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निबन्धितपावतीडाकद्वारा / By SPEED POST A.D.

फा. सं./F. No.: VIII/10-10/Commr./O&A/2022-23

DIN- 20240471MN00004404F6

आदेशकीतारीख/Date of Order :10.04.2024
जारीकरनेकीतारीख/Date of Issue :10.04.2024

द्वारापारित :- **शिवकुमारशर्मा, प्रधानआयुक्त**
Passed by :- Shiv Kumar Sharma, Principal Commissioner

मूलआदेशसंख्या :

Order-In-Original No: AHM-CUSTM-000-PR.COMMR-01-24-25 Dated 10.04.2024 in the case of M/s. Vital Laboratories Private Limited located at Plot No. 1710 & A1-2208, GIDC, Phase-III, Vapi-396195.

1 जिसव्यक्ति(यों) कोयहप्रतिभेजीजातीहै, उसेव्यक्तिगतप्रयोगकेलिएनिःशुल्कप्रदानकीजातीहै।

1. This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इसआदेशसेअसंतुष्टकोईभीव्यक्तिइसआदेशकीप्राप्तिसेतीनमाहकेभीतरसीमाशुल्क, उत्पादशुल्कएवंसेवाकरअपीलीयन्यायाधिकरण, अहमदाबादपीठकोइसआदेशकेविरुद्धअपीलकरसकताहै।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. उक्तअपीलप्रारुपसं. सी.ए.3 मेंदाखिलकीजानीचाहिए।उसपरसीमाशुल्क (अपील) नियमावली, 1982 केनियम 3 केउपनियम (2) मेंविनिर्दिष्टव्यक्तियोंद्वाराहस्ताक्षरकिएजाएंगे।उक्तअपीलकोचारप्रतियोंमेंदाखिलकियाजाएतथाजिसआदेशके विरुद्धअपीलकीगईहो,

उसकीभीउतनीहीप्रतियाँसंलग्नकीजाएँ(उनमेंसेकमसेकमएकप्रतिप्रमाणितहोनीचाहिए)।अपीलसेसम्बंधितसभी दस्तावेजभीचारप्रतियोंमेंअग्रेषितकिएजानेचाहिए।

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. अपीलजिसमेंतथ्योंकाविवरणएवंअपीलकेआधारशामिलहैं,
चारप्रतियोंमेंदाखिलकीजाएगीतथाउसकेसाथजिसआदेशकेविरुद्धअपीलकीगईहो,
उसकीभीउतनीहीप्रतियाँसंलगनकीजाएंगी (उनमेंसेकमसेकमएकप्रमाणितप्रतिहोगी)।

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. अपीलकाप्रपत्रअंग्रेजीअथवाहिन्दीमेंहोगाएवंइससेसंक्षिप्तएवंकिसीतर्कअथवाविवरणकेबिनाअपीलकेकारणों केस्पष्टशीर्षोंकेअंतर्गततैयारकरनाचाहिएएवंऐसेकारणोंकोक्रमानुसारक्रमांकितकरनाचाहिए।

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. केंद्रियसीमाशुल्कअधिनियम,1962कीधारा 129
ऐकेउपबन्धोंकेअंतर्गतनिर्धारितफीसजिसस्थानपरपीठस्थितहै,
वहांकेकिसीभीराष्ट्रीयकृतबैंककीशाखासेन्यायाधिकरणकीपीठकेसहायकरजिस्ट्रारकेनामपररेखांकितमाँगड्राफ्ट केजरिएअदाकीजाएगीतथायहमाँगड्राफ्टअपीलकेप्रपत्रकेसाथसंलग्नकियाजाएगा।

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. इसआदेशकेविरूद्धसीमाशुल्क, उत्पादशुल्कएवंसेवाकरअपीलीयन्यायाधिकरणमेंशुल्कके 7.5% जहांशुल्कअथवाशुल्कएवंजुरमानाकाविवादहैअथवाजुरमानाजहांशीर्फजुरमानाकेबारेमेविवादहैउसकाभुकतान करकेअपीलकीजाशकतीहै।

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
केअंतर्गतनिर्धारितकिएअनुसारसंलग्नकिएगएआदेशकीप्रतिपरउपयुक्तन्यायालयशुल्कटिकटलगाहोनाचाहिए।

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/10-10/Commr./O&A/2022-23 dated 07.09.2022 issued by the Commissioner of Customs, Ahmedabad to **M/s. Vital Laboratories Private Limited** located at Plot No. 1710 & A1-2208, GIDC, Phase-III, Vapi-396195 .

Brief facts of the case:

M/s. Vital Laboratories Private Limited located at Plot No. 1710 & A1-2208, GIDC, Phase-III, Vapi-396195 (IEC-0398063371) (herein after referred as 'the importer' or 'the Noticee' for the sake of brevity) are engaged in the import of goods by availing the benefit of exemption under Notification No.18/2015-Cus dated 01-04-2015 (as amended by Notification No. 79/2017-Cus dated 13-10-2017) under the Advance Authorizations Scheme.

2. Intelligence was developed by the Directorate of Revenue Intelligence, Kolkata(herein after referred to as 'DRI'), to the effect that various importers 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 any 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 the 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 During the course of scrutiny of records, it was noticed that M/s. Vital Laboratories Private Limited, Plot No. 1710 & A1-2208, GIDC, Phase-III, Vapi-396195 (IEC-0398063371) availed such exemption in respect of 03 (Three) licenses issued under Advance Authorizations Scheme, but while going through the process of such imports and corresponding exports towards discharge of export obligation, they failed to comply with the pre-import condition, as demanded under the said Notification No. 79/2017-Cus dated 13-10-2017, that extended such conditional exemption. Pre-import condition simply means that the goods should be imported prior to commencement of export to enable the exporter to manufacture finished goods, which could be subsequently exported under the same Advance Authorization for discharge of Export Obligation.

