मूलआदेशसंख्या/Order-In-Original No: AHM-CUSTM-000-PR.COMMR-13-2024-25 dated 18.04. 2024 in the case of M/s Chiripal Poly Films Ltd (IEC No. 0810007266), Chiripal House, Shivranjani Cross Roads, Satellite, Ahmedabad, Gujarat-380015.

1 जिसव्यक्ति(यों) कोयहप्रतिभेजीजातीहै, उसेव्यक्तिगतप्रयोगकेलिएनिःशुल्कप्रदानकीजातीहै।

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2. इसआदेशसेअसंतुष्टकोईभीव्यक्तिइसआदेशकीप्राप्तिसेतीनमाहकेभीतरसीमाशुल्क, उत्पादशुल्क एवं सेवाकर अपीलीयन्यायाधिकरण, अहमदाबाद पीठको इसआदेशकेविरुद्धअपीलकरसकताहै।अपीलसहायकरजिस्ट्रार, सीमाशुल्क, उत्पादशुल्कएवंसेवाकरअपीलीयन्यायाधिकरण, दुसरीमंज़िल, बहुमालीभवन गिरिधरनगरपुलकेबाजुमे, गिरिधरनगर, असारवा, अह्मदाबाद-380 004 कोसम्बोधितहोनीचाहिए।

2. Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan, Nr. Girdhar Nagar Bridge, Girdhar Nagar, Asarwa, *Ahmedabad* – 380004.

3. उक्तअपीलप्रारुपमं. सी.ए.3 मेंदाखिलकीजानीचाहिए।उसपरसीमाशुल्क (अपील) नियमावली, 1982 केनियम 3 केउपनियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपीलको चारप्रतियोंमेंदाखिलकियाजाएतथाजिसआदेशकेविरुद्धअपीलकीगईहो, उसकी भी उतनी ही प्रतियाँ संलग्नकी जाएँ

(उनमेंसेकममेंकमएकप्रतिप्रमाणितहोनीचाहिए)।अपीलसेसम्बंधितसभीदस्तावेजभीचारप्रतियोंमेअग्रेषितकिएजाने चाहिए।

3. The Appeal should be filed in Form No. C.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Customs (Appeals) Rules, 1982. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपीलज्ञापनमेंतथ्योंकाविवरणएवंअपीलकेआधारशामिलहैं, चार प्रतियोंमें दाखिलकी जाएगी तथा उसके साथ जिस आदेशके विरुद्ध अपीलकीगईहो, उसकीभीउतनीहीप्रतियाँसंलगनकीजाएंगी (उनमेंसेकममेंकमएकप्रमाणितप्रतिहोगी)।

4. The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपीलका प्रपत्र अंग्रेजी अथवा हिन्दीमें होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरणके बिना अपीलके कारणोंके स्पष्टशीर्षोंके अंतर्गत तैयार करना चाहिए एवं ऐसे कारणोंको क्रमानुसा रक्रमांकित करना चाहिए।

5. The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. केंद्रियमीमाशुल्कअधिनियम,1962 कीधारा 129 ऐकेउपबन्धोंकेअंतर्गतनिर्धारितफीसजिसस्थानपरपीठस्थितहै, वहांकेकिसीभीराष्ट्रीयकृतबैंककीशाखासेन्यायाधिकरणकीपीठकेसहायकरजिस्ट्रारकेनामपररेखांकितमाँगड्राफ्टकेज रिएअदाकीजाएगीतथायहमाँगड्राफ्टअपीलकेप्रपत्रकेसाथसंलग्नकियाजाएगा।

6. The prescribed fee under the provisions of Section 129A of the Customs Act,1962 shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. इसआदेशकेविरूद्धमीमाशुल्क, उत्पादशुल्कएवंसेवाकरअपीलीयन्यायाधिकरणमेंशुल्कके 7.5% जहां शुल्क अथवा शुल्क एवं जुरमानाका विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवादहै उसका भुकतान करके अपीलकी जा शकती है।

7. An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute".

8. न्यायालयशुल्कअधिनियम, 1870 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेशकी प्रतिपर उपयुक्तन्यायालय शुल्क टिकट लगा होना चाहिए।

8. The copy of this order attached therein should bear an appropriate court fee stamp as prescribed under the Court Fees Act, 1870.

Sub: Show Cause Notice No.VIII/10-11/DRI/KZU/Commr/O&A/2021-22 dated 16.09.2022 issued by the Commissioner of Customs, Ahmedabad to M/s Chiripal Poly Films Ltd, an importer having IEC No. 0810007266, and having their registered office at Chiripal House, Shivranjani Cross Roads, Satellite, Ahmedabad, Gujarat-380015.

Brief facts of the case:

M/s Chiripal Poly Films Ltd, an importer having IEC No. 0810007266, and having their registered office at Chiripal House, Shivranjani Cross Roads, Satellite, Ahmedabad, Gujarat-380015 (hereinafter referred to as 'the importer' or 'the Noticee' for the sake of brevity),is engaged in the import of various goods through ACC, Ahmedabad, Hazira Port & ICD Sabarmati under Advance Authorizations.

2. Intelligence was developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter referred to as DRI) to the effect that M/s Chiripal Poly Films Ltd(importer), had imported various input materials without payment of Duty of Customs under cover of a number of Advance Authorizations issued by regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importer availed benefit of exemption extended by Notification No. 18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No. 79/2017 dated 13-10-2017, and did not pay Customs Duty in the form of Integrated Goods & Service Tax (IGST) levied under sub-section (7) of Section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended subject to condition that the person willing to avail such benefit should comply with pre-import condition and the finished goods should be subjected to physical exports only.

2.1 Accordingly, inquiry was initiated by way of issuance of Summons under Section 108 of the Customs Act, 1962. The importer was summoned for production of documents in connection with such imports and also for giving evidence. On scrutiny of the data &supporting documents by the importer as a whole, it is found that the importer had contravened the provision of pre-import condition in respect of total **30 (Thirty) Advance Authorizations**, involving 85 (Eighty-Five) Bills of Entry, and incorrectly availed exemption benefit for an amount of **Rs 20, 05, 87, 508/-**.

2.2 From the **Table-1** below, which shows Advance Authorization specific No. & date of the respective first Bill of Entry and first Shipping Bill, the data submitted by the authorized representative of the company, and the corresponding documents like original Bills of Entry under which goods were imported, first Bill of Entry in respect of every Advance Authorization and corresponding first Shipping Bill, it is seen that in respect of **16 (Sixteen) [Sr No. 1 to 16]** Advance Authorizations, the goods were exported before the commencement of imports. Therefore, it appears that for the manufacture of the export goods under the subject Advance Authorizations, they used domestically procured materials, thereby contravened the provision of pre-import condition and went on to avail benefit of exemption.

Table-1

Advance Authorization specific No. and date of the first Bill of Entry and first Shipping Bill							
Sr No	AA No	AA Date	First BE No	BE Date	First SB No	SB Date	Gap
Advance Authorizations in case of which export happened prior to commencement of import							
1	810140456	08-06-2017	3817226	31-10-2017	5250332	06-04-2017	-208
2	810140403	31-05-2017	2773413	08-08-2017	5250332	06-04-2017	-124
3	810143418	07-09-2018	8259132	29-09-2018	6412248	19-07-2018	-72
4	810143440	11-09-2018	8330052	05-10-2018	5639121	18-06-2018	-109
5	810143556	25-09-2018	8737970	05-11-2018	6387841	21-07-2018	-107

6	810139872	10-03-2017	2278048	29-06-2017	5250332	06-04-2017	-84
7	810143454	11-09-2018	8201357	25-09-2018	6075152	07-07-2018	-80
8	810140707	24-07-2017	3806341	30-10-2017	8247629	26-08-2017	-65
9	810140745	02-08-2017	5038519	08-02-2018	1707745	21-12-2017	-49
10	810143557	25-09-2018	8738140	05-11-2018	7748065	22-09-2018	-44
11	810141874	25-01-2018	5750994	27-03-2018	761266	20-02-2018	-35
12	810141352	22-11-2017	4724684	08-01-2018	1500632	12-12-2017	-27
13	810141037	27-09-2017	4062476	19-11-2017	9499415	26-10-2017	-24
14	810143431	07-09-2018	8321219	04-10-2018	7719581	21-09-2018	-13
15	810141759	11-01-2018	6111305	24-04-2018	4176831	12-04-2018	-12
16	810142445	26-04-2018	6824169	15-06-2018	5352051	05-06-2018	-10

Advance Authorizations in case of which certain input materials imported after commencement of significant exports and also import continued even after completion of export.

17	0810141923	02-02-2018	5750994	27-03-2018	3983015	04-04-2018	8
18	0810141621	28-12-2017	6003876	16-04-2018	4434602	25-04-2018	9
19	0810143432	07-09-2018	8321219	04-10-2018	8299211	16-10-2018	12
20	0810140744	02-08-2017	3817226	31-10-2017	9980460	18-11-2017	18
21	0810142078	27-02-2018	5750994	27-03-2018	4214947	14-04-2018	18
22	0810141036	27-09-2017	4557757	26-12-2017	2769535	09-02-2018	45
23	0810139450	03-01-2017	8739594	02-03-2017	5519059	19-04-2017	48
24	0810142404	17-04-2018	6200550	01-05-2018	5692097	20-06-2018	50
25	0810142565	09-05-2018	6824169	15-06-2018	7445220	07-09-2018	84
26	0810142497	02-05-2018	6606063	31-05-2018	7234301	30-08-2018	91
27	0810142406	17-04-2018	6200550	01-05-2018	7356409	04-09-2018	126
28	0810140390	30-05-2017	2031373	09-06-2017	9646461	02-11-2017	146
29	0810139871	10-03-2017	9887465	30-05-2017	1740022	22-12-2017	206
30	0810139561	17-01-2017	9872516	29-05-2017	1829513	27-12-2017	212

2.3 Therefore, in respect of the 14 (Fourteen) Advance Authorizations **[Sr No. 17 to 30]** of Table-1, the importer imported only a few input materials prior to export, whereas, all other import materials were imported subsequent to exports. It is also revealed that even after completion of entire exports, the importer continued to import materials under the same Authorization. It is but natural, that such imported duty-free goods could not have been used for the specified purpose of manufacturing export goods to be exported towards discharge of export obligation of the subject Advance Authorization. Therefore, despite having made first import prior to first export, the importer has grossly failed to comply with the condition of pre-import in respect of all 14 Advance Authorizations and still availed benefit of exemption of IGST on the goods imported by them.

2.4 The present notice is being issued demanding duty in respect ofACC, Ahmedabad,Hazira Port & ICD Sabarmati mentioned at Sr No. 1,2 & 3 of Table-2 below involving 63 Bills of Entry mentioned against this port in Table-4 below and collective amount of duty demanded for the purpose of the present notice stands at **Rs.16,93,28,540/-**.

Table-2

Port specific Value and IGST Amount saved			
Sr No	**Port**	**Value (Rs)**	**IGST Amount Saved (Rs)**
Ports under jurisdiction of Commissioner of Customs, Ahmedabad			
1	Ahmedabad Airport	₹ 2,02,10,920	₹ 36,37,966
2	Hazira Port	₹ 25,91,89,603	₹ 4,66,54,129
3	ICD Sabarmati	₹ 66,13,13,591	₹ 11,90,36,446
		₹ 94,07,14,114	**₹ 16,93,28,540**
Port under jurisdiction of Commissioner of Customs, Mundra			
4	Mundra Port	₹ 7,99,48,121	₹ 1,43,90,662
Port under jurisdiction of Commissioner of Customs, Nhava Sheva			
5	Nhava Sheva Port	₹ 9,37,12,809	₹ 1,68,68,306
Grand Total		₹ 1,11,43,75,043	**₹ 20,05,87,508**

Table-3

Advance Authorization specific Amount of IGST Saved			
Sr No	**AA No**	**AA Date**	**IGST Amount Saved (Rs)**
1	810139450	03-01-2017	₹ 2,97,889
2	810139561	17-01-2017	₹ 88,95,899
3	810139871	10-03-2017	₹ 47,54,829
4	810139872	10-03-2017	₹ 2,81,752
5	810140390	30-05-2017	₹ 75,59,053
6	810140403	31-05-2017	₹ 22,76,958
7	810140456	08-06-2017	₹ 1,47,30,826
8	810140707	24-07-2017	₹ 1,62,09,011
9	810140744	02-08-2017	₹ 10,54,027

10	810140745	02-08-2017	₹ 1,72,56,281
11	810141036	27-09-2017	₹ 1,31,00,919
12	810141037	27-09-2018	₹ 1,63,56,746
13	810141352	22-11-2017	₹ 42,99,224
14	810141621	28-12-2017	₹ 25,43,054
15	810141759	11-01-2018	₹ 1,70,08,324
16	810141874	25-01-2018	₹ 42,48,964
17	810141923	02-02-2018	₹ 42,48,964
18	810142078	27-02-2018	₹ 51,12,641
19	810142404	17-04-2018	₹ 30,53,528
20	810142406	17-04-2018	₹ 29,51,743
21	810142445	26-04-2018	₹ 41,27,826
22	810142497	02-05-2018	₹ 75,409
23	810142565	09-05-2018	₹ 44,29,589
24	810143418	07-09-2018	₹ 35,97,179
25	810143431	07-09-2018	₹ 1,96,62,216
26	810143432	07-09-2018	₹ 10,58,280
27	810143440	11-09-2018	₹ 42,97,675
28	810143454	11-09-2018	₹ 1,37,38,448
29	810143556	25-09-2018	₹ 8,71,603
30	810143557	25-09-2018	₹ 24,88,651
Total			**₹ 20,05,87,508**

Table-4

Port and Bills of Entry specific Value and IGST Amount saved

Sr No	Port	BE No	BE Date	Value (Rs)	IGST Amount Saved (Rs)
1	**Ahmedabad Airport**	4062476	19-11-2017	₹ 59,87,833	₹ 10,77,810
2		4724684	08-01-2018	₹ 23,14,735	₹ 4,16,652
3		5603639	16-03-2018	₹ 28,05,287	₹ 5,04,952
4		6003876	16-04-2018	₹ 28,09,446	₹ 5,05,700
5		6447439	19-05-2018	₹ 29,26,791	₹ 5,26,822

6		6994808	28-06-2018	₹ 33,66,828	₹ 6,06,029
		Total		**₹ 2,02,10,920**	**₹ 36,37,966**
7	**Hazira Port**	4884962	20-01-2018	₹ 2,15,69,844	₹ 38,82,572
8		5750994	27-03-2018	₹ 7,03,93,286	₹ 1,26,70,791
9		6200550	01-05-2018	₹ 3,36,54,364	₹ 60,57,785
10		6824169	15-06-2018	₹ 3,42,27,406	₹ 61,60,933
11		8201357	25-09-2018	₹ 3,66,80,709	₹ 66,02,528
12		8259132	29-09-2018	₹ 74,15,044	₹ 13,34,708
13		8330052	05-10-2018	₹ 2,02,78,194	₹ 36,50,075
14		8737970	05-11-2018	₹ 1,73,12,256	₹ 31,16,206
15		8738140	05-11-2018	₹ 1,76,58,500	₹ 31,78,530
		Total		**₹ 25,91,89,603**	**₹ 4,66,54,129**
16	**Mundra**	3764768	26-10-2017	₹ 47,33,933	₹ 8,52,108
17		5218971	15-02-2018	₹ 25,20,548	₹ 4,53,699
18		5625959	17-03-2018	₹ 1,86,60,809	₹ 33,58,946
19		5646888	19-03-2018	₹ 62,69,071	₹ 11,28,433
20		6079600	21-04-2018	₹ 25,10,195	₹ 4,51,835
21		6111305	24-04-2018	₹ 1,31,93,394	₹ 23,74,811
22		6262692	05-05-2018	₹ 34,78,073	₹ 6,26,053
23		6271898	07-05-2018	₹ 52,17,109	₹ 9,39,080
24		6455691	20-05-2018	₹ 49,29,239	₹ 8,87,263
25		7911042	04-09-2018	₹ 1,35,97,111	₹ 24,47,480
26		8160516	22-09-2018	₹ 48,38,639	₹ 8,70,955
		Total		**₹ 7,99,48,121**	**₹ 1,43,90,662**
27	**Nhava Sheva**	5973331	13-04-2018	₹ 32,65,541	₹ 5,87,797
28		5974352	13-04-2018	₹ 48,99,979	₹ 8,81,996
29		5986383	16-04-2018	₹ 50,71,187	₹ 9,12,814
30		6192560	30-04-2018	₹ 63,52,374	₹ 11,43,427
31		6242390	04-05-2018	₹ 70,20,444	₹ 12,63,680
32		6523684	25-05-2018	₹ 53,00,511	₹ 9,54,092
33		6604569	31-05-2018	₹ 1,10,66,783	₹ 19,92,021