2.2 Accordingly, the investigation was initiated against the importer by way and also for giving evidences. **Statement of Shri Surendra Shivaji Jawale, Authorised Representative of the importer** was recorded on 30.05.2022 under Section 108 of the Customs Act, 1962 wherein he interalia stated that:-

- he looked after the works related to export, import, export benefit, DGFT related matters of the said Company;

- they had imported 'Quin Quina Cinchona Bark' under CTH 12119039 under 04 Advance licenses and used these raw materials for manufacturing of Quin Sulphate/Qunin Hydrochloride/ Dry Hydrochloride classified under CTH 29 of the Schedule 1 of the Customs Tariff Act, 1962. The details of the Licenses issued under Advance Authorisation Scheme wherein 'Quin Quina Cinchona Bark' were imported are as under:-

Table-1

License No.	Date of Registration	Qty. of Quin Quina Cinchona Bark imported	Import Assessable Value of Quin Quina Cinchona Bark (in Rs.)
0310814757	21.07.2017	1205,543 Kg	18,06,14,463/-

0310820003	22.03.2018	1205,825 Kg	19,15,19,154/-
0310824604	23.10.2018	64,538 Kg	58,48,575/-
0310724681	25.10.2018	1295,919 Kg	18,16,35,019/-

- they had imported dried Cinchona Bark classified under CTH 12119039 wherein IGST applicable as import Duty is 5%; that they were aware of the facts that dried Cinchona Bark attracts IGST @ 5 % and fresh/chilled Cinchona Bark attracts IGST @ Nil rate; that they had submitted a letter dated 24.05.2022 wherein they declared that their imported products attracts IGST @ 5 %.

- they had imported dried Cinchona Bark during the period from 13.10.2017 to 10.01.2019 under Advance Authorisation Scheme as per details mentioned in Annexure –A attached to their statement; that the import of goods were done through ICD Tumb and Nhava Sheva Port.

- he was shown Notification No. 79/2017-Cus. dated 13.10.2017; that he was aware that Notification No.18/2015 dated 01.04.2015 was amended vide Notification no. 79/2017-Cus. dated 13.10.2017 under which pre-import and Physical export condition was inserted on Duty Free import of goods; that for the purpose of availing the benefit of exemption from payment of IGST, one was supposed to comply with the pre-import condition; that pre-import condition demands that the entire materials should be imported under Advance Authorizations and it should be utilized exclusively for the purpose of manufacture of finished goods, which would be exported out of India; that for the purpose of availing the benefit of exemption from payment of IGST, one was supposed to comply with the pre-import condition.

- On being asked regarding details of import & export made under the above said licenses, he submitted details of import & export made in the said licenses in a file bearing page no. from 01 to 10; that on perusal of the first date of import as well as first date of export as submitted below made in respect of the said licenses, it can be seen that export were made first in three of the licenses out of four, which implies that the pre-import condition imposed vide Notification No. 79/2017-Cus. dated 13.10.2017 is not fulfilled.

Table-2

Sr. No.	License No.	Date	First BE No.	BE Date	First SB No.	SB date
1.	0310814757	21.07.2017	2769083	08.08.2017	7190284	06.07.2017
2.	0310820003	22.03.2018	5960088	12.04.2018	2678567	06.02.2018
3.	0310824604	23.10.2018	9007545	26.11.2018	3148314	30.03.2019
4.	0310724681	25.10.2018	9050154	29.11.2018	7841037	26.09.2018

- that exports were done first before import under the three Licenses (mentioned at Sr. No. 1,2, & 4) issued under Advance Authorization Scheme; that quite naturally, they did not manufacture the goods which were exported under the above mentioned Advance Authorization corresponding to the said Shipping Bills, out of the Duty-free materials imported under the subject Advance Authorization. Therefore, the materials which were exported against the Shipping Bills, were not manufactured entirely out of the Duty-free materials imported under the Advance Authorization in question; that resulted in non-compliance of the pre-import condition; that the License

mentioned at Sr. No. 3 above, they were satisfied with the pre-import conditions and the goods imported Duty free in the said License were utilized for manufacturing of finished goods which were exported under the said License; that they had also done physical exports in respect of License mentioned at Sr. No. 3.

- On being further asked regarding the complete details of Bills of Entry filed at ICD Tumb wherein pre-import condition is violated on import of Duty free goods, he submitted Annexure B wherein it can be seen that they had imported 2826 MT of dried Cinchona Bark having assessable value Rs. 45.13 Crores through ICD Tumb wherein IGST foregone amounts to be Rs.2.62 Crores. On being asked regarding payment of the said defaulted IGST amount, he stated that similar matter is pending before Hon'ble Supreme Court of India; that they are also filing intervention petition in Hon'ble Supreme Court of India in this matter and would rely on the judgment of the Court.

2.3 From the data submitted by the Authorized Representative of the importer and the corresponding documents like Bills of Entry under which goods were imported, first Bill of Entry in respect of licenses issued under Advance Authorization Scheme mentioned at Sr. No. 1,2 and 4 of the Table 2 above and corresponding first Shipping Bill, it is seen that in case of all 03 (Three) Advance Authorizations, the goods were exported before the commencement of imports. Therefore, it was confirmed that for manufacture of the export goods, the importer used domestically or otherwise procured materials, thereby contravening the provision of pre-import condition and went on to avail benefit of exemption. Therefore, in terms of explanation given at Para 4.3 below, the importer failed to comply with the pre-import condition and therefore, was not eligible for IGST exemption benefit.

2.4 It is clear that in respect of the aforementioned 03 (Three) Advance Authorizations, the importer failed to use Duty-free materials imported under the respective Advance Authorizations for the purpose of manufacture of the finished goods, which were exported towards discharge of export obligation. It is also evident that the Duty-free goods subsequently imported could not have been used for the specified purpose. Therefore, the importer failed to comply with the pre-import condition in respect of these Advance Authorizations.

2.5 From the facts of the case and the statement recorded of the Authorized Representative of the importer, it appears that –

i) In case of all 03 (Three) Licenses issued under Advance Authorization Scheme, they started exporting finished goods even before the imports were commenced. Therefore, such input materials despite being covered by the respective Advance Authorization and absolutely necessary for the purpose of manufacture of the export goods, have not been used for the specified purpose.

ii) Considerable quantity of materials exported under the impugned Advance Authorizations were manufactured out of input materials procured from the domestic market or otherwise;

iii) Significant quantity of the Duty-free imported materials was used to manufacture goods, which were sold in the domestic market, i.e. not used for manufacture of export goods;

(iv) They could not comply with the pre-import condition imposed by virtue of Notification No.79/2017-Cus dated 13-10-2017, but still availed benefit of exemption of IGST, in violation of the condition of the said Notification.

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) DGFT Notification No. 33/2015-20 dated 13-10-2017;
e) DGFT Notification No. 31/2013 (RE-2013) dated: - 01-08-2013;
f) DGFT Circular No. 3/2013 (RE-2013) dated, 02-08-2013;
g) Notification No 18/2015-Customs dated 01-04-2015;
h) Notification No 79/2017-Customs dated 13-10-2017;
i) Section 111(o) of the Customs Act, 1962;
j) Section 112(a) of the Customs Act;
k) Section 28(4) of the Customs Act, 1962;

a) Para 4.03 of the Foreign Trade Policy (2015-20):-

Advance Authorisation is issued to allow Duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed / utilised in the process of production of export product, may also be allowed.

b) Para 4.05 of the Foreign Trade Policy (2015-20):-

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), (t), (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 of Foreign Trade Policy 2015-20:-

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) 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. I. 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."

(e) 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 4.7.14". 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.

(f) 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.

(g) 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, 88, 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, 71/2003-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.

(h) Notification No. 79/2017-Cus. Dated 13.10.2017:-

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes 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, namely :

(Relevant Provisions only)--

Sr. No.	Notification number and date	Amendments
2.	18/2015-Customs, dated the1stApril, 2015 [vide number G.S.R. 254 (E) dated the1stApril, 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-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 leviable thereon 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 cess leviable 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 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) 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**; (xiii) 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 available up to the 31stMarch, 2018.

Section 111(o) of the Customs Act:-

Section 111. Confiscation of improperly imported goods, etc. –

Section 111 (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;

J. SECTION 112. Penalty for improper importation of goods, etc.-

Any person, -

(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, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,
shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

[(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

K Section 28(4) of the Customs Act, 1962:-

Section 28 [Recovery of [duties not levied or not paid or short-levied or short-paid] or erroneously refunded. –

(4) Where any duty has not been levied or not paid or has been short-levied or short-paid] or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-
(a) collusion; or
(b) any wilful mis-statement; or
(c) suppression of facts,
by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been [so levied or not paid] or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

4. Discussion on provisions of Law:-

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

4.1.1 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, Antidumping duty and Safeguard duty, while importing such input materials under Advance Authorizations.

4.1.2 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.11/2017 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.

4.1.3 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.

4.1.4 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**.

4.1.5 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).

4.1.6 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;

4.2. Physical Export condition in relation to the Foreign Trade Policy (2015-20) and t

4.2.1 The concept of physical export is derived from Para 4.05(c) and Para 9.20 of the F 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.

4.2.2 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).

4.2.3 This implies that to avail the benefit of exemption as extended through amendme of Export Obligation 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.

4.3 Pre-import condition in relation to the Foreign Trade Policy (2015-20) and the condition:-

4.3.1 Pre-import condition has been part of the Policy for long. In terms of Para 4.13 of the

4.3.2 The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Pol 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).

4.3.3 Advance Authorization are issued for import of Duty-free materials first, which would 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.

4.3.4 DGFT Notification No. 31/2013 (RE-2013) dated 01-08-2013, was issued to incorpor Para 4.03. **Inputs actually imported must be used in the export product.**

4.3.5 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, 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.

4.3.6 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). 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.

4.3.7 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).

4.3.8. 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.

5. The 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."*

5.1 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."*

5.2 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".**

5.3 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:

5.4 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 CENVA T Credit under the CENVA T Credit Rules, 2004;"

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

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);"

5.5 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.

5.6 Thus, insertion of such conditions in the Notification, is indicative of legislative int 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 Duty paid on the imported inputs, at the time of processing of the said inputs.

5.7 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.

6. IGST benefit is available against Advance Authorizations subject to observance of pre-import condition in terms of the condition of the 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 provision 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.

6.1 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 production of 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.

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

7.1 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.

7.2 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, as it 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.

7.3 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.

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

8.1 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 piecemeal. 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.

8.2 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.

8.3 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.

8.4 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 obligation vis-a-vis the total export obligation. In addition to the Customs Duty calculatable, interest on the same is payable. Customs Notification too, incorporates the same provision.

8.5 Thus in both the cases, Advance Authorization under Chapter 4 &EPCG under Chapter 5 of the HBP, 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.

8.6 Contrary to above provisions, in the case of imports under Advance Authorisation 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.

9. 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:-

9.1 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-Cus 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 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;" 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.

9.2 DGFT Notification No. 33/2015-20 dated 13-10-2017 amended 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 Cess leviable under subsection (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.

9.3 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 Paragraph 4.3 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.

9.4 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.

10. Quantification of Duty foregone:-

M/s. Vital Laboratories Private Limited imported Duty free goods as per details mentioned in Annexure A to this Show cause Notice during the period from 13.10.2017 to 10.01.2019 availing the benefit of Advance Authorisation Scheme. They had utilised three Licenses for Duty free import of goods. The IGST applicable on the import of the goods is @ 5%. In the said three Licenses, the importer had imported 2826.329 MT of goods having assessable value of **Rs. 45,13,14,527/-** through ICD Tumb (INSAJ6) wherein IGST forgone amounts to be **Rs. 2,62,37,904/- (Two Crore, Sixty Two Lakh, Thirty Seven Thousand Nine Hundred and Four only).(details as per Annexures B-1 and B-2 and consolidated in Annexure-B to this Show Cause Notice).**

11. Contravention of the statutory Provisions: -

11.1 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 the benefit of IGST exemption. The law demands true facts to be declared by the importer. It was 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.