34		6622549	01-06-2018	₹ 1,38,28,933	₹ 24,89,208
35		6871486	20-06-2018	₹ 86,64,467	₹ 15,59,604
36		7085790	05-07-2018	₹ 91,26,289	₹ 16,42,732
37		8016257	12-09-2018	₹ 1,91,16,300	₹ 34,40,934
		Total		**₹ 9,37,12,809**	**₹ 1,68,68,306**
38	**ICD Sabarmati**	3658591	17-10-2017	₹ 26,77,567	₹ 4,81,962
39		3717762	23-10-2017	₹ 1,53,91,551	₹ 27,70,479
40		3719029	23-10-2017	₹ 48,36,222	₹ 8,70,520
41		3719041	23-10-2017	₹ 53,55,128	₹ 9,63,923
42		3772403	27-10-2017	₹ 1,35,95,389	₹ 24,47,170
43		3806341	30-10-2017	₹ 4,00,04,161	₹ 72,00,749
44		3817226	31-10-2017	₹ 1,26,77,984	₹ 22,82,037
45		3840284	01-11-2017	₹ 82,09,589	₹ 14,77,726
46		3840312	01-11-2017	₹ 17,24,833	₹ 3,10,470
47		4002275	15-11-2017	₹ 80,76,967	₹ 14,53,854
48		4015218	15-11-2017	₹ 7,817	₹ 1,407
49		4137707	24-11-2017	₹ 1,77,38,033	₹ 31,92,846
50		4189551	28-11-2017	₹ 1,39,78,189	₹ 25,16,074
51		4228692	01-12-2017	₹ 56,33,000	₹ 10,13,940
52		4229420	01-12-2017	₹ 84,49,500	₹ 15,20,910
53		4557757	26-12-2017	₹ 43,79,100	₹ 7,88,238
54		4787218	12-01-2018	₹ 81,55,811	₹ 14,68,046
55		5038519	08-02-2018	₹ 9,58,68,225	₹ 1,72,56,281
56		5338331	24-02-2018	₹ 56,36,308	₹ 10,14,535
57		5816526	31-03-2018	₹ 1,86,60,809	₹ 33,58,946
58		6074926	21-04-2018	₹ 55,04,873	₹ 9,90,877
59		6337413	11-05-2018	₹ 1,91,36,964	₹ 34,44,654
60		6361855	14-05-2018	₹ 90,46,683	₹ 16,28,403
61		6391559	15-05-2018	₹ 90,46,683	₹ 16,28,403
62		6500246	23-05-2018	₹ 30,22,449	₹ 5,44,041
63		6931855	23-06-2018	₹ 25,88,656	₹ 4,65,958
64		7188364	12-07-2018	₹ 2,18,41,611	₹ 39,31,490
65		7293924	20-07-2018	₹ 96,54,333	₹ 17,37,780

66		7293981	20-07-2018	₹ 65,67,394	₹ 11,82,131
67		7542389	07-08-2018	₹ 1,63,38,006	₹ 29,40,841
68		7618774	13-08-2018	₹ 1,39,21,722	₹ 25,05,910
69		8245353	28-09-2018	₹ 35,96,833	₹ 6,47,430
70		8286342	02-10-2018	₹ 71,97,667	₹ 12,95,580
71		8321219	04-10-2018	₹ 64,10,900	₹ 11,53,962
72		8384830	09-10-2018	₹ 12,82,039	₹ 2,30,767
73		8433230	12-10-2018	₹ 1,74,26,306	₹ 31,36,735
74		8440376	12-10-2018	₹ 98,52,694	₹ 17,73,485
75		8455628	15-10-2018	₹ 58,62,628	₹ 10,55,273
76		8508693	18-10-2018	₹ 1,04,58,250	₹ 18,82,485
77		8515528	18-10-2018	₹ 86,24,989	₹ 15,52,498
78		8636967	27-10-2018	₹ 36,09,028	₹ 6,49,625
79		8636969	27-10-2018	₹ 72,18,056	₹ 12,99,250
80		8651454	29-10-2018	₹ 1,75,82,433	₹ 31,64,838
81		8661481	30-10-2018	₹ 1,81,60,806	₹ 32,68,945
82		8662159	30-10-2018	₹ 36,32,161	₹ 6,53,789
83		8865284	15-11-2018	₹ 5,10,34,506	₹ 91,86,211
84		859009254	19-03-2018	₹ 4,19,94,739	₹ 75,59,053
85		859009664	02-01-2019	₹ 3,96,44,000	₹ 71,35,920
		Total		**₹ 66,13,13,591**	**₹ 11,90,36,446**
Grand Total				**₹ 1,11,43,75,043**	**₹ 20,05,87,508**

3. Legal Provisions:

Following provisions of law are relevant to the Show Cause Notice.

a) Para 4.03 of the Foreign Trade Policy (2015-20);
b) Para 4.05 of the Foreign Trade Policy (2015-20);
c) Para 4.13 of the Foreign Trade Policy (2015-20);
d) Para 4.14 of the Foreign Trade Policy (2015-20);
e) 9.20 of the Foreign Trade Policy (2015-20);
f) Para 4.27 of the Hand Book of Procedures (2015-20);
g) Section 2(e) of the Foreign Trade (DR) Act, 1992;
h) DGFT Notification No. 33/2015-20 dated 13-10-2017;
i) DGFT Notification No. 31/2013 (RE-2013) dated: - 01-08-2013;
j) DGFT Circular No. 3/2013 (RE-2013) dated. 02-08-2013;
k) Notification No 18/2015-Customs dated 01-04-2015;
l) Notification No 79/2017-Customs dated 13-10-2017;

m) Section 17 of the Customs Act, 1962;
n) Section 46 (4) of the Customs Act, 1962;
o) Section 111(o) of the Customs Act, 1962;
p) Section 112(a) of the Customs Act;
q) Section 124 of the Customs Act, 1962;

a) Para 4.03 of the Foreign Trade Policy (2015-20) inter-alia states that :-

An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

b) Para 4.05 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.05 Eligible Applicant / Export / Supply
(a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.
(b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in paragraph 4.18 of Handbook of Procedures) shall be issued to manufacturer exporter only.
(c) Advance Authorisation shall be issued for:
(i) Physical export (including export to SEZ);
(ii) Intermediate supply; and/or
(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP. (iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

c) Para 4.13 Foreign Trade Policy (2015-20) inter-alia states that :-

4.13 Pre import condition in certain cases-

(i) DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.

(ii) Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).

(iii) Import of drugs from unregistered sources shall have pre-import condition.

d) Para 4.14 Foreign Trade Policy (2015-20) inter-alia states that :-

4.14 Details of Duties exempted

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act,

1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition. Imports against Advance Authorisations for physical exports are exempted from Integrated Tax and Compensation Cess upto 31.03.2018 only.

e) Para 9.20 Foreign Trade Policy (2015-20) inter-alia states that :-

9.20
"Export" is as defined in FT (D&R) Act, 1992, as amended from time to time.

f) *4.27 Exports/Supplies in anticipation or subsequent to issue of an Authorisation.*

(a) Exports / supplies made from the date of EDI generated file number for an Advance Authorisation, may be accepted towards discharge of EO. Shipping / Supply document(s) should be endorsed with File Number or Authorisation Number to establish co-relation of exports / supplies with Authorisation issued. Export/supply document(s) should also contain details of exempted materials/inputs consumed.

(b) If application is approved, authorisation shall be issued based on input / output norms in force on the date of receipt of application by Regional Authority. If in the intervening period (i.e. from date of filing of application and date of issue of authorisation) the norms get changed, the authorization will be issued in proportion to provisional exports / supplies already made till any amendment in norms is notified. For remaining exports, Policy / Procedures in force on date of issue of authorisation shall be applicable.

(c) The export of SCOMET items shall not be permitted against an Authorisation until and unless the requisite SCOMET Authorisation is obtained by the applicant.

(d) Exports/supplies made in anticipation of authorisation shall not be eligible for inputs with pre-import condition.

g) Section 2(e) of the Foreign Trade (DR) Act, 1992 states that :-

(e) "import" and 'export" means respectively bringing into, or taking out of, India any goods by land, sea or air;

h) *Notification No.33/2015-2020 New Delhi,*
Dated: 13 October, 2017
Subject: Amendments in Foreign Trade Policy 2015-20 -reg

S.O. (E): In exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby makes following amendments in Foreign Trade Policy 2015-20. 1. Para 4.14 is amended to read as under: "4.14: Details of Duties exempted Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition."

.....

i) ***NOTIFICATION NO. 31 (RE-2013)/ 2009-2014***
NEW DELHI, DATED THE 1st August, 2013

In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2009-2014, the Central Government hereby notifies the following amendments in the Foreign Trade Policy (FTP) 2009-2014.

2. After para 4.1.14 of FTP a new para 4.1.15 is inserted.

"4.1.15 Wherever SION permits use of either (a) a generic input or (b) alternative inputs, unless the name of the specific input(s) [which has (have) been used in manufacturing the export product] gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the shipping bill. At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those inputs which have been specifically indicated in the shipping bill."

3. Para 4.2.3 of FTP is being amended by adding the phrase "4.1.14 and 4.1.15" in place of "and 4.1.14". The amended para would be as under:

"Provisions of paragraphs 4.1.11, 4.1.12, 4.1.13, 4.1.14 and 4.1.15 of FTP shall be applicable for DFIA holder."

4. ***Effect of this Notification:*** *Inputs actually used in manufacture of the export product should only be imported under the authorisation. Similarly inputs actually imported must be used in the export product. This has to be established in respect of every Advance Authorisation / DFIA.*

j) ***Policy Circular No.03 (RE-2013)/2009-2014***
Dated the 2nd August, 2013

Subject: Withdrawal of Policy Circular No.30 dated 10.10.2005 on Importability of Alternative inputs allowed as per SION.

Notification No.31 has been issued on 1st August, 2013 which stipulates "inputs actually used in manufacture of the export product should only be imported under the authorisation. Similarly inputs actually imported must be used in the export product." Accordingly, the earlier Policy Circular No.30 dated 10.10.2005 becomes infructuous and hence stands withdrawn.

2. This is to reiterate that duty free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the Notification No. 31 issued on 1.8.2013. Hence any clarification or notification or communication issued by this Directorate on this matter which may be repugnant to this Notification shall be deemed to have been superseded to the extent of such repugnancy.

k) ***Notification No.- 18/2015 - Customs, Dated: 01-04-2015-***

G.S.R. 254 (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against a valid Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and

from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the said Customs Tariff Act, subject to the following conditions, namely :-

(i) that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;

(ii) that the said authorisation bears,-

(a) the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a merchant exporter; and

(b) the shipping bill number(s) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfillment of export obligation; or

(c) the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfillment of export obligation;

(iii) that the materials imported correspond to the description and other specifications where applicable mentioned in the authorisation and are in terms of para 4.12 of the Foreign Trade Policy and the value and quantity thereof are within the limits specified in the said authorisation;

(iv) that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen percent per annum from the date of clearance of the said materials;

(v) that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been so used:

Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the

Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);

(vii) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No.16/ 2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):

Provided that the Commissioner of Customs may, by special order or a public notice and subject to such conditions as may be specified by him, permit import and export through any other sea-port, airport, inland container depot or through a land customs station within his jurisdiction;

(viii) that the export obligation as specified in the said authorisation (both in value and quantity terms) is discharged within the period specified in the said authorisation or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorisation:

Provided that an Advance Intermediate authorisation holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.05 (c) (ii) of the Foreign Trade Policy;

(ix) that the importer produces evidence of discharge of export obligation to the satisfaction of the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, within a period of sixty days of the expiry of period allowed for fulfillment of export obligation, or within such extended period as the said Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, may allow;

(x) that the said authorisation shall not be transferred and the said materials shall not be transferred or sold;

Provided that the said materials may be transferred to a job worker for processing subject to complying with the conditions specified in the relevant Central Excise notifications permitting transfer of materials for job work;

Provided further that, no such transfer for purposes of job work shall be effected to the units located in areas eligible for area based exemptions from the levy of excise duty in terms of notification Nos. 32/1999-Central Excise dated 08.07.1999, 33/1999-Central Excise dated 08.07.1999, 39/2001- Central Excise dated 31.07.2001, 56/2002- Central Excise dated 14.11.2002, 57/2002- Central Excise dated 14.11.2002, 49/2003- Central Excise dated 10.06.2003, 50/2003- Central Excise dated 10.06.2003, 56/2003- Central Excise dated 25.06.2003, 71/03-Central Excise dated 09.09.2003, 8/2004- Central Excise dated 21.01.2004 and 20/2007- Central Excise dated 25.04.2007;

(xi) that in relation to the said authorisation issued to a merchant exporter, any bond required to be executed by the importer in terms of this notification shall be executed jointly by the merchant exporter and the supporting manufacturer binding themselves jointly and severally to comply with the conditions specified in this notification.

l) ***Notification No. 79/2017 - Customs, Dated: 13-10-2017-***

Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in

column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table:-

-: Table:-

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*
1	*16/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 252(E), dated the 1 st April, 2015]*	*In the said notification,- (a) in the opening paragraph, after clause (ii), the following shall be inserted, namely:- "(iii) the whole of integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act: Provided that the exemption from integrated tax and the goods and services tax compensation cess shall be available up to the 31st March, 2018."; (b) in the Explanation C (II), for the words "However, the following categories of supplies, shall also be counted towards fulfilment of export obligation:", the words "However, in authorisations where exemption from integrated tax and goods and service tax compensation cess is not availed, the following categories of supplies, shall also be counted towards fulfilment of export obligation:" shall be substituted.*
2.	*18/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 254 (E), dated the 1 st April, 2015]*	*In the said notification, in the opening paragraph,- (a) for the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub- 2 sections (1), (3) and (5) of section 3, safeguard duty leviable thereon under section 8B and anti-dumping duty leviable thereon under section 9A", the words, brackets, figures and letters "from the whole of the additional duty leviablethereon under sub-sections (1), (3) and (5) of section 3, integrated tax leviable thereon under sub-section (7) of section 3, goods and services tax compensation cessleviable thereon under sub-section (9) of section 3, safeguard duty leviable thereon under section 8B, countervailing duty leviable thereon under section 9 and anti-dumping duty leviable thereon under section 9A" shall be substituted;* *(b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:-* *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9)* ***of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;";*** *(c) after condition (xi), the following conditions shall be inserted, namely :-* *"(xii) that the exemption from integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9) of section* ***3 of the said Customs Tariff Act shall be subject to pre-import***

		condition; *(xiii) that the exemption from integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9) of* ***section 3 of the said Customs Tariff Act shall be available up to the 31st March, 2018.".***

m) Section 17 (1) of the Customs Act, 1962 reads as:-

[SECTION 17. Assessment of duty. – (1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviableon such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re- assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

Explanation.- For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received.

n) Section 46 (4) of the Customs Act, 1962 reads as:-

"The importer while presenting a Bill of Entry, shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, relating to the imported goods....."

o) ***Section 111 (o) of the Customs Act, 1962 inter alia stipulates-***

"111. Confiscation of improperly imported goods, etc. -_
The following goods brought from a place outside India shall be liable to confiscation:

.....

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

p) ***Further section 112 of the Customs Act, 1962 provides for penal action and inter-alia stipulates:-***

Any person shall be liable to penalty for improper importation of goods,-
(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, ..."

q) ***Section 124 of the Customs Act, 1962 inter alia stipulates :-***

No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person

(a) is given a notice in writing with the prior approval of the officer of customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter :

4. Imposition of two conditions for availing the IGST exemption in terms of Notification No. 79/2017-Cus dated 13-10-2017:-

4.1 Whereas Advance Authorizations are issued by the Directorate General of Foreign Trade (DGFT) to importers for import of various raw materials without payment of Customs duty and the said export promotional scheme is governed by Chapter 4 of the Foreign Trade Policy (2015-20), applicable for subject case and corresponding Chapter 4 of the Hand Book of Procedures (2015-20). Prior to GST regime, in terms of the provisions of Para 4.14 of the prevailing Foreign Trade Policy (2015-20), the importer was allowed to enjoy benefit of exemption in respect of Basic Customs Duty as well as Additional Customs Duties, Anti-dumping Duty and Safeguard Duty, while importing such input materials under Advance Authorizations.

4.2 With the introduction of GST w.e.f 01-07-2017, Additional Customs Duties (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Accordingly, Notification No.26/2017-Customs dated 29 June 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. It was a conscious decision to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of Duty during

supply to DTA, or to take refund of such IGST amount within a specified period. The corresponding changes in the Policy were brought through Trade Notice No.11/2018 dated 30-06-2017. It is pertinent to note here that while in pre-GST regime blanket exemption was allowed in respect of all Duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

4.3 However, subsequently, the Government of India decided to exempt imports under Advance Authorizations from payment of IGST, by introduction of the Customs Notification No.79/2017 dated 13-10-2017. However, such exemption from the payment of IGST was made conditional. The said Notification No.79/2017 dated 13-10-2017, was issued with the intent of incorporating certain changes/ amendment in the principal Customs Notifications, which were issued for extending benefit of exemption to the goods when imported under Advance Authorizations. The said Notification stated that the Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the Notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table. Only the relevant portion pertaining to the Customs Notification No.18/2015 dated 01-04-2015 is reproduced in Para 3(j) above, which may be referred to.