11.2 M/s. Vital Laboratories Private Limited appear to have wilfully suppressed the facts that they had not used Duty free imported materials in manufacturing of exported 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 the benefit of IGST exemption. The above acts of omission and commission on the part of the importer appear to have rendered the imported goods cleared under Forty six Bills of Entry as listed in Annexures- B1 and B2 and consolidated in Annexure-B to this Show Cause Notice having a total assessable value of **Rs. 45,13,14,527/-(Rupees Forty Five Crores Thirteen Lakhs Fourteen Thousand Five Hundred Twenty Seven Only)** liable to confiscation under Section 111(0) of the Customs Act, 1962 as detailed above. The IGST amounting to **Rs. 2,62,37,904/- (Two Crores Sixty Two Lakhs Thirty Seven Thousand Nine Hundred and Four only)** not paid by the importer is liable to be recovered under Section 28(4) of the Customs Act, 1962.

11.3 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 discussed in the foregoing paras. Therefore the amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with interest.

11.4. 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 the 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 the 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 the subject goods, without complying 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 along with appropriate interest under Section 28AA of the Customs Act, 1962.

11.5 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 the 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.

11.6 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 wilful 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.

11.7 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;

11.8 Therefore, while Section 28 gives authority to recover Customs Duty, short paid or not-paid, and Section 111(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.

12. In view of the above, Show Cause Notice No. VIII/10-10/Commr./O&A/HQ/2022-23 dated 07.09.2022 have been issued to , M/s. Vital Laboratories Private Limited, Plot No.1710 & A1-2208, GIDC, Phase-III, Vapi-396195 (IEC-0398063371), called upon to Show Cause in writing to the Commissioner of Customs, Ahmedabad as to why:-

a) Customs Duty amounting to Rs. 2,62,37,904/- (Rupees Two Crore, Sixty Two Lakh, Thirty Seven Thousand Nine Hundred and Four only) in the form of IGST saved in course of imports of the goods through ICD Tumb under the Advance Authorizations and the corresponding Bills of Entry as mentioned in Annexures-A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice, 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), should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962;

b) Subject goods having assessable value of Rs.45,13,14,527/- (Rupees Forty Five Crore, Thirteen Lakh, Fourteen Thousand, Five Hundred and Twenty Seven Only) imported through ICD Tumb, under the subject Advance Authorizations should 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, on the Customs Duty demanded(as mentioned at (a) above);

d) Penalty should not be imposed 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 with an intent to evade

payment of Customs Duty 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 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.

f) Bonds executed at the time of import should not be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty as mentioned above and interest thereupon.

13. Defence submission: The importer submitted their written submission dated 27.03.2024 wherein they interalia stated as under:

13.1 Demand is barred by limitation: that the demand is barred by limitation as the demand is raised for the period from 20.10.2017 to 01.02.2018 for Rs.56,25,907/- and from 02.02.2018 to 10.01.2019 for Rs.2,06,11,997/- whereas the show cause notice is issued on date 07.09.2022 and there was no mis-declaration or suppression, so larger period of limitation may not be invoked here, further there was no suppression or mis-statement in this matter by the Noticee and relied on the decision of i) Mohan Textiles Vs. Commissioner of Central Excise, Mumbai-V [2020 (37) G.S.T.L. 246 (Tri. - Mumbai)] and (ii) Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur 2013 (288) E.L.T. 161 (S.C.) (iii) Ashirvad Enterprise Pvt.Ltd. Vs. CESTAT, Kolkata 2013 (288) E.L.T. 172 (Pat.) (iv) Union of India Vs. Rajasthan Spinning & Weaving Mills 2009 (238) E.L.T. 3 (S.C.) (v) Commr. of Cus. (imports), Mumbai Vs. Hundai Heavy Indus. Co. Ltd. [2018 (361) E.L.T. 837 (Bom) (vi) International Metro Civil Contractors Vs. Commr. of S.T. Delhi 2019 (20) G.S.T.L. 66 (Tri. - Del.).

13.2 Bonafide belief: That the importer is involved in this activity of import of various duty free goods as raw material against advance authorisation scheme since long and previously there was no pre-import condition in the notification; that this pre-import condition was introduced for the first time 2017 after the introduction of GST; that the revenue authorities were also clearing the goods without the payment of GST; that nobody insisted for the payment IGST at the time of assessment of goods; further the High Court of Gujarat, vide Judgment dated 04.02.2019, and struck down the pre-import condition with retrospective effect from the date of imposition of said condition i.e. 13-10-2017 declaring the condition as ultra vires the Advance Authorisation Scheme; that the Hon'ble Supreme Court has allowed the appeal of Revenue, however directed the Revenue to permit claim of refund or input credit (whichever applicable and/or wherever customs duty was paid) and 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 and for the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular in this regard and accordingly Board also has issued circulars M.F. (D.R.) Circular No.16/2023-Cus. dated 7-6-2023 and Instruction F. No. 276/73/2019-CX.8A, dated 23-4-2019 on this issue; that whole event shows that divergent judicial pronouncements have been made on the said issue. Hence, no such charges should be levelled on the importer and no penalty should be imposed on the importer/

Noticee; that finally, the pre-import condition was omitted vide Notification No.1/2019-Cus. dated 10-1-2019 and therefore, the Importer was also under the bonafide belief that they need not pay the GST at the time of clearance of the goods; that the importer relied on the decision of (i) Maxim Tubes Company Ltd. Vs. Union of India [2019 (368) E.L.T. 337 (Guj.)], (ii) Commissioner of Central Excise, Vapi Vs. Kolety Gum Industries [2016 (335) E.L.T. 581 (S.C), (iii) Pr. Commr. Of Service Tax Vs. Shree Chanakya Education Society [2018 (362) E.L.T. 741 (Bom.)] (iv) Mela Ram & Sons Vs. Commissioner of Central Excise & ST., Lucknow [2019 (20) G.S.T.L. 75 (Tri. – All).

13.3 Onus of assessment lies with the revenue since goods were assessed, examined and out of charged by the proper officer: That it is evident from the Bills of Entry that Importer had declared everything e.g. description, value, quantity, specification, classification, Advance Authorisation details etc. before the department for the assessment of the goods and it was the duty of the proper officer of the department to assess the goods to duty as per the applicable rate of duty prevalent at that time; that the proper officer of the department had failed to assess the goods properly at the material time of assessment; that the demand is time barred and importer is not at any fault; that they relied on the case laws (i) Oswal Cables Pvt. LTd Vs. Commissioner of C.Ex. & Cys, Siliguri [2016 (333) E.L.T. 345 (Tri. - Kolkata)](ii) Dimension Data India Pvt. Ltd Vs. Commissioner of Customs [2021 (376) E.L.T. 192 (Bom.)] upheld by Hon'ble Supreme Court reported in Commissioner v. Dimension Data India Private Ltd. – [2022 (379) E.L.T. A39 (S.C.)] (iii) Sirthai Superware India Ltd. Vs. Commr. of Customs, Nhava Sheva-III [2020 (371) E.L.T. 324 (Tri. - Mumbai)](iv) Densons Pultreataknik Vs. Commissioner of Central Excise 2003 (155) E.L.T. 211 (S.C.) (v) K-Link Healthcare (India) Pvt. Ltd. Vs. Commr. of Cus. (Air), Chennai 2018 (364) E.L.T. 476 (Tri. - Chennai).

13.4 Importer cannot be held liable for availing exemption of IGST on import of the impugned goods under Advance Authorisation: That they had correctly declared the description, classification, quantity of the goods and its relevant Notification and Advance Authorisation number in the Bills of Entry and presented the goods before the proper officer for assessment, examination and then proper officer after scrutinizing all the parameters had allowed the goods for clearance for further action and as such the Noticee had neither mis-declared the goods nor suppressed any information before the department. If at all any discrepancy is there in the leviability of IGST or any other duty on the impugned goods, then concerned officer should be held responsible because the importer/ Noticee had declared everything and assessment is the duty of the proper officer of the department; that the chronological events of issuance of different Circulars/ Notifications by the Board and passing of different judgments by the Hon'ble Courts proves that the issue is a common issue for various importers and the importer had no mens rea in evading any duty of the Govt.

13.5 Revenue Neutral: That , payment of IGST is revenue neutral because even if GST would have been paid by the importer, the same was available as refund to the notice after export; that they relied upon the case laws (i) CCE Vs. Prakash Industries2013 (290) E.L.T. 693 (Tri. - Del.) (ii) Reliance Ports & Terminals Vs. CCE 2013 (29) S.T.R. 616 (Tri. - Ahmd.) (iii) Monga Brothers Vs. CCE, 2013 (294) E.L.T. 332 (Tri. - Del.), (iv) Alembic Ltd Vs. CCE 2014 (308) E.L.T. 535 (Tri. - Ahmd.) ALEMBIC LTD.Vs CCE, (v) SRF Ltd. v. Commissioner - 2016 (331) E.L.T. A138 (S.C), (vi) Jet Airways India Ltd. Vs. CC-ST 2016-TIOL-2072-CESTAT-MUM (vii) Asmitha Microfin Ltd. Vs. Commr. of Cus. C.Ex. & St, Hyderabad-III 2020 (33) G.S.T.L. 250 (Tri. - Hyd.),(viii) Airasia India Ltd. Vs. Commissioner of Central Tax2021-TIOL-341-CESTAT-BANG.

13.6 Goods are not liable to confiscation under section 111(m) of the Customs Act, 1962: That the goods have already been cleared for home consumption after proper scrutiny by the proper officer of the department. Hence, the said goods are not available for confiscation; that the importer had neither done any mis-declaration nor any suppression for facts, the impugned goods are liable for confiscation under section 111(o) of the Customs Act, 1962.

13.7 No mis-declaration by the Noticee, hence No penalty imposable: That since there is no mis-declaration of description, value or anything else on the part of Importer, no penalty is imposable and relied on case laws (i) Mohit Pater Mills Ltd. Vs. Commissioner of Central Excise, Noida [2012 (285) E.L.T. 379 (Tri. - Del.)] (ii)Meco Instruments Pvt. Ltd Vs. Commissioner of Customs, Sahar, Mumbai [2008 (230) E.L.T. 545 (Tri. – Mumbai)], (iii) Prabha Industries Vs. Commissioner of Customs (Appeals), Cochin COCHIN [2008 (223) E.L.T. 543 (Tri. – Bang.)], (iv) Pramod Kumar Vs. Commissioner of Customs, New Delhi [2018 (363) E.L.T. 411 (Tri. - Del.)], (v) C.C. & C.E, Visakhapatnam Vs. Andhra Pradesh Paper Mills Ltd. [2015 (324) E.L.T. 60 (A.P.)], (vi) Vallabh Wool Industries Vs. Commr. of Cus. (Export), Nhava Sheva [2020 (372) E.L.T. 888 (Tri. - Mumbai)], (vii) Agarwal Industrial Corporation Ltd Vs. Commr. of Cus., Manglore [2020 (373) E.L.T. 280 (Tri. - Bang.)].

13.8 Penalty not imposable where the issue is of interpretational in nature and department was also not sure about imposing IGST on the impugned imported goods at the material time: That as the goods are truly and correctly declared and there was no intention to evade any duty, no penalty can be imposed; that the impugned goods were cleared after proper assessment, examination by the proper officer of the department; that they relied upon the case laws (i) Uniflex Cables Ltd. Vs. Commissioner of Central Excise, Surat-II (ii) Ruby Confectionery Pvt. Ltd Vs. C.C.Ex & ST, Hyderabad-IV 2017 (47) S.T.R. 160 (Tri. - Hyd.) (iii) Commissioner of Service Tax Vs. Idea Cellular Ltd.2019 (366) E.L.T. 616 (Bom.).

13.9 Penalty not imposable in the matter of IGST collected under sub-section 7 of section 3 of Customs Tariff Act, 1975: That in the absence of specific provisions relating to levy of interest and penalty in the respective legislation, interest cannot be recovered and penalty cannot be imposed by taking recourse to machinery relating to recovery of duty; that relied on the decision of Mahindra & Mahindra Ltd. [2022-TIOL-1319-HC-MUM-CUS] and stated that the SLP against the above Order is also dismissed.