4.4 Therefore, by issuing the subject Notification No. 79/2017-Cus dated 13-10-2017, the Government of India amended inter-alia Notification No.18/2015-Cus dated 01-04-2015, and extended exemption from the payment of IGST at the time of import of input materials under Advance Authorizations. But such exemption was not absolute. As a rider, certain conditions were incorporated in the subject notification. One being the condition that such exemption can only be extended so long as exports made under the Advance Authorization are physical exports in nature and the other being the condition that to avail such benefit one has to follow the pre-import condition.

5. The Director General of Foreign Trade, in the meanwhile, issued one Notification No. 33/2015-20 dated 13-10-2017, which amended the provision of Para 4.14 of the Foreign Trade Policy (2015-20), **to incorporate the exemption from IGST, subject to compliance of the pre-import and physical export conditions**. It is pertinent to mention, that the principal Customs Notification No. 18/2015-Cus, being an EXIM notification, was amended by the Notification No. 79/2017-Cus dated 13-10-2017, in tandem with the changed Policy by integrating the same provisions for proper implementation of the provisions of the Foreign Trade Policy (2015-20).

5.1 Therefore, conscious legislative intent is apparent in the changes made in the Foreign Trade Policy (2015-20) and corresponding changes in the relevant Customs Notifications, that to avail the benefit of exemption in respect of Integrated Goods and Service Tax (IGST), one would require to comply with the following two conditions: -

i) All exports under the Advance Authorization should be physical exports, therefore, debarring any deemed export from being considered towards discharge of export obligation;

ii) Pre-import condition has to be followed, which requires materials to be imported first and then be used for manufacture of the finished goods, which could in turn be exported for discharge of EO;

6. Physical Export condition in relation to the Foreign Trade Policy (2015-20) and the Notification No. 79/2017-Cus dated 13-10-2017, and whether it was followed by the importer:

6.1 Whereas the concept of physical export is derived from Para 4.05(c) and Para 9.20 of the Foreign Trade Policy (2015-20) read with Section 2(e) of the Foreign Trade (DR) Act, 1992. Para 9.20 of the Policy refers to Section 2(e) of the Foreign Trade (DR) Act, 1992, which defines 'Export' as follows:-

(e)"import" and 'export" means respectively bringing into, or taking out of, India any goods by land, sea or air;

Therefore, primarily, export involves taking out goods out of India, however, in Chapter 4 of the Policy, Para 4.05 defines premises under which Advance Authorizations could be issued and states that -

(c) Advance Authorization shall be issued for:

(i) Physical export (including export to SEZ);
(ii) Intermediate supply; and/or
(iii) Supply of goods to the categories mentioned in paragraph 7.02 (b), (c), (e), (f), (g) and (h) of this FTP.
(iv) Supply of 'stores' on board of foreign going vessel / aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

6.2 Therefore, the definition has been further extended in specific terms under Chapter 4 of the Policy and the supplies made to SEZ, despite not being an event in which goods are being taken out of India, are considered as Physical Exports. However, other three categories defined under (c) (ii), (iii) & (iv) do not qualify as physical exports. Supplies of intermediate goods are covered by Letter of Invalidation, whereas, supplies covered under Chapter 7 of the Policy are considered as Deemed Exports. None of these supplies are eligible for being considered as physical exports. Therefore, any category of supply, be it under letter of Invalidation and/or to EOU and/or under International Competitive Bidding (ICB) and/or to Mega Power Projects, other than actual exports to other country and supply to SEZ, cannot be considered as Physical Exports for the purpose of Chapter 4 of the Foreign Trade Policy (2015-20).

6.3 This implies that to avail the benefit of exemption as extended through amendment of Para 4.14 of the Policy by virtue of the DGFT Notification No. 33/2015-20 dated 13-10-2017, one has to ensure that the entire exports made under an Advance Authorization towards discharge of EO are physical exports. In case the entire exports made, do not fall in the category of physical exports, the Advance Authorization automatically sets disqualified for the purpose of exemption.

7. Pre-import condition in relation to the Foreign Trade Policy (2015-20) and the Notification No.79/2017-Cus dated 13-10-2017; Determination of whether the goods imported under the impugned Advance Authorization comply with the pre-import condition, and whether it was followed by the importer.

7.1 Whereas pre-import condition has been part of the Policy for long. In terms of Para 4.13 of the Policy, there are certain goods for which pre-import condition was made applicable through issuance of DGFT Notification way before the Notification dated 13-10-2017 came into being.

7.2 The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)]. **It demands that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage.This Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built,** which is required to be followed, barring where otherwise use has been allowed in terms of Para 4.27 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.12 of the Policy (2009-14)].

7.3 Advance Authorization are issued for import of Duty-free materials first, which would be used for the purpose of manufacture of export goods, which would be exported out of India or be supplied under deemed export, if allowed by the Policy or the Customs Notification. The very name Advance Authorization was coined with prefix 'Advance', which illustrates and indicates the basic purpose as aforesaid. Spirit of the scheme is further understood, from the bare fact that while time allowed for import is 12 months (conditionally extendable by another six months) from the date of issue of the Authorization, the time allowed for export is 18 months (conditionally extendable by 6 months twice) from the date of issue of the Authorization. The reason for the same was the practical fact that conversion of input materials into finished goods ready for export, takes considerable time depending upon the process of manufacture.

7.4 DGFT Notification No. 31/2013 (RE-2013) dated: - 01-08-2013, was issued to incorporate a new Para No. 4.1.15 in the Foreign Trade Policy. The said Para is an extension of the Para 4.1.3[Para 4.03 of the Policy (2015-200] and stipulated further condition which clarified the ambit of the aforesaid Para 4.1.3. I**nputs actually imported must be used in the export product.**

7.5 A Circular No.3/2013 (RE-2013) dated, 02-08-2013, was also issued by the Ministry of Commerce in line with the aforesaid Notification. The Circular reiterates that Duty free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the Notification No. 31 issued on 1.8.2013.

7.6 Therefore, combined reading of Para 4.03 of the Foreign Trade Policy, in force at the time of issuance of the Authorizations, and the Notification aforesaid along with the Circular as mentioned above, makes it obvious, that **benefit of exemption from payment of Customs Duty is extended to the input materials subject to strict condition, that such materials would be exclusively used in the manufacture of export goods which would be ultimately exported.** Therefore, the importer does not have the liberty to utilize such Duty-free materials otherwise, nor do they have freedom to export goods manufactured out of something, which was not actually imported.

7.7 Therefore, such Authorizations principally do have the pre-import condition in-built, which is required to be followed, barring where otherwise use has been allowed in terms of Para 4.27 of the Foreign Trade Policy (2015-20) [erstwhile Para 4.12 of the Policy (2009-14)]. Para 4.27 of the Hand Book of Procedures for the relevant period allows exports/supplies in anticipation of an Authorization. This provision has been made as an exception to meet the requirement in case of exigencies. However, the importers/exporters have been availing the benefit of the said provision without exception and the export goods are made out of domestically or otherwise procured materials and the Duty-free imported goods are used for purposes other than the manufacture of the export goods. However, Para 4.27 (d) has barred such benefit of export in anticipation of Authorization for the inputs with pre-import condition.

7.8 Specific provision under the said Para 4.27 (d) was made, which states that –

(d) Exports/supplies made in anticipation of authorization shall not be eligible for inputs with pre-import condition.

Therefore, whenever pre-import condition is applicable in respect of the goods to be imported, the Advance Authorization holder does not have any liberty to export in anticipation of Authorization. The moment input materials are subject to pre-import condition, they become ineligible for export in anticipation of Authorization, by virtue of the said provision of Para 4.27 (d).

7.9 The pre-import condition requires the imported materials to be used for the manufacture of finished goods, which are in turn required to be exported towards discharge of export obligation, and the same is only possible when the export happens subsequent to the commencement of imports after allowing reasonable time to manufacture finished goods out of the same. Therefore, when the law demands pre-import condition on the input materials to be imported, goods cannot be exported in anticipation of Advance Authorization. **Provisions of Para 4.27(a) & (d), i.e export in anticipation of Authorization and the pre-import condition on the input materials are mutually exclusive and cannot go hand in hand.**

8. Whereas Advance Authorization Scheme is not just another scheme, where one is allowed to import goods Duty free, for which the sole liability of the beneficiary is to complete export obligation only by exporting goods mentioned in the Authorization. **It is not a scheme that gives carte blanche to the importer, so far as utilization of imported materials is concerned. Rather, barring a few exceptions covered by the Policy and the Notification, it requires such Duty-free imported materials to be used specifically for the purpose of manufacture of export goods.** As discussed above, the scheme requires physical incorporation of the imported materials in the export goods after allowing normal wastage. Export goods are required to be manufactured out of the very materials which have been imported Duty free. **The law does not permit replenishment**. The High Court of Allahabad in the case of *Dharampur Sugar Mill* reported in *2015 (321) ELT 0565 (All.)* has observed that:-

> *" **From the records we find that the import authorization requires the physical incorporation of the imported input in export product after allowing normal wastage, reference clause 4.1.3.** In the instant case, the assessee has hopelessly failed to establish the physical incorporation of the imported input in the exported sugar. The Assessing Authority and the Tribunal appears to be correct in recording a finding that the appellant has violated the provisions of Customs Act, in exporting sugar without there being any Export Release Order in the facts of this case."*

8.1 The Hon'ble Supreme Court in the case of *Pennar Industries* reported in *TIOL-2015-(162)-SC-CUS* has held that :-

> *"It would mean that not only the raw material imported (in respect of which exemption from duty is sought) is to be utilized in the manner mentioned, namely, for manufacture of specified products by the importer/assessee itself, this very material has to be utilized in discharge of export obligation. **It, thus, becomes abundantly clear that as per this Notification, in order to avail the exemption from import duty, it is necessary to make export of the product manufactured from that very raw material which is imported.** This condition is admittedly not fulfilled by the assessee as there is no export of the goods from the raw material so utilized. Instead, export is of the product manufactured from other material, that too through third party. Therefore, in strict sense, the mandate of the said Notification has not been fulfilled by the assessee."*

8.2 The High Court of Madras (Madurai Bench) in the case of M/s Vedanta Ltd on the issue under consideration held that:-

> **"pre-import simply means import of raw materials before export of the finished goods to enable the physical export and actual user condition possible and negate the revenue risk that is plausible by diverting the imported goods in the local market".**

8.3 Conditions No. (v) & (vi) of the Notification No. 18/2015-Cus dated 01-04-2015, prescribe the modalities to be followed for import of Duty-free goods under Advance Authorization, in cases, where export obligation is discharged in full, before the commencement of imports. This is to ensure that the importer does not enjoy the benefit of Duty exemption on raw materials twice for the same export. It is but natural that in such a situation the importer would have used domestically procured materials for the purpose of manufacture of goods that have been exported and on which required Duties would have been paid and credit of the same would also have been availed by the importer. The importer has in this kind of situation, two options in terms of the above Notification:

8.4.1 The first option is elucidated in condition No. (v) of the notification, which is as under-

> *"(v) that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT Credit under CENVAT Credit Rules, 2004 has been availed, then the importer shall, at the time of clearance of the imported materials furnish a bond to the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself, to use the imported materials in his factory or in the factory of his supporting manufacturer for the manufacture of dutiable goods and to submit a certificate, from the jurisdictional Central Excise officer or from a specified chartered accountant within six months from the date of clearance of the said materials, that the imported materials have been so used:*
>
> *Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;"*

8.4.2 The second option is similarly elaborated in condition no. (vi) of the notification, as under-

> *"(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);"*

8.5 Thus, the purport of the above conditions in the erstwhile notification is to ensure that if domestically procured inputs have been used for manufacture of the exported goods and the inputs are imported Duty-free after the exports, then the benefit of "zero-rating" of exports is not availed by the exporter twice.

8.6 Thus, insertion of such conditions in the notification, is indicative of legislative intent of keeping check on possible misuse of the scheme. However, ensuring compliance of these two conditions is not easy, on the other hand, such conditions are vulnerable to be mis-used and have the inherent danger to pave way for 'rent-seeking'. Therefore, to **plug the loop-hole, and to facilitate & streamline the implementation of the export incentive scheme, in the post-GST scenario the concept of "Pre-Import" and "Physical Export" was introduced in the subject Notification**, which make the said conditions (v) & (vi) infructuous. This is also in keeping with the philosophy of GST legislation to remove as many conditional exemptions as possible and instead provide for zero-rating of exports through the option of taking credit of the IGST duties paid on the imported inputs, at the time of processing of the said inputs.

8.7 It is the Duty of an importer seeking benefits of exemption extended by Customs Notifications issued by the Government of India/ Ministry of Finance; to comply with the conditions imposed in the notification, which determines, whether or not one becomes eligible for the exemption. **Exemption from payment of Duty is not a matter of right, if the same comes with conditions which are required to be complied with. It is a pre-requisite that only if such conditions are followed, that one becomes eligible for such benefit. As discussed above, such conditions have been brought in with the objective of facilitating zero-rating of exports with minimal compliance and maximum facilitation.**

9. Whereas IGST benefit is available against Advance Authorizations subject to observance of pre-import condition in terms of the conditions of Para 4.14 of the Foreign Trade Policy (2015-20) & also the conditions of the newly introduced condition (xii) of Customs Notification No.18/2015 dated 01-04-2015 as added by Notification No. 79/2017-Cus dated 13-10-2017. Such pre-import condition requires goods to be imported prior to commencement of exports to ensure manufacturing of finished goods made out of the Duty-free inputs so imported. These finished goods are then to be exported under the very Advance Authorization towards discharge of export obligation. As per provisions of Para 4.03 of the Foreign Trade Policy (2015-20), physical incorporation of the imported materials in the export goods is obligatory, and the same is feasible only when the imports precedes export.

9.1 The following tests enables one to determine whether the pre-import condition in respect of the Duty-free imported goods have been satisfied or not:

i) If the importer fulfils a part or complete export obligation, in respect of an Advance Authorization, even before commencement of any import under the subject Advance Authorization, it is implied that such imported materials have not gone into production of goods that have been exported, by which the export obligation has been discharged. Therefore, pre-import condition is violated.

ii) Even if the date of the first Bill of Entry under which goods have been imported under an Authorization is prior to the date of the first Shipping Bill through which exports have been made, indicating exports happened subsequent to import, but if documentary evidences establish that the consignments, so imported, were received at a later stage in the factory after the commencement of exports, then the goods exported under the Advance Authorization could not have been manufactured out of the Duty free imported goods. This aspect can be verified from the date of the Goods Receipt Note (GRN), which establishes the actual date on which materials are received in the factory. Therefore, in absence of the imported materials, it is implied that the export goods were manufactured out of raw materials, which

were not imported under the subject Advance Authorization. Therefore, pre-import condition is violated.

iii) In cases, where multiple input items are allowed to be imported under an Advance Authorization, and out of a set of import items, only a few are imported prior to commencement of export, it implies that in the production of the export goods, except for the item already imported, the importer had to utilize materials other than the Duty-free materials imported under the subject Advance Authorization. The other input materials are imported subsequently, which do not and could not have gone into productionof the finished goods exported under the said Advance Authorization. Therefore, pre-import condition is violated.

iv) In some cases, preliminary imports are made prior to export. Subsequently, exports are effected on a scale which is not commensurate with the imports already made. If the quantum of exports made is more than the corresponding imports made during that period, then it indicates that materials used for manufacture of the export goods were procured otherwise. Rest of the imports are made later which never go into production of the goods exported under the subject Advance Authorization. It is then implied that the imported materials have not been utilized in entirety for manufacture of the export goods, and therefore, pre-import condition is violated.

10. Whether the Advance Authorizations issued prior to 13-10-2017 should come under purview of investigation.

10.1 It is but natural that the Advance Authorizations which were issued prior to 13-10-2017, would not and could not contain condition written on the body of the Authorization, that one has to fulfil pre-import condition, for the bare fact that no such pre-import condition was specifically incorporated in the parent Notification No.18/2015 dated 01-04-2015. The said condition was introduced by the Notification No. 79/2017-Cus dated 13-10-2017, by amending the principal Customs Notification. Therefore, for the Advance Authorizations issued prior to 13-10-2017, logically there was no obligation to comply with the pre-import condition. At the same time, there was no exemption from the IGST either during that period. Notifications are published in the public domain, and every individual affected by it is aware of what benefit it extends and in return, what conditions are required to be complied with. To avail such benefits extended by the Notification, one is duty bound to observe the formalities and/or comply with the conditions imposed in the Notification.

10.2 While issuing the subject Notification, the Government of India instead of imposing a condition that such benefit would be made available for Advance Authorizations issued on and after the date of issuance of the Notification, kept the doors wide open for those, who obtained such Advance Authorization in the past too, subject to conditions that such Authorizations are valid for import, and pre-import and physical export conditions have also been followed in respect of those Advance Authorizations. Therefore, instead of narrowing down the benefit to the importers, in reality, it extended benefit to many Advance Authorizations, which could have been out of ambit of the Notification, had the date of issue been made the basic criterion for determination of availment of benefit. Further, the notification did not bring into existence any new additional restriction, rather it introduced new set of exemption, which was not available prior to issue of the said notification. However, as always, such exemptions were made conditional. Even the parent notification, did not offer carte blanche to the importers to enjoy benefit of exemption, asit also had set of conditions, which were required to be fulfilled to

avail such exemption. As such, an act of the Government is in the interest of the public at large, instead of confining such benefits for the Advance Authorizations issued after 13-10-2017, the option was left open, even for the Authorizations, which were issued prior to the issuance of the said notification. The notification never demanded that the previously issued authorizations have to be pre-import compliant, but definitely, it made it compulsory that benefit of exemption from IGST can be extended to the old Advance Authorizations too, so long, the same are pre-import compliant.The importers did have the option to pay IGST and avail other benefit, as they were doing prior to introduction of the said notification without following pre-import condition. The moment they opted for IGST exemption, despite being an Advance Authorization issued prior to 13-10-2017, it was necessary for the importer to ensure that pre-import/physical export conditions have been fully satisfied in respect of the Advance Authorization under which they intended to import availing exemption.

10.3 Therefore, it is not a matter of concern whether an Advance Authorization was issued prior to or after 13-10-2017, to ascertain whether the same is entitled for benefit of exemption from IGST, the Advance Authorization should pass the test of complying with both the pre-import and physical export conditions.

11. Whether the Advance Authorizations can be compartmentalized to make it partly compliant to pre-import/ physical export and partly otherwise.

11.1. Whereas Advance Authorization Scheme has always been Advance Authorization specific. The goods to be imported/exported, quantity of goods required to be imported/exported, value of the goods to be imported/exported, nos. of items to be allowed to be imported/exported, everything is determined in respect of the Advance Authorization issued. Advance Authorization specific benefits are extended irrespective of the fact whether the importer chooses to import the whole materials at one go or in piece meal. Therefore, such benefit and/or liabilities are not Bills of Entry specific. Present or the erstwhile Policy has never had any provision for issuance of Advance Authorizations, compartmentalizing it into multiple sections, part of which may be compliant with a particular set of conditions and another part compliant with a different set of conditions. Agreeing to the claim of considering part of the imports in compliance with pre-import condition, when it is admitted by the importer that pre-import condition has been violated in respect of an Advance Authorization, would require the Policy to create a new provision, to accommodate such diverse set of conditions in a single Authorization. Neither the present set of Policy nor the Customs notification has any provision to consider imports under an Advance Authorization by hypothetically bifurcating it into an Authorization, simultaneously compliant to different set of conditions. As of now, the Advance Authorizations are embedded with a particular set of conditions only. An authorization can be issued either with pre-import condition or without it. **Law doesn't permit splitting it into two imaginary set of Authorizations, for which requirement of compliances are different.**

11.2 Allowing exemption for part compliance is not reflective in the Legislative intent. For proportional payment of Customs Duty in case of partial fulfilment of EO, specific provisions have been made in the Policy, which, in turn has been incorporated in the Customs Notification. No such provision has been made in respect of imports w.r.t Advance Authorizations with **"pre-import and physical exports" conditions.In absence of the same, compliance is required in respect of the Authorization as a whole.** In other words, if there are multiple shipments of import & multiple shipments of export, then so long as there are some shipments in respect of which duty-free imports have taken place later & exports corresponding to the same have been done before, then, the pre-import condition stipulated in the IGST exemption notification gets violated. **Once that happens,**

then even if there are some shipments corresponding to which imports have taken place first & exports made out of the same thereafter, the IGST exemption would not be available, as the benefits of exemption applies to the license as a whole. Once an Advance Authorization has been defaulted, there is no provision to consider such default in proportion to the offence committed.

11.3 Para 4.49 of the Hand Book of Procedures (2015-20), Volume-I, demands that if export obligation is not fulfilled both in terms of quantity and value, the Authorization holder shall, for the regularization, **pay to Customs Authorities, Customs Duty on unutilized value of imported/ indigenously procured material along with interest** as notified; which implies that the Authorization holder is legally duty bound to pay the proportionate amount of Customs Duty corresponding to the **unfulfilled export obligation.** Customs Notification too, incorporates the same provision.

11.4 Para 5.14 (c) of the Hand Book of Procedures, Volume-I, (2015-20) in respect of EPCG Scheme stipulates that where export obligation of any particular block of years is not fulfilled in terms of the above proportions, except in such cases where the export obligation prescribed for a particular block of years is extended by the Regional Authority, such Authorization holder shall, within 3 months from the expiry of the block of years,pay as Duties of Customs, an amount that is proportionate to the unfulfilled portion of the export obligationvis-a-vis the total export obligation. In addition to the Customs Duty calculable, interest on the same is payable. Customs notification too, incorporates the same provision.

11.5 Thus, in both the cases, Advance Authorization under Chapter 4 & EPCG under Chapter 5 of the HBPv1, the statutory provisions have been made for payment of Duty in proportion to the unfulfilled EO. This made room for part compliance and has offered for remedial measures. The same provisions have been duly incorporated in the corresponding Customs Notifications.

11.6 Contrary to above provisions, in the case of imports under Advance Authorization with pre-import and physical export conditions for the purposes of availing IGST exemptions, **both the Policy as well as the Customs Notifications are silent on splitting of an Advance Authorisation. This clearly indicates that the legislative intent is totally different in so far as exemption from IGST is concerned. It has not come with a rider allowing part compliance**. Therefore, once vitiated, the IGST exemption would not be applicable on entire imports made under the Authorisation.

12. Violations in respect of the Foreign Trade Policy (2015-20) and the condition of the Notification No. 79/2017-Cus dated 13-10-2017 in respect of the imports made by the importer:-

12.1 Whereas Customs Notification No.79/2017 dated 13-10-2017, was issued extending benefit of exemption of IGST (Integrated Goods & Service Tax), on the input raw materials, when imported under Advance Authorizations. The original Customs Notifications No 18/2015 dated 01-04-2015, that governs imports under Advance Authorizations, has been suitably amended to incorporate such additional benefit to the importers, by introduction of the said Notification. It was of course specifically mentioned in the said notification that "the exemption from integrated tax and the goods and services tax compensation cessleviable thereon under sub-section (7) and sub-section (9) of Section 3 of the said Customs Tariff Act shall be subject to pre-import condition;"therefore, for the purpose of availing the benefit of exemption from payment of IGST, one is required to comply with the pre-import condition. Pre-import condition demands that the entire materials imported under Advance Authorizations should be utilized exclusively for the purpose of manufacture of finished goods, which would be exported out of India. Therefore, if

the goods are exported before commencement of import or even after commencement of exports, by manufacturing such materials out of raw materials which were not imported under the respective Advance Authorization, the Pre-import condition is violated.

12.2 DGFT Notification No. 33/2015-20 dated 13-10-2017 amended the Para 4.14 of the Foreign Trade Policy (2015-20). It has been clearly stated in the said Para 4.14 of the Policy that-

> *" imports under Advance **Authorisation for physical exports** are also exempt from whole of the integrated tax and Compensation Cessleviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, **and such imports shall be subject to pre-import condition.**"*

Basically, the said Notification brought the same changes in the Policy, which have been incorporated in the Customs Notification by the aforementioned amendment.

12.3 For the purpose of availing the benefit of exemption from payment of IGST in terms of Para 4.14 of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No.79/2017-Cus dated 13-10-2017, it is obligatory to comply with the pre-import as well as physical export conditions. Therefore, if for reasons as elaborated in para-7 above, the duty-free materials are not subjected to the process of manufacture of finished goods, which are in turn exported under the subject Advance Authorization, condition of pre-import gets violated.

12.4 Combined provisions of the Foreign Trade Policy and the subject Customs Notifications, clearly mandate, only imports under pre-import condition would be allowed with the benefit of such exemption subject to physical exports. Therefore, no such exemption can be availed, in respect of the Advance Authorizations, against which exports have already been made before commencement of import or where the goods are supplied under deemed exports. The importer failed to comply with the aforementioned conditions.

13. Pre-import has to be put in respect of input, which should find place in paragraph 4.13 of the Foreign Trade Policy, which is not so in the present case.

13.1 Para 4.13 (i) states that:-

> *"DGFT may, by Notification, impose pre-import condition for inputs under this Chapter."*

The said Para clearly left open, the scope of imposing pre-import condition on any goods which could have been covered by the said Chapter 4 of the Policy. Therefore, imposing such condition across board for all goods imported under Advance Authorization was well within the competence and authority of the Policy makers. The only condition was to issue a Notification before imposition of such pre-import condition. In the present case DGFT has issued the Notification No., 33/2015-20, which fulfills the requirement of the said provision of law.

13.2 Para 4.13 of the Foreign Trade Policy states that to impose pre-import condition the Directorate General of Foreign Trade is required to issue Notification for that purpose. The DGFT has followed the said principle and accordingly issued Notification No. 33/2015-20 dated 13-10-2017. **The said Notification is general in nature and does not exclude any goods from the purview of the same.** Only condition that is imposed that for one and all goods, is that pre-import condition has to be followed in case the importer wants to avail the benefit of IGST exemption.

In absence of any specific negative list containing specific mention of set of goods, which may not be covered by the said provision, it has been ensured that all goods are covered by the said Notification, provided that the importer intends to avail exemption of IGST. **It is a common practice and understanding that in case of general provision, the same is applicable to one and all except those covered by a specific clause in the form of negative list.It is neither practicable nor possible to specify each and every single item on earth for the purpose. In absence of any such negative list offered by the said notification, such pre-import condition becomes applicable for all goods to be imported.**

13.3 Therefore, the question of specific mention of a particular set of items does not arise. It is impracticable and impossible to issue a Notification mentioning all possible goods, which could be imported under Advance Authorization, to bring them within the ambit of pre-import condition. **Much simpler and conventional way to cover goods across board is to issue Notification in general, without any negative list.** The DGFT Authority has done the same, and issued the subject Notification No. 33/2015-20 dated 13-10-2017, which without any shadow of doubt covers all goods including the one being imported by the importer. Mis-interpreation of the scope of Para 4.13 of the Foreign Trade Policy and an attempt to confine the scope of the said para to infer that the subject goods imported are not covered by the said para is not in consonance with the Policy in vogue.

13.4 Interpretation that the reference to "inputs with pre-import condition" in the Foreign Trade Policy and Hand Book of Procedures should be construed to mean only those inputs which have been notified under Appendix-4J also appears to be distorted, misleading and contrary to the spirit of the Policy. Para 4.13 states that "DGFT may, by Notification, impose pre-import condition for inputs...". The term Inputs has been used in general without confining its' scope to the set of limited items covered by Appendix-4J. As discussed below, **the purpose of Appendix-4J is to specify export obligation period of a few inputs, for which pre-import condition has also been imposed**. But that does not mean, the item has to be specified in Appendix-4J, for being considered as inputs having pre-import condition imposed. The basic requirement of the Para is to issue a Notification under Foreign Trade Policy, declaring goods on which such pre-import condition is imposed. Such requirement was fulfilled by the Policy makers and DGFT Notification No. 33/2015-20 dated 13-10-2017, was issued accordingly. The Notification, by not incorporating any negative list or exclusion clause, made it clear that any inputs imported under Advance Authorization, would require to follow pre-import condition in case the importer wants to avail benefit of IGST exemption. **Appendix-4J has nothing to do with it.**

13.5 Appendix 4J issued in tandem with the provision of Para 4.22 of the Foreign Trade Policy during the material period (presently under Para 4.42 of the Hand Book of Procedures), provides for export obligation period in respect of various goods allowed to be imported. While, Para 4.22 is the general provision, that specifies 18 months as the export obligation period in general, the said Para, also provides that such export obligation period would be different for a set of goods as mentioned in Appendix-4J. **Therefore, Appendix-4J has been placed in the Policy as a part of Para 4.22 of the Policy and not as part of Para 4.13. Secondly, Appendix-4J is basically a negative list for the purpose of Para 4.22, which specifies a set of goods for which export obligation period is different from the general provision of Para 4.22. In addition to that in respect of those items additional condition has also been imposed that pre-import condition has to be followed.**

13.6 From the heading of the said Appendix-4J, which states that **"Export Obligation Period for Specified Inputs....."** it clearly refers to Para 4.22 of the Foreign Trade Policy / Para 4.42 of the Hand Book of Procedures, **it becomes clear that the purpose of the same is to define EO period of specified goods.** Simply,

because Appendix 4J demands for compliance of pre-import condition, does not mean that the same becomes the list meant for goods for which pre-import condition is applicable. Therefore, emphasizing on the fact that the goods imported are not covered by the Appendix 4J, and therefore, are beyond the purview of the subject notification is incorrect and baseless.

14. Violations of the provisions of the Customs Act, 1962:-

14.1 Whereas in terms of Section 46 of the Customs Act, 1962, while presenting the Bills of Entry before the Customs Authority for clearance of the imported goods, it was the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorizations under which imports were being made availing benefit of IGST exemption. The law demands true facts to be declared by the importer. It was the duty of the importer to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorization. As the importer has been working under the regime of self-assessment, where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of the goods, it was the sole responsibility of the importer to place correct facts and figures before the assessing authority. In the material case, the importer has failed to comply with the requirements of law and incorrectly availed benefit of exemption of Notification No. 79/2017-Cus dated 13-10-2017. This has therefore, resulted in violation of Section 46 of the Customs Act, 1962.

14.2 The importer failed to comply with the conditions laid down under the relevant Customs Notification as well as the DGFT Notification and the provisions of the Foreign Trade Policy (2015-20), as would be evident from the discussion in the earlier paras of this Notice. The amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with interest.

14.3 With the introduction of self-assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the importer, it was duty of the importer to present correct facts and declare to the Customs Authority about their inability to comply with the conditions laid down in the Customs Notification, while seeking benefit of exemption under Notification No. 79/2017-Cus dated 13-10-2017. However, contrary to this, they availed benefit of the subject Notification for claiming the exemption from payment of IGST suppressing the fact that the export took place prior to import of the goods under Advance Authorization and they are not entitled for exemption of IGST as they did not comply with the conditions laid down in the exemption Notification in violation of Section 17 of the Customs Act, 1962. Amount of Customs Duty attributable to such benefit availed in the form of exemption of IGST, is therefore, recoverable from them under Section 28(4) of the Customs Act, 1962.

14.4 The importer failed to comply with the pre-import condition of the Notification and imported goods Duty free by availing benefit of the same without observing condition, which they were duty bound to comply. This has led to contravention of the provisions of the Notification No.79/2017-Cus dated 13-10-2017, and the Foreign Trade Policy (2015-20), which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

14.5 Section 114A of the Customs Act, 1962, stipulates that where the Duty has not been levied or has been short-levied by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the Duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the Duty or interest so determined. It

appears that the Noticee has deliberately suppressed the fact of their failure to comply with the conditions of pre-import/physical export in respect of the impugned Advance Authorizations, which they were well aware of at the time of commencement of import itself, from the Customs Authority. Such an act of deliberation appears to have rendered them liable to penalty under Section 114A of the Customs Act, 1962.

14.6 Section 124 of the Customs Act, 1962, states that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person:

(a) is given a notice in writing with the prior approval of the officer of Customs not below the rank of an Assistant Commissioner of Customs, informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
(c) is given a reasonable opportunity of being heard in the matter;

14.7 Therefore, while Section 28 gives authority to recover Customs Duty, short paid or not-paid, and Section 110(o) of the Act, hold goods liable for confiscation in case such goods are imported by availing benefit of an exemption notification and the importer fails to comply with and/or observe conditions laid down in the Notification, Section 124 & Section 28 of the Customs Act, 1962, authorise the proper officer to issue Show Cause Notice for confiscation of the goods, recovery of Customs Duty and imposition of penalty in terms of Section 112(a) of the Customs Act, 1962.