13.10 Penalty not imposable under section 112(a) of the Customs Act, 1962: That they have declared the description, value, specification, quantity of the goods, Advance Authorisation number correctly and they have neither committed nor omitted to do anything which can render the impugned goods liable for confiscation under section 111(o) of the Customs Act, 1962 and the impugned imported goods were not prohibited goods, therefore, no penalty under section 112(a) of the Customs Act, 1962 is imposable on the importer.

13.11 Penalty not imposable u/s 114A as there is no wilful mis-statement or suppression of facts: That they had neither colluded nor given any mis-statement nor suppressed any facts and therefore, no penalty is imposable on the Noticee under Section 114A of the Customs Act, 1962 and relied on the case laws (i) Indian Oil Corporation Ltd. Vs. Commissioner of Cus. & C.Ex., Cochin [2004 (178) E.L.T. 713 (Tri. - Bang.)] (ii) Landis Gyr Ltd. Vs. Commissioner of Central Excise , Kolkata-V [2013 (290) E.L.T. 447 (Tri. - Kolkata)], (iii) I.O.C.L. Vs. Commissioner of Service Tax, Silliguri [2013 (294) E.L.T. 97 (Tri. - Kolkata)], (iv) Sirthai Superware India Ltd. Vs. Commr. Of Customs, Nhava Sheva-III [2020 (371) E.L.T. 324 (Tri. - Mumbai)], (v) Thyssenkrupp Industries India P. Ltd. Vs. CC (Import), Mumbai [2016 (343) E.L.T. 533 (Tri. - Mumbai)]

14. The importer vide letter dated 05.04.2024 submitted additional submission wherein they submitted statement of import and export data in respect of Advance Authorization No. 310824604 dated 23.10.2018 and stated that the mandatory condition of pre-import has been complied with and as such the importer under said licence No. 310824604 dated 23.10.2018 is eligible for exemption from payment of IGST. Further, submitted that they are trying to collect and collate data of all import and export in respect of the reaming three license Nos. 0310814757 dated 21.07.2017, 0310820003 dated 22.03.2018 and 0310724681 dated 25.10.2018 to verify how much export is made after the respective import shipments to calculate how much proportionate demand of IGST on such imports may be dropped and therefore, requested to grant 15 day's time to submit import and export data for the remaining said three licenses.

15. Personal Hearing: Personal Hearing in the instant matter was fixed on 29.01.2024. Importer vide E mail dated 30.01.2024 requested to allow 15 days time to attend P.H. Accordingly, next date of Personal Hearing was fixed on 22.02.2024, but importer failed to attend Personal Hearing fixed on 22.02.2024. Therefore, again Personal Hearing was fixed on 27.03.2024. Shri Sanjay Kalra, Consultant of Importer attended Personal Hearing held on 27.03.2024 wherein he reiterated contents of their written submission dated 27.03.2024 and further requested for additional date for Personal Hearing. Accordingly again date of Personal Hearing was fixed on 05.04.2024. During the Personal Hearing held on 05.04.2024 , consultant submitted the documents of export of goods which was manufactured from the goods imported under Advance Authorization.

16. Findings: I have carefully gone through the Show Cause Notice dated 07.09.2022, written submissions dated 27.03.2024 and 05.04.2024 filed by M/s. Vital Laboratories Pvt. Ltd., as well as the records of personal hearing held on 27.03.2024 & 05.04.2024.

17. I find from the records that the present Show Cause Notice dated 07.09.2022 was transferred to Call Book on 30.09.2022 as in the identical issue, the Department had filed SLP No. 25771/2019 against the order of Hon'ble Gujarat High Court in case of M/s. Maxim Tubes Company P. Ltd., and it was informed to the Importer vide letter dated 03.10.2022. Now the said Show Cause Notice has been retrieved from Call Book in view of Hon'ble Supreme Court decision dated 28.04.2023 in case of M/s. Cosmo Films Ltd. and same has been taken up for adjudication. 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. w.e.f 28.04.2023.

18. The issues for consideration before me in these proceedings are as under:-

a) Whether Duty of Customs amounting to Rs. 2,62,37,904/- (Rupees Two Crore, Sixty Two Lakh, Thirty Seven Thousand, Nine Hundred and Four only) in the form of IGST saved in course of imports of the goods through ICD Tumb under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexures- A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice, 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), should be demanded and recovered under Section 28(4) of the Customs Act, 1962?

b) Whether subject goods having assessable value of Rs.45,13,14,527/- (Rupees Forty Five Crore, Thirteen Lakh, Fourteen Thousand, Five Hundred and Twenty Seven Only) imported through ICD Tumb under the subject Advance Authorizations as detailed in the Annexures- A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice should 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) Whether interest should be demanded and recovered under Section 28AA of the Customs Act, 1962, on such duty of Customs as mentioned at (a) above?

d) Whether penalty should be imposed 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 with an intent to evade payment of Customs Duty 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?

e) Whether penalty should be imposed 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?

f) Whether the Bonds executed 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 as mentioned above and interest thereupon?

19. I find that the question of Duty liability with interest and penal liabilities on the Importer would be relevant only if the bone of the contention as to whether the Importer has violated the obligatory 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.

20. Genesis of Pre Import Condition:

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

20.1.1 Relevant 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.

20.1.2 Relevant 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 4-J or will be as indicated in Standard Input Output Norms (SION).

20.1.3 Relevant 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.

20.1.4 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.***

20.2 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.

20.2.1 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.**"

20.2.2 Notification 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*	*In the said notification, in the opening paragraph,-* *(a) .....* *(b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:-*

	[vide number G.S.R. 254 (E), dated the 1 st April, 2015]	*"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;***

20.3 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.

20.4 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".**

20.5 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.

20.6 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 10.01.2019 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 from13.10.2017 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."*

20.7 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 *suomotu* 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.

20.8 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".