14.8 In conclusion it appears that the importer M/s Chiripal Poly Films Ltd., have contravened the provisions of Section 17 & 46 of the Customs Act, 1962, and also the provisions of Customs Notification No. 18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No. 79/2017 dated 13-10-2017, read with provisions of Para 4.03, 4.13 & 4.14 of the Foreign Trade Policy (2015-20), as amended by the DGFT Notification No. 33/2015-20 dated 13-10-2017, issued in terms of the provision of Para 4.13 of the Foreign Trade Policy (2015-20), as they imported various items through ACC, Ahmedabad,Hazira Port & ICD Sabarmati port without payment of duty of Customs under cover of Advance Authorizations, on the strength of the subject Notification and availed benefit of exemption from payment of IGST and/or Compensation Cess on the goods so imported, leviable in terms of Sub-section (7) & Sub-section (9) of Section 3 of the Customs Tariff Act, 1975, but failed to comply with pre-import and/or physical export conditions laid down in the subject notification. Their act of omission and/or commission appears to have resulted in nonpayment of duty of Customs in the form of Integrated Goods & Service Tax (IGST) to the extent of **Rs.16,93,28,540/-** in respect of imports made at through ACC, Ahmedabad,Hazira Port & ICD Sabarmatiwhich appears to be recoverable under Section 28(4) of the Customs Act, 1962 read with Notification No. 18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No. 79/2017 dated 13-10-2017, read with provisions of Para 4.03, 4.13 & 4.14 of the Foreign Trade Policy (2015-20), as amended by the DGFT Notification No. 33/2015-20 dated 13-10-2017, issued in terms of the provision of Para 4.13 of the Foreign Trade Policy (2015-20), along with applicable interest, and also appears to attract provision of section 111(o) of the Customs Act, 1962, making the goods valued at **Rs.94,07,14,114/-**liable for confiscation and the Company liable to penalty under Section 112 (a) and Section 114A of the Act ibid.

15. Therefore a Show Cause Notice No. VIII/10-11/DRI/KZU/Commr/O&A/2021-22 dated 16.09.2022 was issued to M/s Chiripal Poly Films Ltd, Chiripal House, Shivranjani Cross Roads, Satellite, Ahmedabad,

Gujarat-380015 calling upon to Show Cause in writing to the Commissioner of Customs, Ahmedabad having his Office at 1st Floor, Customs House, Near All India Radio, Navrangpura, Ahmedabad, Gujarat-380009within 30 days of receipt of the notice as to why:-

a) Duty of Customs amounting to **Rs.16,93,28,540/- (Rupees Sixteen Crores Ninety Three Lakhs Twenty Eight Thousand Five Hundred and Forty only)** in the form of IGST saved in course of imports of the goods through Hazira Port, Ahmedabad Airport and ICD Sabarmati under the subject Advance Authorizations and the corresponding Bills of Entry as detailed above, in respect of which benefit of exemption under Customs Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import condition as stipulated in the said Notification, and also for contravening provisions of Para 4.14 of the Foreign Trade Policy (2015-20), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, **should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 read with the provisions of Section 143(3) of the Customs Act, 1962** which provide for recovery of the Customs Duty and interest there upon by way of enforcement of the Bonds executed by them at the time of import;

b) Subject goods having assessable value of **Rs.94,07,14,114/-(Rupees Ninety Four Crores Seven Lakhs Fourteen Thousand One Hundred and Fourteen only)**imported through Hazira Port, Ahmedabad Airport and ICD Sabarmati under the subject Advance Authorizations shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017, without complying with obligatory pre-import condition laid down under the said Notification;

c) Interest should not be demanded and recovered under Section 28AA of the Customs Act, 1962, from them on such duty of Customs in the form of IGST as demanded at (a) above, benefit of exemption of which was incorrectly availed;

d) Penalty should not be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods availing exemption of Notification and without observance of the conditions set out in the Notification, and also by reasons of misrepresentation and suppression of facts as elaborated above resulting in non-payment of Duty,which rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962, and also rendered Customs Duty recoverable under Section 28(4) of the Customs Act, 1962;

e) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962, for improper importation of goods availing exemption under notification No.18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017, without observance of the pre-import and/or physical export conditions set out in the Notification, resulting in non-payment of Customs Duty, which rendered the goods liable to confiscation under section 111(o) of the Customs Act, 1962;

16. Defense Submissions:-M/s. Chiripal Poly Films Ltd submitted their reply to the Show Cause Notice No. VIII/10-11/DRI/KZU/Commr/O&A/2021-22 dated 16.09.2022 wherein they interalia stated as under:

16.1 Regarding the payment of the duties foregone on the imports, the noticee submitted that -

(a) 13 Bill of Entries comply with pre-import condition for the goods imported for which duty demand is quantified was Rs. 2,64,65,844/-.

(b) In total Rs. 13,64,48,378/- towards custom duties foregone on the goods imported under 45 Bill of Entries (out of Total 63 Bill of Entries) along with a further sum of Rs.10,42,86,757/- (towards interest have been fully paid, and therefore no actual duty liability survives in this case.

16.2 The noticee denied the allegation of violations of provisions of the Customs Act, 1962 leveled in the Show Cause Notice. The noticee emphasized that the true nature and scope of pre-import condition was not known to them at the time when they imported the goods under the concerned bills of entry and claimed exemption of Notification No.18/2015-Cus.;

16.3 Pre-import condition:

The noticee submitted that the Central Government has not defined "pre-import" condition while issuing Notification No.79/2017-Cus. dated 13.10.2017, and the DGFT has also not defined "pre-import" condition while issuing Notification No.33/2015-2020 dated 13 October, 2017 for substituting para 4.14 of the Foreign Trade Policy. But the concept of "pre-import" condition was explained by the Revenue authorities before the Hon'ble Gujarat High Court while filing reply affidavits in the Writ Petitions filed by the petitioners. In the lead case being Special CA No.14558/2018 filed by M/s. Maxim Tubes Co. Ltd., an affidavit in reply was filed on behalf of the Directorate of Revenue Intelligence, Ahmedabad Zonal Unit.

16.4 Partly fulfilment of the condition:

The noticee submitted that even the DRI authorities in the Court proceedings, the materials covered by the AA should be imported first, and imports in a phased manner is also permissible; and therefore it is obvious that quantities of materials imported duty free in phased manner would be used for production of the specified final products as and when such materials are received in factory of an industry like us. It is not required nor obligatory for an industry like us to import the entire quantity first, because imports of materials in phased manner by importing smaller quantities in instalments or piecemeal is permissible under the AA scheme. This peculiarity results in a situation where "pre-import" condition may be partly fulfilled i.e. the condition may be fulfilled for a part of the quantity imported under the Advance Authorisation, and also for a part of the quantity imported under a particular bill of entry. It is possible that a part of the quantity of raw materials imported in phased manner was used for production of the specified final products exported under the said Advance Authorisation towards discharge of export obligation of that Authorisation; but leaving certain quantity of raw materials imported at a later stage in a phased manner, because such quantity may not have been used for export of the goods under the said Advance Authorisation. The noticee submitted that in their case also, this situation has arisen because pre-import condition stands fulfilled for a part of the quantity imported under a bill of entry with reference to a specific Advance Authorisation. Therefore, re-assessment of such bill of entry would be required under Circular No.16/2023-Cus. only for the remaining quantity for which "pre-import" condition was not fulfilled fully. The noticee emphasized that their case is of fulfilment of pre-import condition partly (i.e. for a part of the quantity of materials imported duty free under a bill of entry in respect of a specific Advance Authorisation) and partly requiring re-assessment, because pre-import condition was partly fulfilled for certain quantities of materials imported tax free, whereas this condition was not fulfilled for a part of the quantity

of inputs, imported under the same bill of entry. The noticee also emphasized that re-assessment of only 6 bills of entry (out of 11 bills of entry involved in this show cause notice) would be required, leaving undisturbed those quantities of materials imported tax free under the same bill of entry, which were utilised for fulfilment of export obligation towards the concerned Advance Authorisation. The noticee submitted that the Show Cause Notice is only Assumption of the authority that in the case of imports under Advance Authorisation subject to pre-import and physical export conditions for the purposes of availing IGST exemptions, both the Policy as well as the Customs Notifications are silent on splitting of an Advance Authorisation. This clearly indicates that the legislative intent is totally different in so far as exemption from IGST is concerned. It has not come with a rider allowing part compliance.

16.5 Use For Export Only:

The noticee submitted that all the goods imported under AA scheme under all the above referred 11 bills of entry have been actually utilised for manufacture of final products, which were exported.

16.6 Confiscation of the goods: The noticee submitted that-

(i) The goods valued at Rs.94,07,14,114/- are proposed to be held as liable for confiscation under Section 111(o) of the Customs Act, but this proposal is unjustified and without any jurisdiction because they are not liable for any omission or commission that would render these goods liable for confiscation under Section 111(o) of the Act.

(ii) Section 111(o) of the Customs Act comes into play when the goods were exempted subject to any condition, and such condition was not observed. No case is made out in the Notice that conditions of any notification for exemption were not satisfied. In any case, the goods cleared for home consumption by filing Bills of Entry have not been put under seizure, and these goods having been cleared for home consumption, they cease to be "imported goods" as contemplated under Section 2(25) of the Customs Act.

(iii) The goods have been noticed by proper Custom officers, and they have been allowed to be cleared for home consumption in the normal course of assessment. In case of Manjula Showa Ltd. **2008 (227) ELT 330**, the Appellate Tribunal has held that goods cannot be confiscated nor could any duty be imposed when there was no seizure of any goods. The Larger Bench of the Tribunal in case of Shiv Kripa Ispat Pvt. Ltd. **2009 (235) ELT 623** has also upheld this principle.

16.7 Penalties:

The noticee submitted that the proposal for imposition of penalties under Sections 112(a) and 114A of the said Act are also unjustified because there is no case for imposing even a token penalty on them. The noticee quoted the the principles as laid down by the Hon'ble Supreme Court in the land mark case of Messers Hindustan Steel Limited reported in **1978 ELT (J159)** wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so.

16.8 Interest:

In respect of the demand of interest the noticee submitted that –

(i) the proposal for recovery of interest under Section 28AA of the said Act is also an action *de-hors* of any merit in law. The present one is not a case of any duty not levied or short levied or erroneously refunded and hence Section 28AA of the Act is not applicable. Since the goods imported by us were correctly classified, and duties leviable thereon have been noticed and paid, there is no non-levy or short levy as regards importation of the goods in question. Interest liability would arise only when any duty was liable to be paid as determined under Section 28 of

the said Act, and therefore Section 28AA of the Act for interest is also not applicable in the present case.

(ii) As explained at the very beginning of this reply, the demand in the present case is that of IGST leviable under sub section (7) of Section 3 of the Customs Tariff Act. Section 3(7) of the Act is the charging section for IGST on goods imported into India, and this is a separate levy independent of the customs duty leviable under section 12 of the Customs Act. For late payment of IGST leviable under sub-section (7) of Section 3 of the Customs Tariff Act, there is no provision for charging interest. Interest is a separate levy, and a charging section or a charging provision for interest must be present in the statute levying the tax in case of late payment of such tax by an noticee.

The noticee relied upon a judgement of the Hon'ble Gujarat High Court in case of CCE, Surat-I V/s. Ukai Pradesh Sahkari Khand Udyog Mandli Ltd. **2011 (271) ELT 32 (Guj.)** wherein the Hon'ble Gujarat High Court has firmly held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in that behalf. The noticee also referred to and relied upon a recent judgement of the Hon'ble Bombay High Court in case of Mahindra & Mahindra Ltd. V/s. Union of India reported in **2022 (10) Tax Amendment India 212 – Bombay High Court,** wherein the Hon'ble High Court has held that in the absence of a specific provision relating to levy of interest in the respective legislation, interest cannot be recovered by taking recourse to machinery provisions relating to recovery of duty.

(iii) The noticee submitted that the methodology and procedure for reassessment of goods imported under AA Scheme are provided by the Government of India vide Circular No.16/2023-Cus. This circular is issued pursuant to the direction of the Hon'ble Supreme Court in para 75 of the judgment in cases of UOI & others V/s. Cosmo Films Ltd. and others delivered on April 28, 2023 but the Hon'ble Supreme Court has not directed for recovery of interest while delivering this judgment, and deciding the Revenue's appeals before it. The Hon'ble Supreme Court has directed the Revenue to permit the noticee to claim refund or input credit (whichever applicable and/or wherever custom duty was paid).

16.9 Revenue neutral situation:

The noticee submitted that the situation in their case is revenue neutral. Therefore, there cannot be any interest liability only because the amount of IGST is paid now owing to the litigation about the legality and validity of the pre-import condition. Amount of IGST, if paid at the time of import, was fully admissible as ITC and as refund; and the amount of IGST now paid is also fully admissible as ITC and refund. The Government has therefore erroneously and wrongly referred to payment of interest vide para 5.2(c) of Circular No.16/2023-Cus. Inasmuch as such interest liability could not have been imposed by the Government in this case of a totally revenue neutral situation. The noticee relied upon on Time Limitation are like HMM Limited – 1995 (76) ELT 497 (SC), Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) and others referred to in submissions in this case.

17. Personal Hearing: Shri Paresh M Dave (Advocate) & Shri P P Jadeja (Tax Consultant), the authorized representatives of M/s. Chiripal Poly Films Ltd attended the Personal Hearing on 18.12.2023 and reiterated their earlier submissions dated 06.11.2023.

18. Findings: I have carefully gone through the Show Cause Notice dated 16.09.2022, written submissions dated 06.11.2023 filed by M/s Chiripal Poly Films Ltd and records of personal hearing held on 18.12.2023.

19. I find from the records that the present Show Cause Notice dated 16.09.2022 has been retrieved from Call Book for adjudication in view of Hon'ble Supreme Court decision dated 28.04.2023 in case of M/s. Cosmo Films Ltd. I also find that after issuance of Show Cause Notice on 16.09.2022, the importer was informed vide letter F. No.VIII/10-11/DRI/KZU/Commr/O&A/2021-22dated 03.10.2022 the reason for transfer of Show Cause Notice to Call Book as stipulated under Sub - Section 9A of Section 28 of the Customs Act, 1962.Accordingly, the time limit specified in Section 28 (9) ibid shall apply from the date when the reason specified under Section 28 (9A) has ceased to exist i.e., with effect from 28.04.2023.

20. The issues for consideration before me in the present SCN are as under:-

(i) Whether, the importer, during October13,2017 to January 9,2019 was eligible for availing exemption under Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017on the inputs imported under Advance Authorizations without fulfillment of mandatory 'Pre Import Condition'?

(ii) Whether the Duty of Customs amounting to **Rs.16,93,28,540/-**as detailed in the Notice is required to be demanded and recovered from them under Section 28(4) of the Customs Act,1962 alongwith Interest under Section 28AA of the Customs Act, 1962?

(iii) Whether, subject goods having assessable value of **Rs.94,07,14,114/-** as detailed in the Show Cause Notice, are liable for confiscation under Section 111(o) of the Customs Act, 1962?

(iv) Whether the Duty of Customs amounting to **Rs.11,10,26,373/-** deposited by them towards Customs Duty in the form of IGST should be appropriated towards payment of Customs Duty of **Rs.16,93,28,540/-**?

(v) Whether amount of **Rs.10,42,86,757/-** deposited by them towards interest should be appropriated towards payment of interest?

(vi) Whether thePre-import condition has been fulfilled in **13 BEs** (Sr No. 1 to 13 in the Table below), wherein amount of Custom Duty involved is **Rs.2,44,07,903/-**and assessable value is **Rs.13,55,99,462/-**?

(vii) Whether the Customs Duty already paid at the time of import in **5 BEs** (Sr No. 14 to 18 in the Table below), wherein amount of Custom Duty involved is **Rs.3,38,94,264/-** and assessable value is **Rs.18,83,01,464/-**?

(viii) Whether the noticee is liable to penalty under Section 114A of the Customs Act, 1962?

(ix) Whether the noticee is liable to penalty under Section 112(a) of the Customs Act, 1962?

(x) Whether Bonds executed by them at the time of import is enforceable in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty as mentioned above alongwith interest?

21. I find that Duty liability with interest and penal liabilities would be relevant only if the bone of the contention that whether the Importer has violated the mandatory pre-import condition as stipulated in Notification No.79/2017-Cus.

dated 13-10-2017 is answered in the affirmative. Thus, the main point is being taken up firstly for examination.

22. Genesis of Pre Import Condition:

22.1 Before proceeding to adjudication of the Show Cause Notice, let us firstly go through relevant provisions which will give genesis of 'Pre Import Condition'.

22.1.1Relevant Para 4.03 of the Foreign Trade Policy (2015-20) inter-alia states that:-

An Advance Authorisation is issued to allow duty free import of inputs, which are physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, energy, catalysts which are consumed/ utilised to obtain export product, may also be allowed. DGFT, by means of Public Notice, may exclude any product(s) from purview of Advance Authorisation.

22.1.2Relevant Para 4.13 of the Foreign Trade Policy (2015-20) inter-alia states that:-

4.13 Pre-import condition in certain cases-

(i) DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.

(ii) Import items subject to pre-import condition are listed in Appendix 4J or will be as indicated in Standard Input Output Norms (SION).

22.1.3Relevant Para 4.14 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.14 Details of Duties exempted-

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition. Imports against Advance Authorisations for physical exports are exempted from Integrated Tax and Compensation Cess upto 31.03.2018 only.

22.1.4 NOTIFICATION NO. 31 (RE-2013)/ 2009-2014 dated 1st August, 2013:

In exercise of powers conferred by Section 5 of the Foreign Trade (Development & Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.2 of the Foreign Trade Policy, 2009-2014, the Central Government hereby notifies the following amendments in the Foreign Trade Policy (FTP) 2009-2014.

2. After para 4.1.14 of FTP a new para 4.1.15 is inserted.

"4.1.15 Wherever SION permits use of either (a) a generic input or (b) alternative inputs, unless the name of the specific input(s) [which has (have) been used in manufacturing the export product] gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the shipping bill. At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those inputs which have been specifically indicated in the shipping bill."

3. Para 4.2.3 of FTP is being amended by adding the phrase "4.1.14 and 4.1.15" in place of "and 4.1.14". The amended para would be as under: "Provisions of paragraphs 4.1.11, 4.1.12, 4.1.13, 4.1.14 and 4.1.15 of FTP shall be applicable for DFIA holder."

*4. **Effect of this Notification:** Inputs actually used in manufacture of the export product should only be imported under the authorisation.* ***Similarly inputs actually imported must be used in the export product. This has to be established in respect of every Advance Authorisation / DFIA.***

22.2 With the introduction of GST w.e.f 01-07-2017, Additional Duties of Customs (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Accordingly, Notification No.26/2017-Customs dated 29 June 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. The corresponding changes in the Policy were brought through Trade Notice No.11/2018 dated 30-06-2017. I find that it is pertinent to note here that while in pre-GST regime blanket exemption was allowed in respect of all Duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

However, subsequently, the Government decided to exempt imports under Advance Authorizations from payment of IGST, by introduction of the Customs Notification No.79/2017 dated 13-10-2017. However, such exemption from the payment of IGST was made conditional. The said Notification No.79/2017 dated 13-10-2017, was issued with the intent of incorporating certain changes/ amendment in the principal Customs Notifications, which were issued for extending benefit of exemption to the goods when imported under Advance Authorizations

22.2.1 D.G.F.T. Notification No. 33/2015-2020 dated 13.10.2017 amended the provisions of Para 4.14 of the Foreign Trade Policy 2015-20 which read as under:

Para 4.14 is amended to read as under:

"4.14: Details of Duties exempted

Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However,

imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and **such imports shall be subject to pre-import condition.**"

22.2.2Notification No.- 79/2017 - Customs, Dated: 13-10-2017. The relevant amendment made in Principal Notification No. 18/2015-Customs dated 01.04.2015 vide Notification No. 79/2017 - Customs, Dated: 13-10-2017 is as under:

-: Table:-

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*
1	.....	.....
2.	*18/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 254 (E), dated the 1 st April, 2015]*	*In the said notification, in the opening paragraph,- (a) .....* *(b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:-* *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9)* ***of section 3 of the said Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;";*** *(c) ....* *(c) after condition (xi), the following conditions shall be inserted, namely :-* *"(xii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section* ***3 of the said Customs Tariff Act shall be subject to pre-import condition;***

22.3 Further, I find that Notification No.01/2019-Cus. dated 10.01.2019 removed/omitted the 'Pre Import condition' laid down vide Amendment Notification No. 79/2017- Cus dated 13.10.2017 in the Principal Notification No. 18/2015-Cus dated 01.04.2015.

22.4 The High Court of Madras (Madurai Bench) in the case of M/s Vedanta Ltd reported as 2018 (19) G.S.T.L. 637 (Mad.)on the issue under consideration held that:-

> **"pre-import simply means import of raw materials before export of the finished goods to enable the physical export and actual user condition possible and negate the revenue risk that is plausible by diverting the imported goods in the local market".**

22.5 I find that the Importer has taken plea that meaning of phrase 'Pre-import Condition' was neither defined in the FTP policy nor in the notification. I find that

'Pre-Import Condition' is unambiguous word/phrase. Further, I find that the definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)] wherein it is said that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage. Thus, this Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built,which is required to be followed. In the instant case, it is undisputed fact that the Importer has not complied with the Pre-Import Condition as laid down vide Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017.

22.6 Further, I find that this issue is no longer *res-integra* in as much as Hon'ble Supreme Court in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) has overruled judgment of Hon'ble High Court of Gujarat and has held that pre-import condition, during **October,2017 to January,2019**, in Advance Authorization Scheme was valid. Relevant Paras of the decision are as under:

69. The object behind imposing the 'pre-import condition' is discernible from Paragraph 4.03 of FTP and Annexure-4J of the HBP; that only few articles were enumerated when the FTP was published, is no ground for the exporters to complain that other articles could not be included for the purpose of 'pre- import condition'; as held earlier, that is the import of Paragraph 4.03(i). The numerous schemes in the FTP are to maintain an equilibrium between exporters' claims, on the one hand and on the other hand, to preserve the Revenue's interests. Here, what is involved is exemption and postponement of exemption of IGST, a new levy altogether, whose mechanism was being worked out and evolved, for the first time. The plea of impossibility to fulfil 'pre-import conditions' under old AAs was made, suggesting that the notifications retrospectively mandated new conditions. The exporter respondents' argument that there is no *rationale* for differential treatment of BCD and IGST under AA scheme is without merit. BCD is a customs levy at the point of import. At that stage, there is no question of credit. On the other hand, IGST is levied at multiple points (including at the stage of import) and input credit gets into the stream, till the point of end user. As a result, there is justification for a separate treatment of the two levies. IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962. The impugned notifications, therefore, cannot be faulted for arbitrariness or under classification.

70. The High Court was persuaded to hold that the subsequent notification of 10-1- 2019 withdrew the 'pre-import condition' meant that the Union itself recognized its unworkable and unfeasible nature, and consequently the condition should not be insisted upon for the period it existed, *i.e.*, after 13-10- 2017. This Court is of the opinion that the reasoning is faulty. It is now settled that the FTPRA contains no power to frame retrospective regulations. Construing the later notification of 10-1-2019 as being effective from 13-10- 2017 would be giving effect to it from a date prior to the date of its existence; in other words the Court would impart retrospectivity. In *Director General of Foreign Trade &Ors.* v *Kanak Exports &Ors.* [2015 (15) SCR 287 = 2015 (326) E.L.T. 26 (S.C.)] this Court held that :

"Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to 'amend' the policy

which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospective."

71. To give retrospective effect, to the notification of 10-1-2019 through interpretation, would be to achieve what is impermissible in law. Therefore, the impugned judgment cannot be sustained on this score as well.

75. *For the foregoing reasons, this court holds that the Revenue has to succeed. The impugned judgment and orders of the Gujarat High Court are hereby set aside. However, since the respondents were enjoying interim orders, till the impugned judgments were delivered, the Revenue is directed to permit them to claim refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard."*

22.7 I find that based on the decision of Hon'ble Supreme Court in aforesaid case of Union of India Vs. Cosmo Films Ltd, CBIC issued Circular No. 16/2023-Cus dated 07.06.2023 which is reproduced as below:

Import — Pre-import condition incorporated in Foreign Trade Policy and Handbook of Procedures 2015-20 — Availing exemption from IGST and GST Compensation Cess — Implementation of Supreme Court direction in Cosmo Films case

M.F. (D.R.) Circular No. 16/2023-Cus., dated 7-6-2023

F. No. 605/11/2023-DBK/569

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs, New Delhi

Subject : Implementation of Hon'ble Supreme Court direction in judgment dated 28-4-2023 in matter of Civil Appeal No. 290 of 2023 relating to 'pre-import condition' - Regarding.

Attention is invited to Hon'ble Supreme Court judgment dated 28-4-2023 in matter of Civil Appeal No. 290 of 2023 (*UOI and others* v. *Cosmo Films Ltd.*) [(2023) 5 Centax 286 (S.C.) = 2023 (72) G.S.T.L. 417 (S.C.)] relating to mandatory fulfilment of a 'pre-import condition' incorporated in para 4.14 of FTP 2015-20 *vide* the Central Government (DGFT) Notification No. 33/2015-20, dated 13-10-2017, and reflected in the Notification No. 79/2017-Customs, dated 13-10-2017, relating to Advance Authorization scheme.

2. The FTP amended on 13-10-2017 and in existence till 9-1-2019 had provided that imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and compensation cess, as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition.

3. Hon'ble Supreme Court has allowed the appeal of Revenue directed against a judgment and order of Hon'ble Gujarat High Court [2019 (368) E.L.T. 337 (Guj.)] which had set aside the said mandatory fulfilment of pre-import condition. As such,

this implies that the relevant imports that do not meet the said pre-import condition requirements are to pay IGST and Compensation Cess to that extent.

4. While allowing the appeal of Revenue, the Hon'ble Supreme Court has however directed the Revenue to permit claim of refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of the judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular in this regard.

5.1 The matter has been examined in the Board for purpose of carrying forward the Hon'ble Supreme Court's directions. It is noted that -

(a) ICES does not have a functionality for payment of customs duties on a bill of entry (BE) (unless it has been provisionally assessed) after giving the Out-of-Charge (OOC) to the goods. In this situation, duties can be paid only through a TR-6 challan.

(b) Under GST law, the BE for the assessment of integrated tax/ compensation cess on imports is one of the documents based on which the input tax credit may be availed by a registered person. A TR-6 challan is not a prescribed document for the purpose.

(c) The nature of facility in Circular No. 11/2015-Cus. (for *suo motu* payment of customs duty in case of *bona fide* default in export obligation) [2015 (318) E.L.T. (T11)] is not adequate to ensure a convenient transfer of relevant details between Customs and GSTN so that ITC may be taken by the importer.

(d) The Section 143AA of the Customs Act, 1962 provides that the Board may, for the purposes of facilitation of trade, take such measures for a class of importers-exporters or categories of goods in order to, *inter alia*, maintain transparency in the import documentation.

5.2 Keeping above aspects in view, noting that the order of the Hon'ble Court shall have bearing on importers others than the respondents, and for purpose of carrying forward the Hon'ble Court's directions, the following procedure can be adopted at the port of import (POI) :-

(a) **for the relevant imports that could not meet the said pre-import condition and are hence required to pay IGST and Compensation Cess to that extent, the importer (not limited to the respondents) may approach the concerned assessment group at the POI with relevant details for purposes of payment of the tax and cess along with applicable interest.**

(b) the assessment group at POI shall cancel the OOC and indicate the reason in remarks. The BE shall be assessed again so as to charge the tax and cess, in accordance with the above judgment.

(c) the payment of tax and cess, along with applicable interest, shall be made against the electronic challan generated in the Customs EDI System.

(d) on completion of above payment, the port of import shall make a notional OOC for the BE on the Customs EDI System [so as to enable transmission to GSTN portal of, *inter alia*, the IGST and Compensation Cess amounts with their date of payment (relevant date) for eligibility as per GST provisions].

(e) the procedure specified at (a) to (d) above can be applied once to a BE.

6.1 Accordingly, the input credit with respect to such assessed BE shall be enabled to be available subject to the eligibility and conditions for taking input tax credit under Section 16, Section 17 and Section 18 of the CGST Act, 2017 and rules made thereunder.

6.2 Further, in case such input tax credit is utilized for payment of IGST on outward zero-rated supplies, then the benefit of refund of such IGST paid may be available to the said registered person as per the relevant provisions of the CGST Act, 2017 and the rules made thereunder, subject to the conditions and restrictions provided therein.

7. The Chief Commissioners are expected to proactively guide the Commissioners and officers for ironing out any local level issues in implementing the broad procedure described in paras 5 and 6 above and ensuring appropriate convenience to the trade including in carrying out consequential actions. For this, suitable Public Notice and Standing Order should be issued. If any difficulties are faced that require attention of the Board, those can be brought to the notice.

22.8 Further, I find that DGFT have issued Trade Notice No. 7/2023-24 dated 08.06.2023, saying that "all the imports made under Advance Authorization Scheme on or after 13.10.2017 and upto and including 09.01.2019 which could not meet the pre-import condition may be regularized by making payments as prescribed in the Customs Circular".

22.9 Thus, from the findings and discussion in Para 22 to 22.8 above, I find that there is no dispute that the said importer has failed to comply with the mandatory conditions of 'Pre-Import' while claiming the benefit of Exemption from IGST and Compensation Cess under Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 during the period from October13, 2017 to January 9,2019, in Advance Authorization Scheme.

23. The payments of the duty & interest made by M/s Chiripal Poly Films Ltd:

23.1 During the course of investigation, I find that the importer has made payment of IGST of **Rs.11,10,26,373/- [Rs.16,93,28,540 – (Rs.2,44,07,903+Rs.3,38,94,264)]** along with interest of **Rs.10,42,86,757/-**in respect of 45 Bill of Entries. Further, I find that in respect of remaining 13 Bill of Entries wherein IGST involved is **Rs.2,44,07,903/-,** the pre-import condition is not violated as detailed in Sr. No.1 to 13 of the table below. In addition of this, I find that the importer has already paid IGST amount of **Rs.3,38,94,264/-** at the time of imports in respect of these 05 BoEs as detailed in Sr. No.14 to 18 of the table below-

Sr No	BE No	BE Date	IGST demanded as per SCN in Rs	Duty Paid
1	4062476	19-11-2017	1077810	These 13 Bill of Entries have not violated the pre-import conditions as imports were made prior to the exports in terms of the (i) Letter F.No.CH/Hazira/SCN-Chiripal/2384/2023-24 dated 23.01.2024, (ii) F.No.VIII/48-36/ICD/Misc/2023 dated 18.01.2024 & 09.04.2024 & (iii) F.No.VIII/48-69/Misc/Importer/2021-22 dated
2	4724684	08-01-2018	416652	
3	6003876	16-04-2018	505700	
4	6447439	19-05-2018	526822	

5	4884962	20-01-2018	3882572	17.01.2024& 15.04.2024 issued by the Deputy Commissioner of Customs, Hazira Port, Surat, Joint Commissioner (In Situ), ICD Khodiyar & Deputy Commissioner, ACC, Ahmedabad respectively. The IGST amount involved in these BoE is **Rs.2,44,07,903/-.**
6	6200550	01-05-2018	6057785	
7	8259132	29-09-2018	1334708	
8	4015218	15-11-2017	1407	
9	5816526	31-03-2018	3358946	
10	6337413	11-05-2018	3444654	
11	6361855	14-05-2018	1628403	
12	6391559	15-05-2018	1628403	
13	6500246	23-05-2018	544041	
14	5038519	08-02-2018	17256281	IGST amount of **Rs.3,38,94,264/-** has been already paid at the time of imports in respect of these 05 BoEs.
15	8245353	28-09-2018	647430	
16	8286342	02-10-2018	1295580	
17	8.59E+08	19-03-2018	7559053	
18	8.59E+08	02-01-2019	7135920	
19	5603639	16-03-2018	504952	IGST amount of **Rs.11,10,26,373/-** has been paid for duty forgone vide these 45 BoEs.
20	6994808	28-06-2018	606029	
21	5750994	27-03-2018	12670791	
22	6824169	15-06-2018	6160933	
23	8201357	25-09-2018	6602528	
24	8330052	05-10-2018	3650075	
25	8737970	05-11-2018	3116206	
26	8738140	05-11-2018	3178530	
27	3658591	17-10-2017	481962	
28	3717762	23-10-2017	2770479	
29	3719029	23-10-2017	870520	
30	3719041	23-10-2017	963923	
31	3772403	27-10-2017	2447170	
32	3806341	30-10-2017	7200749	
33	3817226	31-10-2017	2282037	
34	3840284	01-11-2017	1477726	
35	3840312	01-11-2017	310470	

36	4002275	15-11-2017	1453854	
37	4137707	24-11-2017	3192846	
38	4189551	28-11-2017	2516074	
39	4228692	01-12-2017	1013940	
40	4229420	01-12-2017	1520910	
41	4557757	26-12-2017	788238	
42	4787218	12-01-2018	1468046	
43	5338331	24-02-2018	1014535	
44	6074926	21-04-2018	990877	
45	6931855	23-06-2018	465958	
46	7188364	12-07-2018	3931490	
47	7293924	20-07-2018	1737780	
48	7293981	20-07-2018	1182131	
49	7542389	07-08-2018	2940841	
50	7618774	13-08-2018	2505910	
51	8321219	04-10-2018	1153962	
52	8384830	09-10-2018	230767	
53	8433230	12-10-2018	3136735	
54	8440376	12-10-2018	1773485	
55	8455628	15-10-2018	1055273	
56	8508693	18-10-2018	1882485	
57	8515528	18-10-2018	1552498	
58	8636967	27-10-2018	649625	
59	8636969	27-10-2018	1299250	
60	8651454	29-10-2018	3164838	
61	8661481	30-10-2018	3268945	
62	8662159	30-10-2018	653789	
63	8865284	15-11-2018	9186211	
	Total		169328540	

24. Whether the Duty of Customs amounting to Rs.16,93,28,540/-as detailed in the Notice is required to be demanded and recovered from them

(invoking extended period) under Section 28(4) of the Customs Act, 1962 and whether Bonds executed by the Importer at the time of import should be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty alongwith interest?