20.9 Thus, from the findings and discussion in Para 20 to 20.8 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.

20.10 The importer vide additional submission dated 05.04.2024 has submitted that in respect of Advance Authorization No. 310824604 dated 23.10.2018 the mandatory condition of pre-import has been complied with and as such the import under said licence No. 310824604 dated 23.10.2018 is eligible for exemption from payment of IGST. I find that demand of differential duty of IGST has been raised in respect of only three Advance Authorization which are (i) No. 0310814757 dated 21.07.2017,(ii) 0310820003 dated 22.03.2018 & (iii) 0310724681 dated 25.10.2018 and in Para 10 of the SCN, it has been specifically mentioned that importer has imported Duty free goods as mentioned in Annexure-A to the SCN during the period from 13.10.2017 to 10.01.2019 availing the benefit of Advance Authorization Scheme. In the said Annexure-A to SCN, only the three Advance Licence (i) No. 0310814757 dated 21.07.2017,(ii) 0310820003 dated 22.03.2018 & (iii) 0310724681 dated 25.10.2018 are covered. Therefore, I find that, no demand is raised in respect of Advance Authorizaton No. 310824604 dated 23.10.2018.

21. Whether the Duty of Customs amounting Rs. 2,62,37,904/- (Rupees Two Crore, Sixty Two Lakh, Thirty Seven Thousand, Nine Hundred and Four only) in the form of IGST saved in course of imports of the goods through ICD Tumb under the Advance Authorizations and the corresponding Bills of Entry as mentioned in Annexures- A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice is required to be demanded and recovered (invoking extended period) under Section 28(4) of the Customs Act, 1962 read with Customs Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017and whether Bonds executed by 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:

21.1 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 has 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 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 Authorisation 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 Authorisation. Therefore, extended period is rightly invoked and therefore differential Customs Duty amounting to **Rs. 2,62,37,904/-** is required to be recovered under Section 28 (4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act,1962.

21.2 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 being 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) fulfil 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.

21.3 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 fulfil 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 alongwith interest without any time limit. Therefore, I find that without prejudice to the Provisions of Section 28 (4) of the

Customs Act,1962, the Bond is required to be enforced under Section 143 (3) of the Customs Act, 1962 for the recovery of differential Customs Duty of **Rs. 2,62,37,904/-** alongwith interest.

21.4 I find that the importer has contested that there was no mis-declaration or suppression, so larger period of limitation may not be invoked here. Further the importer relied on the decision of i) Mohan Textiles Vs. Commissioner of Central Excise, Mumbai-V [2020 (37) G.S.T.L. 246 (Tri. - Mumbai)] and (ii) Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur 2013 (288) E.L.T. 161 (S.C.) (iii) Ashirvad Enterprise Pvt. Ltd. Vs. CESTAT, Kolkata 2013 (288) E.L.T. 172 (Pat.) (iv) Union of India Vs. Rajasthan Spinning & Weaving Mills 2009 (238) E.L.T. 3 (S.C.) (v) Commr. of Cus. (imports), Mumbai Vs. Hundai Heavy Indus. Co. Ltd. [2018 (361) E.L.T. 837 (Bom) (vi) International Metro Civil Contractors Vs. Commr. of S.T. Delhi 2019 (20) G.S.T.L. 66 (Tri. - Del.). I find that importer at the time of import under Advance Authorization was well aware the resultant goods have already been exported by filing Shipping Bill prior to the import of the goods, however, with clear intent to evade the payment of IGST, they wrongly claimed the benefit of Notification No.18/2015-Cus dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, therefore, extended period is rightly invoked. Further, at the time of import under Advance Authorization, the importer had filed Bond under Section 143 of the Customs Act, 1962 for the clearance of the goods under Advance Authorization, which does not prescribe any time limit for recovery of duty. Therefore, ratio of none of the aforesaid decisions relied upon by the importer are applicable to instant case.

21.5 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 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.

21.6 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 amounting to Rs. 2,62,37,904/- is liable to be recovered under Section 28(4) of the Customs Act, 1962. Therefore, I find that differential Customs Duty of Rs. 2,62,37,904/- 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.

21.7 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;".

21.8 The importer has contested that in absence of specific provisions relating to levy of interest and penalty in the respective legislation, interest cannot be recovered and penalty cannot be imposed by taking recourse to machinery relating to recovery of duty and placed reliance on the judgement Hon'ble Mumbai High Court in case of Mahindra & Mahindra v. Union of India, [2022-TIOL-1319-HC-MUN-CUS] 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 Special Leave Petition filed against the said order is dismissed by the Hon'ble Supreme Court and therefore no interest on the IGST ,demanded should be recovered. 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. Said decision of Mahindra & Mahindra Ltd reported in [2022-TIOL-1319-HC-MUN-CUS] 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."**

21.9 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."

22. Whether the subject goods having assessable value of Rs.45,13,14,527/- imported through ICD Tumb, under the subject Advance Authorizations as detailed in as mentioned in Annexures- A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice should be held liable for confiscation under Section 111(o) of the Customs Act, 1962:

22.1 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.

22.2 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..."

22.3 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 "

22.4 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)."

22.5 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:-

" .

.

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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."

23. Whether Penalty should be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods availing benefit of exemption Notification without observance of the conditions set out in the notification, and also by reasons of misrepresentation and suppression of facts with an intent to evade payment of Customs Duty 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.

23.1. I find that demand of differential Custom Duty of Rs. 2,62,37,904/- 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 wilful mis-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.

23.2 Further, I rely on the ratio of the decision of Honble 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 is held as under :

"39. The last contention of Shri Amanullah in 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."

I find that 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. Therefore, the ratio of case laws relied upon by the importer is not applicable to present case.

24. 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.

25. 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 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, we are 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 period as 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**."

25.1 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**."

25.2 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 afore 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" However, the importer has not paid the IGST amount and therefore, in absence of the payment of IGST by the Importer, their plea of Revenue Neutrality is not tenable and the case laws relied in this regard are also not tenable.