24.1 I find that it would be worth to reiterate that the Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd has overruled judgment of Hon'ble Gujarat High Court and held that pre-import conditions, during October13, 2017 to January 9,2019, in Advance Authorization Scheme was valid. Thus, I find that the Hon'ble Supreme Court has settled that IGST and Compensation Cess involved in the Bills of Entry filed during October13, 2017 to January 9,2019 is required to be paid on failure to compliance of 'Pre Import Condition as stipulated under Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. I find that it is undisputed fact that the said Importer has failed to fulfill and comply with 'Pre Import condition' incorporated in the Foreign Trade Policy of 2015-2020 and Handbook of Procedures 2015-2020 by DGFT Notification No. 33/2015-20 and Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Further, I find that Importer is well aware of the rules and regulation of Customs as well as Exim Policy as they are regularly importing the goods under Advance Authorization and they were fully aware that the goods being cleared from Customs was not fulfilling pre import condition as they have already filed the Shipping Bill to this effect and goods have already been exported. Thus, it proves beyond doubt that goods imported under subject Bills of Entry were never used in the goods already exported. Thus, I find that the Importer with clear intent to evade the payment of IGST and Compensation Cess, have suppressed the facts of export without compliance of Pre- Import condition from the Department while filing Bills of Entry under Advance Authorization. I find that the importer has complied with the pre-import conditions in respect of 13 BoE wherein IGST involved is**Rs.2,44,07,903/-** requires to be dropped from the Customs Duty demand of **Rs.16,93,28,540/-**as demanded in the Notice. Further, I find that the importer has already paid IGST in respect of 05 BoE wherein IGST involved is**Rs.3,38,94,264/-** requires to be dropped from the Customs Duty demand of **Rs.16,93,28,540/-**as demanded in the Notice. Therefore, extended period is rightly invoked and therefore differential Customs duty of **Rs.11,10,26,373/- [Rs.16,93,28,540 – (Rs.2,44,07,903+Rs.3,38,94,264)]** requires to be recovered under Section 28 (4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act,1962.

24.2 Further, without prejudice to the demand under Section 28 (4) of the Customs Act,1962, I find that in the present case, the importer has also filed Bond under Section 143 of the Customs Act, for the clearance of imported goods under Advance Authorization availing the benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Sub Section (1) of Section 143 explicitly says that *"Where this Act or any other law requires anything to be done before a person can import or export any goods or clear any goods from the control of officers of customs and the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that having regard to the circumstances of the case, such thing cannot be done before such import, export or clearance without detriment to that person, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may, notwithstanding anything contained in this Act or such other law, grant leave for such import, export or clearance on the person executing a bond in such amount, with such surety or security and subject to such conditions as the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] approves, for the doing of that thing within such time after the import, export or clearance as may be specified in the bond".* On perusal of language of the Bonds filed by the Importer, I find that conditions are

explicitly mentioned in Bond. The wording and condition of Bond inter alia is reproduced below:

WHEREAS we, the obligor (s) have imported the goods listed in annexure-1 availing customs duty exemption in terms of the notification of the Government of India in Ministry of Finance (department of revenue) No.018/2015 dated 01.04.2015 (hereinafter referred to as the said Notification) against the Advance License No. (hereinafter as the license) for the import of the goods mentioned there in on the terms and conditions specified in the said notification and license.

"NOW THE CONDITIONS OF THE ABOVE BOND ARE THAT:-
1. I/We, the obligor(s) fulfill the conditions of the said notification and shall observe and comply with its terms and condition.
2.We the obligor shall observe all the terms and conditions specified in the license.
3....
4...
5.We, the obligor, shall comply with the conditions stipulated in the said Import & Export Policy as amended from time to time.
6....

It is hereby declared by us, the obligor(s) and the Government as follows:-

1. The above written Bond is given for the performance of an act in which the public are interest.
2. The Government through the commissioner of customs or any other officer of the Customs recover the same due from the Obligor(s) in the manner laid sub-section (1)of the section 142 of the customs act,1962."

24.3 I find that no time limit is prescribed for recovery of any liability in case of Bond filed under Section 143 (1) of the Customs Act,1962 as it is continuous liability on the part of the importer to follow the conditions prescribed in the Bond. I find that the said importer is obliged to follow the conditions of the Bond. Therefore, I find that by filing the Bond under Section 143, said Importer is obliged to pay the consequent duty liabilities on noncompliance/failure to fulfill the conditions of the Notification. Therefore, I find that without prejudice to the extended time limit envisaged under Section 28 (4) of the Customs Act, 1962, said Importer is liable to pay differential duty of **Rs.11,10,26,373/- (Rs.16,93,28,540–Rs.2,44,07,903 - Rs.3,38,94,264)** alongwith interest. Further, I find that the importer has paid the differential duty **Rs.11,10,26,373/-** alongwith interest of **Rs.10,42,86,757/-**. In view of this, I find that without prejudice to the Provisions of Section 28 (4) of the Customs Act, 1962, the Bond filed by the importer may be enforced.

24.4 The importer has contended that imposition of interest on the proposed demand is wholly without jurisdiction and illegal as IGST on imports is leviable under Section 3(7) of the Customs Tariff Act and there is no statutory provision providing for levy of interest in case of delayed payment of duty under the Customs Tariff Act and therefore interest as proposed is not leviable. In this regard, I find that based on the discussions in the foregoing paras, I have already held that the demand in the present case is recoverable from them under the provisions of Section 28(4) of the Customs Act, 1962. Section 28AA ibid provides that when a person is liable to pay Customs Duty **Rs.11,10,26,373/- [Rs.16,93,28,540 – (Rs.2,44,07,903+Rs.3,38,94,264)]** in accordance with the provisions of Section 28 ibid, in addition to such Duty, such person is also liable to pay interest at applicable rate as well. Thus the said Section provides for payment of interest automatically along with the Duty confirmed/determined under Section 28 ibid.

24.5 Further, Section 28AA ibid provides that when a person is liable to pay Duty in accordance with the provisions of Section 28 ibid, in addition to such Duty, such person is also liable to pay interest at applicable rate as well. Thus the said Section provides for payment of interest automatically along with the Duty confirmed/determined under Section 28 ibid. I have already held that Customs Duty is liable to be recovered under Section 28(4) of the Customs Act, 1962. Therefore, I find that differential Customs Duty of **Rs.11,10,26,373/-** is required to be demanded and recovered as determined under Section 28 (8) of the Customs Act, 1962 alongwith Interest under Section 28AA of the Customs Act, 1962.

24.6 I find that, it is not in dispute that the importer had imported the goods claiming the benefit of Notification No.18/2015 dated 01.04.2015 under Advance Authorization. Condition (iv) of the Notification No.18/2015 dated 01.04.2015 says that "(iv) that in respect of imports made before the discharge of export obligation in full, the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, binding himself to pay on demand an amount equal to the duty leviable, but for the exemption contained herein, on the imported materials in respect of which the conditions specified in this notification are not complied with, together with interest at the rate of fifteen per cent per annum from the date of clearance of the said materials;".

24.7 The importer has also placed reliance on the judgement of Hon'ble Gujarat High Court in case of **CCE, Surat-I V/s. Ukai Pradesh Sahkari Khand Udyog Mandli Ltd. 2011 (271) ELT 32 (Guj.)** wherein the Hon'ble Gujarat High Court has held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in that behalf. The importer has also placed reliance on the judgement of Hon'ble Bombay High Court in the case of **Mahindra and Mahindra Ltd. vs. The Union of India and Ors. WP No. 1848 of 2009 decided on 15.9.2022**wherein penalty and interest demanded was set aside in the absence of provision under Section 3 for Additional Duty of Customs, Section 3A for Special Additional Duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that created a charge in nature of penalty or interest. They have further stated that this judgement has been affirmed by Hon. Supreme Court and the Special Leave Petition filed by the Union of India has been dismissed by order dated 28.7.2023. I find that this contention is not acceptable as the said decision is with regard to pre-GST era. Period covered in the said decision was November'2004 to January'2007 and period covered in present case is 13.10.2017 to 09.01.2019. The Said decisions of Mahindra & Mahindra Ltd reported in (2023) 3 Centax 261 (Bom.) &**CCE, Surat-I V/s. Ukai Pradesh Sahkari Khand Udyog Mandli Ltd. 2011 (271) ELT 32 (Guj.)**relied on by the importer is distinguishable on following grounds.

- In the instant case, IGST has been demanded under Section 28 of the Customs Act, 1962 as well as by enforcement of Bond under Section 143 of the Customs Act, 1962. In this case, the importer has executed Bond before the proper officer binding himself to pay duty alongwith interest in case the importer fails to comply with the condition of Bond. As the importer failed to fulfil the condition of the bond i.e failed to comply with mandatory 'pre-import' condition specified under the Notification, therefore, the importer is liable to pay duty alongwith interest in terms of the conditions of the Bond as specified under Section 143 of the Customs Act, 1962.

  In the case of Mahindra & Mahindra Ltd, no such Bond was executed before the proper officer.

- In the case of Mahindra & Mahindra Ltd, the issue under dispute was charging Section for interest and penalty. According to the Department, the charging Section for imposition of CVD, SAD & Surcharge was Section 12 of the Customs Act, 1962. Hon'ble Court held that charging section for imposition of CVD, SAD & Surcharge was Section 3(1) of Customs Tariff Act, 1975, Section 3(A) of Customs Tariff Act, 1975 and Section 19 (1) of the Finance Act,2000 respectively which did not have provisions for imposition of penalty and interest.

  In the instant case, the demand of IGST has been made in terms of provision of IGST Act, 2017 and the charging Section for IGST on import is Section 5(1) of the IGST Act, 2017, Relevant Para of Section 5(1) of the IGST Act, 2017 is re produced as under:

  "SECTION 5. Levy and collection.

  (1) .....

  Provided that the integrated tax on goods *[other than the goods as may be notified by the Government on the recommendations of the Council]* imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962)."

- Hon'ble Supreme Court in the case of Cosmo Films Ltd has held that ***"IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962."***

24.8 I also find that Hon'ble Supreme Court on 11-3-2016 **dismissed** Civil Appeal filed by Atul Kaushik (Oracle India Ltd) reported in *Oracle India Pvt. Ltd.* v. *Commissioner - 2016 (339) E.L.T. A136 (S.C.)]* against the CESTAT Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015 as reported in 2015 (330) E.L.T. 417 **(Tri.-Del.)** (Atul Kaushik v. Commissioner) holding that " We see no reason to interfere with the impugned order passed by Customs, Excise & Service Tax Appellate Tribunal". Relevant Para of the decision of Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015 of CESTAT reported in 2015 (330) E.L.T. 417 **(Tri.-Del.)** (Atul Kaushik v. Commissioner) is re-produced as under:

"16. The appellants have also contended that penalty, interest and confiscation cannot be invoked in respect of evasion of countervailing duty (levied under Section 3 of the Customs Tariff Act, 1975) on the ground that the provisions relating to these aspects have not been borrowed into Section 3 of the Customs Tariff Act, 1975. In support of the principle that the penalty cannot be levied in the absence of penalty provision having been borrowed in a particular enactment, the appellants cited the judgments in the case ofKhemka& Co. (supra) and Pioneer Silk Mills Pvt. Ltd. (supra). We are in agreement with this proposition and therefore we refrain from discussing the said judgments. The appellants also cited the judgment in the case of Supreme Woollen Mills Ltd. (supra), Silkone International (supra) and several others to advance the proposition that penalty provisions of Customs Act were not applicable to the cases of non-payment of anti-dumping duty and that the same principle is applicable with regard to leviability of interest [India Carbon Ltd. (supra) and V.V.S. Sugar (supra)]. We have perused these judgments. Many of them dealt with Anti-dumping duty/Special Additional Duty (SAD) leviable under various sections (but not Section 3) of Customs Tariff Act, 1975 and in those sections of the Customs Tariff Act, 1975 or in the said Act itself, during the relevant period, there was no provision to apply to the Anti-dumping duty/SAD the provisions of Customs Act, 1962 and the rules and regulations made thereunder including those relating to interest, penalty, confiscation. In the case of Pioneer Silk Mills (supra), the duty involved was the one levied under the Additional Duties of Excise (Goods of Special Importance) Act, 1957

and its Section 3(3) only borrowed the provisions relating to levy and collection from the Central Excise Act, 1944 and in view of that it was held that the provisions relating to confiscation and penalty could not be applied with regard to the duties collected under the said Act of 1957. None of these judgments actually deal with the CVD levied under Section 3 of the Customs Tariff Act, 1975. The impugned countervailing duty was levied under Section 3 of Customs Tariff Act, 1975. Sub-section (8) of Section 3 of the said Act even during the relevant period stipulated as under : -

"S. 3(8) The provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those relating to drawbacks, refunds and exemption from duties shall, so far as may be, apply to the duty chargeable under this section as they apply in relation to the duties leviable under that Act."

It is evident from Section 3(8) of the Customs Tariff Act, 1975 quoted above that all the provisions of Customs Act, 1962 and the rules and regulations made thereunder have been clearly borrowed into the said Section 3 to apply to the impugned CVD and so it is obvious that provisions relating to fine, penalty and interest contained in Customs Act, 1962 are expressly made applicable with regard to the impugned countervailing duty. We must, however, fairly mention that in case of Torrent Pharma Ltd. v. CCE, Surat, CESTAT set aside penalty for evasion of Anti-dumping duty, CVD and SAD (para 16 of the judgment) on the ground that penal provisions of Customs Act, 1962 had not been borrowed in the respective sections of Customs Tariff Act, 1975 under which these duties were levied, but this decision of CESTAT regarding CVD suffered from a fatal internal contraction inasmuch as CESTAT itself in para 14 of the said judgment had expressely taken note of the fact that vide Section 3(8) of the Customs Tariff Act, 1975, the provisions of Customs Act, 1962 and the rules and regulations made thereunder had been made applicable to CVD charged (under Section 3 of Customs Tariff Act, 1975). In the light of this analysis, we hold that this contention of the appellant is legally not sustainable."

Thus, the said order of Tribunal has been affirmed by the Hon'ble Supreme Court whereas Special Leave Petition in case of Mahindra & Mahindra Ltd bearing Diary No. 18824/2023 has been dismissed by Hon'ble Supreme Court holding that "No merit found in the Special Leave Petition". Whereas, the Hon'ble Supreme Court has dismissed the **Civil Appeal** filed by Oracle India Pvt. Ltd (AtulKaushik) against the CESTAT Final Order Nos. A/52353-52355/2015-CU(DB) dated 29-7-2015.

In the case of **Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust and Another 1978 AIR 1283**, the Hon'ble Three Judges Bench held as under:

"The effect of non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must by necessary implication be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order it is difficult to accept the argument that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award."

The dismissal of special leave petition by the Supreme Court by a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the Court is that it was not a fit case where special leave should be granted."

24.9 I find that the said importer has cited the decision of Hon'ble Gujarat High Court in case of Maxim Tubes Company Pvt. Ltd. v. Union of India —reported as

2019 (368) E.L.T. 337 (Guj.) and have contended that the 'Pre import conditions is ultra vires as held by the Hon'ble Gujarat High Court. This plea is not tenable as the Hon'ble Supreme Court has turned down this decision of Maxim Tubes Company Pvt. Ltd. v. Union of India in case of Union of India Vs. Cosmo Film Ltd.

25. Whether the Subject goods having assessable value of Rs.94,07,14,114/-as detailed in the Show Cause Notice, are liable for confiscation under Section 111(o) of the Customs Act, 1962?

25.1 Show Cause Notice proposes confiscation of the impugned imported goods under Section 111(o) of the Customs Act, 1962. Any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer, would come under the purview of Section 111(o) of Customs Act, 1962. As discussed above and relying on the decision of Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) wherein Hon'ble Supreme Court has held that pre-import condition, during October,2017 to January,2019, in Advance Authorization Scheme was valid, I find that the Importer has failed to comply with the pre-import conditions as stipulated under Notification No. No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 and therefore, imported goods under Advance Authorization claiming the benefit of exemption Notification No. No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 are liable for confiscation under Section 111(o) of the Customs Act,1962. I find that the importer has complied with the pre-import conditions in respect of 13 BoE having assessable value of**Rs.13,55,99,462/-.** Therefore, the assessable value of **Rs.13,55,99,462/-**is required to be dropped from the total assessable value of **Rs.94,07,14,114/-**as demanded in the Notice. Further, I find that the importer has already paid IGST in respect of 05 BoE wherein assessable value involved is **Rs.18,83,01,464/-** requires to be dropped from the assessable value of **Rs.16,93,28,540/-**as demanded in the Notice. In view of the above, I find that redemption fine under Section 125 (1) is liable to be imposed in lieu of confiscation of subject goods having assessable value of **Rs.61,68,13,188/- [Rs.94,07,14,114 – (Rs.13,55,99,462+Rs.18,83,01,464)]** imported through ACC, Ahmedabad, Hazira Port & ICD Sabarmati under the subject Advance Authorizations as detailed in the Show Cause Notice.

25.2 As the impugned goods are found liable to confiscation under Section 111 (o) of the Customs Act, 1962, I find it necessary to consider as to whether redemption fine under Section 125(1) of Customs Act, 1962 can be imposed in lieu of confiscation in respect of the imported goods, which are not physically available for confiscation. Section 125 (1) of the Customs Act, 1962 reads as under:-

"**125 Option to pay fine in lieu of confiscation –**

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit..."

25.3 I find that the importer has wrongly availed the benefit of Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017 and further imported goods have been cleared after the execution of Bond for the clearance of the imported goods under Advance Authorization. I rely

on the decision in the matter of Weston Components Ltd. v. Collector reported as 2000 (115) E.L.T. 278 (S.C.) wherein Hon'ble Supreme Court has held that:

"It is contended by the learned Counsel for the appellant that redemption fine could not be imposed because the goods were no longer in the custody of the respondent-authority. It is an admitted fact that the goods were released to the appellant on an application made by it and on the appellant executing a bond. Under these circumstances if subsequently it is found that the import was not valid or that there was any other irregularity which would entitle the customs authorities to confiscate the said goods, then the mere fact that the goods were released on the bond being executed, would not take away the power of the customs authorities to levy redemption fine "

25.4 I find that even in the case where goods are not physically available for confiscation, redemption fine is imposable in light of the judgment in the case of **M/s. Visteon Automotive Systems India Ltd. reported at 2018 (009) GSTL 0142 (Mad)** wherein the Hon'ble High Court of Madras has observed interalia in Para 23 as under:

" **23.***The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant.The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii)."*

25.5 Hon'ble High Court of Gujarat by relying on this judgment, in the case of **Synergy Fertichem Ltd. Vs. Union of India, reported in 2020 (33) G.S.T.L. 513 (Guj.),** has held interalia as under:-

"

174. *..... In the aforesaid context, we may refer to and rely upon a decision of the Madras High Court in the case of M/s. Visteon Automotive Systems v. The Customs, Excise & Service Tax Appellate Tribunal, C.M.A. No. 2857 of 2011, decided on 11th August, 2017 [2018 (9) G.S.T.L. 142 (Mad.)], wherein the following has been observed in Para-23;*

"23. The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per

sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant. The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii)."

175. We would like to follow the dictum as laid down by the Madras High Court in Para-23, referred to above."

25.6 The importer has contended that the goods had already been imported and cleared for home consumption and were never seized by the authorities and therefore they cannot be confiscated. In this regard, I find that the ratio of decision rendered by Hon'ble Tribunal Mumbai in case of *ApcoInfratech Pvt. Ltd.* v. *Commissioner* reported as 2019 (368) E.L.T. 157 (Tri.-Mumbai) affirmed by the Hon'ble Supreme Court reported as *2019 (368) E.L.T. A49 (S.C.)] is squarely applicable to the present case as in the said decision, it has been held as under :*

7. *Heard both the sides and perused the records of the case. We find that the appellant M/s. Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No. 230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road constrsites does not mean that the condition of the notification has been followed. In fact the plant was never used for such contracts as canvassed by the appellant during the importation of goods and claiming exemption. The appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the State of U.P wherein the imported plant would be used. However they never used the said imported equipments in State of U.P. for construction of road. Instead they used the plant as a sub-contractor in State of Rajasthan and Tamil Nadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied.* ***It clearly shows that the appellant never complied with the conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed.*** *We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the appellant liable for penalty under Section 117 of C.A. 1962. Further we find that Shri Anil Singh, Managing*

Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However in case of Shri V.S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/connected with the decision to use machine and his role in violation of condition is also not visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order inasmuch as it has confirmed demand, confiscation of goods and penalties against M/s. Apco and Shri Anil Singh. However the penalty imposed upon Shri V.S. Rao is set aside. The impugned order is modified to the above extent. The appeals filed by M/s. ApcoInfratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed.

In the present case, it is clearly apparent that the importer/noticee never complied with the conditions of the exemption notification and has knowingly violated theconditions. The importer has knowingly cleared the imported goods without observing obligatory condition of 'Pre Import' as envisaged under Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017. In view of the above, the impugned goods imported without observing obligatory condition of "Pre-import" as envisaged in the aforementioned notification are rightly liable for confiscation. Therefore the contention of the importer/noticee is not tenable.

26. Whether Penalty should be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods availing exemption of Notification and without observance of the conditions set out in the notification, and also by reasons of misrepresentation and suppression of facts as elaborated above resulting in non-payment of Duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

26.1. I find that demand of differential Custom Duty totally amounting to **Rs.11,10,26,373/-**has been made under Section 28(4) of the Customs Act, 1962, which provides for demand of Duty not levied or short levied by reason of collusion or wilful mis-statement or suppression of facts. Hence as a naturally corollary, penalty is imposable on the Importer under Section 114A of the Customs Act, which provides for penalty equal to Duty plus interest in cases where the Duty has not been levied or has been short levied or the interest has not been charged or paid or has been part paid or the Duty or interest has been erroneously refunded by reason of collusion or any wilful mis statement or suppression of facts. In the instant case, the ingredient of wilfulmis-statement and suppression of facts by the importer has been clearly established as discussed in foregoing paras and hence, I find that this is a fit case for imposition of penalty equal to the amount of Duty plus interest in terms of Section 114A ibid.

26.2 Further, I rely on the ratio of the decision of Hon'ble Tribunal Delhi in case of Commissioner of Customs Vs. Ashwini Kumar Alia Amanullah reported as 2021 (376) E.L.T. 321 (Tri. - Del.)wherein it has been held as under :

"39. The last contention of Shri Amanullahin his appeal is that since penalty has been imposed under Section 114A, no penalty should be imposed under Section 114AA also upon them. We find that the ingredients of Section 114A and Section 114AA are different. Section 114A provides for non-levy of duty or short levy of duty due to certain reasons. There is no dispute that no duty was levied or paid on the imported gold concealed in the UPS by mis-declaring the nature of goods

Therefore, Section 114A has been correctly invoked in this case and a penalty has been imposed."

26.3 I find that the said importer has cited the case of **M/s. Hindustan Steel Limited reported in 1978 ELT (J159)** wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty of conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed. This plea is not tenable as in present case, importer has with clear intent to evade the payment of IGST have wrongly availed the benefit of exemption Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017 for the clearance of imported goods under Advance Authorization and did not fulfill the 'Pre-Import' condition as stipulated in Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017 and thereby short paid the duty. Therefore, Importer is liable for penalty under Section 114A of the Customs Act, 1962.

27. Whether Penalty should be imposed upon them under Section 112 of the Customs Act, 1962:

I find that fifth proviso to Section 114A stipulates that "where any penalty has been levied under this section, no penalty shall be levied under Section 112 or Section 114." Hence, I refrain from imposing penalty on the importer under Section 112 (a) and 112 (b) of the Customs Act, 1962.

28. I find that Importer has submitted that the entire situation is revenue neutral and even if they paid the IGST on imports at the relevant point of time where pre-import conditions was not satisfied, they would have been entitled to input tax credit of the tax so paid which could have been adjusted against their output tax liability. I find that ratio of decision rendered by Delhi Tribunal in the case of ACL Mobile Ltd. v. Commissioner reported as 2019 (20) G.S.T.L. 362 (Tribunal Del) is applicable here as in the said order it has been held interlia as under :

> ***13.*** *Regarding the last issue with reference to tax liability of the appellant on the facility of availing server/web hosting provided by the Foreign Service provider, we note that providing space in the server is essential and important infrastructure requirement for the appellant. Though, the explanation to BSS gives only inclusive definition of infrastructure support, examining the present context of the support received by the appellant by way of server hosting, weare of the considered view that the same will fall under the overall category of infrastructural support service, which is part of the BSS. Regarding the contention of the appellant, that they need not pay service tax as the situation is revenue neutral, we note that the question of revenue neutrality as a legal principle to hold against a tax liability is not tenable. In other words, no assessee can take a plea that no tax need have been paid as the same is available to them as a credit. This will be against the very basic canon of value added taxation. The revenue neutrality can at best be pleaded as principle for invoking bona fideness of the appellant against the demand for extended periodas well as for penalty which require ingredients of mala fide. Reliance was placed by the Ld. Consultant regarding the submission on revenue neutrality, on the decision of the Tribunal in Jet Airways (supra). We have noted that in the said decision the Tribunal recorded as admitted facts that the appellant are using the said facility for the taxable output services.* ***We note that no such categorical assertion can be recorded in the present case. Even otherwise we note that the availability or otherwise of credit on***

***input service by itself does not decide the tax liability of output service or on reverse charge. The tax liability is governed by the legal provisions applicable during the* relevant time in terms of Finance Act, 1994. The availability or otherwise of credit on the amount to be discharged as such tax liability cannot take away the tax liability itself. Further, the revenue neutrality cannot be extended to a level that there is no need to pay tax on the taxable service. This will expand the scope of present dispute itself to decide on the manner of discharging such tax liability. We are not in agreement with such proposition."**

28.1 I find that the Hon'ble Supreme Court in the case of Star Industries v. Commissioner reported as 2015 (324) E.L.T. 656 (S.C.) has held as under:

*"**35.** It was submitted by the learned counsel for the assessee that the entire exercise is Revenue neutral because of the reason that the assessee would, in any case, get Cenvat credit of the duty paid.* ***If that is so, this argument in the instant case rather goes against the assessee. Since the assessee is in appeal and if the exercise is Revenue neutral, then*** **there was no need even to file the appeal. Be that as it may, if that is so, it is always open to the assessee to claim such a credit."**

28.2 Further, I find that the Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) had directed Revenue to permit claim of refund or input credit (whichever applicable and/or wherever customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard." Consequent to aforesaid decision of Hon'ble Supreme Court, CBIC have issued Circular No.16/2023-Cus dated 07.06.2023 for the procedure to avail the re-credit of IGST and DGFT issued Trade Notice No. 7/2023-24 dated 08.06.2023, saying that " all the imports made under Advance Authorization Scheme on or after 13.10.2017 and upto and including 09.01.2019 which could not meet the pre-import condition may be regularized by making payments as prescribed in the Customs Circular".

28.3 The importer has contended that the show cause notice was issued at a time when no tax was payable by them because of binding judgement of Hon. Gujarat High Court in the case of Maxim Tubes Pvt. Ltd. (supra) and the tax has become payable only by virtue of subsequent judgement of Hon. Supreme Court in the case of Cosmo Films Ltd. (supra) which overturned the judgement of Hon. Gujarat High Court; that there was no tax due from them for the period prior to the judgement of Hon. Supreme Court and therefore in any case interest charged for the period prior to the judgement of Hon. Supreme Court is wholly without jurisdiction and illegal. In this regard, I find that the judgement of the Hon. Gujarat High Court in the case of Maxim Tubes Pvt. Ltd. was not accepted by the Department and challenged in the Hon'ble Apex Court. Hence, the present Show Cause Notice proposing demand under Section 28(4) of the Customs Act, 1962 alongwith interest under Section 28AA of the said Act and imposition of penalty under Section 114A of the said Act was issued when the aforementioned judgement of the Hon'ble High Court was under challenge in the Hon'ble Apex Court. Further, the said Show Cause Notice was subsequently transferred to the Call Book after issuance, as the matter was pending for decision before the Hon'ble Supreme Court. Now, with the Departmental appeal having succeeded in the Hon'ble Apex Court in light of the judgement dated 23.04.2023 in the case of Union of India Vs. Cosmos Films Ltd

reported as 2023 (72) GSTL 147 (SC), the said case has been retrieved from the Call Book and is now ripe for adjudication as per the provisions of Section 28(9)/28(9A) of the Customs Act, 1962. Hence, the contentions of the importer/noticee are untenable. Further, the issue involved in the judgement of Food Corporation of India v/s State of Haryana and Another 119 S.T.C. 1 (S.C.),relied upon by the importer/noticee pertains to tax on levy transactions which is different from the case in hand. Also, the issue involved in the case of United Riceland Ltd. and Another v/s State of Haryana and Others 104 S.T.C. 362 (P.&H) relied upon by the importer/noticee pertains to imposition of purchase tax on paddy under the Haryana General Sales Tax Act which is different from the issue involved in the present Show Cause Notice. Hence, ratio of none of these judgements are applicable to the present case.

29. In view of foregoing discussion and findings, I pass the following order:

::ORDER::

(i) I confirm the Duty of Customs amounting to **Rs.11,10,26,373/- (Rupees Eleven Crore, Ten Lakh, Twenty Six Thousand, Three Hundred and Seventy Three only)** in the form of IGST saved in course of imports of the goods through ACC, Ahmedabad, Hazira Port & ICD Sabarmati under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Notice in terms of the provisions of Section 28(4) of the Customs Act, 1962 and order appropriation of already deposited duty of **Rs.11,10,26,373/-(Rupees Eleven Crore, Ten Lakh, Twenty Six Thousand, Three Hundred and Seventy Three only)** against the demand of **Rs.11,10,26,373/- (Rupees Eleven Crore, Ten Lakh, Twenty Six Thousand, Three Hundred and Seventy Three only).** As the importer has complied with the pre-import conditions in respect of 13 BoEs, wherein IGST involved is **Rs.2,44,07,903/-**,I drop the demand of the Duty of Customs amounting to **Rs.2,44,07,903/-** from the Duty of Customs amounting to **Rs.16,93,28,540/- (Rupees Sixteen Crore, Ninety Three Lakh, Twenty Eight Thousand, Five Hundred and Forty only)** as demanded in the Notice. I also drop the demand of Duty of Customs amounting to **Rs.3,38,94,264/-** from the Duty of Customs amounting to **Rs.16,93,28,540/- (Rupees Sixteen Crore, Ninety Three Lakh, Twenty Eight Thousand, Five Hundred and Forty only)** as demanded in the Notice, as the importer has already paid IGST in respect of 05 BoE at the time of import.

(ii) I order to recover the interest at appropriate rate in respect of demand confirmed at Para (i) above under Section 28(4) of the Customs Act, 1962 and order to appropriate already paid interest of **Rs.10,42,86,757/-(Rupees Ten Crore, Forty Two Lakh, Eighty Six Thousand, Seven Hundred and Fifty Seven only)** towards interest liability.

(iii) I hold the subject goods having assessable value of **Rs. 61,68,13,188/- (Rupees Sixty One Crore, Sixty Eight Lakh, Thirteen Thousand, One Hundred and Eighty Eight only)** imported through ACC, Ahmedabad, Hazira Port & ICD Sabarmati under the subject Advance Authorizations as detailed in the Annexure attached to the Notice, liable to confiscation under Section 111 (o) of the Customs Act, 1962. I impose redemption fine of **Rs.1,85,00,000/-(Rupees One Crore, Eighty Five Lakh only)** in lieu of confiscation under Section 125 of the Customs Act, 1962.

(iv) I impose a penalty of **Rs.11,10,26,373/-(Rupees Eleven Crore, Ten Lakh, Twenty Six Thousand, Three Hundred and Seventy Three only)**plus penalty equal to the applicable interest under Section 28AA of the Customs Act, 1962 payable on the Duty demanded and confirmed at (i) above under Section 114A of the Customs Act, 1962. However, in view of the first and second proviso to Section 114A of the Customs Act, 1962, if the amount of Customs Duty confirmed and interest thereon is paid within a period of thirty days from the date of the communication of this Order, the penalty shall be twenty five percent of the Duty, subject to the condition that the amount of such reduced penalty is also paid within the said period of thirty days.

(v) I refrain from imposing penalty on M/s. Chiripal Poly Films Ltd under Section 112 (a) of the Customs Act, 1962 as penalty has been imposed under Section 114A of the Customs Act, 1962.

30. This order is issued without prejudice to any other action that may be taken under the provisions of the Customs Act, 1962 and Rules/Regulations framed thereunder or any other law for the time being in force in the Republic of India.

31. The Show Cause Notice No. VIII/10-11/DRI/KZU/Commr/O&A/2021-22 dated 16.09.2022 is disposed off in above terms.

18.04.2024

(Shiv Kumar Sharma)
Principal Commissioner

DIN-20240471MN000071767B

F.No. VIII/10-11/DRI/KZU/Commr/O&A/2021-22 Date:18.04.2024

To

M/s Chiripal Poly Films Ltd,
Chiripal House, Shivranjani Cross Roads,
Satellite, Ahmedabad, Gujarat-380015

Copy to:-

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad for information please.
2. The Principal Commissioner of Customs, Customs House, Ahmedabad for information please.
3. The Additional Commissioner of Customs(TRC), Ahmedabad for necessary action.
4. The Deputy Commissioner, ICD Sabarmati, Ahmedabad for information.
5. The Deputy Commissioner, ACC, Ahmedabad.
6. The Deputy Commissioner, Hazira Port for information.
7. The Superintendent of Customs(Systems), Ahmedabad in PDF format for uploading on the Official Website of Customs, Commisionerate, Ahmedabad.
8. Guard File.