26. I find that importer has contended that onus of assessment lies with the revenue since goods were assessed, examined and out of charged by the proper officer and relied on case laws as mentioned at Para 13.3 above. I find that after introduction of self-assessment through amendment in Section 17 of the Customs Act, 1962 vide Finance Act, 2017,it is the responsibility of the Importer to correctly declare the description, classification, applicable exemption Notification, applicable Duties, rate of Duties and its relevant Notifications etc. in respect of said imported goods and pay the appropriate Duty accordingly. In the instant case, it is apparent

that importer despite being in knowledge of the fact that the resultant goods was already exported and thereafter, they sought the clearance under Advance Authorization claiming the exemption from IGST under Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017 intentionally and knowingly that 'pre-import condition' was to complied with, however, mis-stated the facts in Bills of Entry. It is therefore very much apparent that Importer, has wilfully violated the provisions of Section 17(1) of the Customs Act, 1962 in as much as they have failed to correctly self-assess the impugned goods and have also wilfully violated the provisions of Sub-section (4) and (4A) of Section 46 of the Customs Act, 1962. I find that in the self assessement regime, importer himself had sought clearance under Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017 and onus is on the importer to prove that he was eligible for the exemption benefit. I place reliance on the decision of Hon'ble Supreme Court in the case of Meridian Industries Ltd. v. Commissioner — 2015 (325) E.L.T. 417 (S.C.) wherein it has been interalia held as under:

"13. *The appellant is seeking the benefit of exemption Notification No. 8/97-C.E. Since it is an exemption notification, onus lies upon the appellant to show that its case falls within the four corners of this notification and is unambiguously covered by the provisions thereof. It is also to be borne in mind that such exemption notifications are to be given strict interpretation and, therefore, unless the assessee is able to make out a clear case in its favour, it is not entitled to claim the benefit thereof. Otherwise, if there is a doubt or two interpretations are possible, one which favours the Department is to be resorted to while construing an exemption notification."*

26.1 Further, I find that ratio of the case law of Oswal Cables Pvt. Ltd Vs. Commissioner of C.Ex. & Cys, Siliguri [2016 (333) E.L.T. 345 (Tri. - Kolkata)],relied upon by the importer is not applicable to the present case as in the said case entire amount of duty demanded alongwith interest was paid by the appellant before the issue of show cause notice and later on it was observed by the Revenue, that petitioner had not calculated Education Cess and it was not paid by the petitioner and therefore, Tribunal held that it was duty of the of assessing officer to properly assess duty and onus cannot be shifted to assessee for not calculating correct rate of duty. Whereas, in the present case, Importer has wrongly claimed the benefit of Exemption Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017.

The ratio of case law of Sirthai Superware India Ltd. v. Commissioner — 2020 (371) E.L.T. 324 (Tri. - Mum.) relied upon by the importer is not applicable to the present case as in the said case, petitioner had correctly made declaration regarding description of goods whereas, in present case, importer has wrongly claimed benefit of IGST Exemption available in Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017.

The ratio of case law of Densons Pultreataknik Vs. Commissioner of Central Excise 2003 (155) E.L.T. 211 (S.C.) and K-Link Healthcare (India) Pvt. Ltd. Vs. Commr. of Cus. (Air), Chennai 2018 (364) E.L.T. 476 (Tri. - Chennai). are related to classification of goods whereas in the present case, issue is wrong availment of Exemption Notification and non compliance of 'Pre Import Condition' prescribed in Notification No. No. 79/2017-Cus, dated 13.10.2017.

27. In view of my findings in the paras *supra*, I pass the following order:

::ORDER::

a) I confirm the Duty of Customs amounting to Rs. 2,62,37,904/- (Rupees Two Crore, Sixty Two Lakh, Thirty Seven Thousand, Nine Hundred and Four only) in the form of IGST saved in course of imports of the goods through ICD Tumb under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexures- A, B1 and B2

and consolidated in Annexure-B attached to Show Cause Notice, and order recovery of the same from M/s. Vital Laboratories Private Limited. in terms of the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962.

b) I hold the subject goods having assessable value of Rs.45,13,14,527/- (Rupees Forty Five Crore, Thirteen Lakh, Fourteen Thousand, Five Hundred and Twenty Seven Only) imported by Vital Laboratories Private Limited. through ICD Tumb under the subject Advance Authorizations as detailed in the Annexures- A, B1 and B2 and consolidated in Annexure-B attached to Show Cause Notice is liable for confiscation under Section 111(o) of the Customs Act, 1962. However, I give them the option to redeem the goods on payment of Fine of Rs.2,00,00,000/- (Rupees Two Crore only).

c) I impose a penalty of Rs. 2,62,37,904/- (Rupees Two Crore, Sixty Two Lakh, Thirty Seven Thousand, Nine Hundred and Four only) plus penalty equal to the applicable interest under Section 28AA of the Customs Act, 1962 payable on the Duty demanded and confirmed at (a) above under Section 114A of the Customs Act, 1962. However, I give an option under proviso to Section 114A of the Customs Act, 1962, to the importer, If the duty and interest as confirmed above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per the first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within said period of 30 days.

d) I refrain from imposing penalty on M/s. Vital Laboratories Private Limited under Section 112 (a) of the Customs Act, 1962 for the reasons discussed in para 24 supra.

e) I order to enforce the Bonds executed by M/s. Vital Laboratories Private Limited in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty alongwith interest as mentioned at (a) above.

28. 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.

29. The Show Cause Notice No. VIII/10-10/Commr./O&A/2022-23 dated 07.09.2022 is disposed off in above terms.

10.04.2024

(Shiv Kumar Sharma)
Principal Commissioner

DIN-20240471MN00004404F6
F.No. VIII/10-10/Commr./O&A/2022-23 Date:10.04.2024

To,
M/s. Vital Laboratories Private Limited,
Plot No. 1710 & A1-2208, GIDC, Phase-III,
Vapi-396195

Copy to:

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad for information please.
2. The Additional Commissioner of Customs (TRC), Ahmedabad for necessary action.
3. The Deputy Commissioner of Customs, ICD, Tumb.
4. The Superintendent of Customs, Systems, Ahmedabad in PDF format for uploading on the Official Website of Customs Commissionerate, Ahmedabad.
5. Guard File.