प्रधान आयुक्त का कार्यालय, सीमा शुल्क, अहमदाबाद
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS, AHMEDABAD
"सीमा शुल्क भवन", पहली मंजिल, पुराने हाई कोर्ट के सामने, नवरंगपुरा, अहमदाबाद – 380009
"CUSTOMS HOUSE", FIRST FLOOR, OPP. OLD HIGH COURT, NAVRANGPURA, AHMEDABAD – 380009

PHONE : (079) 27544630FAX (079) 27542343E-mail: cus-ahmd-adj@gov.in

निबन्धित पावती डाक द्वारा / By SPEED POST A.D.

फा. सं. : File No. VIII/10-22/COMMR./O&A/2022-23

DIN-20240471MN0000999CB7

आदेश की तारीख/Date of Order : 18.04.2024

जारी करने की तारीख/Date of Issue: 18.04.2024

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

Passed by : - Shiv Kumar Sharma, Principal Commissioner

मूलआदेशसंख्या :

Order-In-Original No: AHM-CUSTM-000-PR.COMMR.-10-2024-25 Dated 18.04.2024 in the case of **M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004**

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1 जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

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

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है।अपील सहायक रजिस्ट्रार, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, दुसरी मंज़िल, बहुमाली भवन, गिरिधर नगर पुल के बाजु मे, गिरिधरनगर, असारवा, अह्मदाबाद-380004 को सम्बोधित होनी चाहिए।

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, Multistory Building, Nr. Girdhar Nagar Bridge, Girdhar Nagar, Asarwa, *Ahmedabad* – 380004.

3. उक्त अपील प्रारुप सं. सी .ए. 3 में दाखिल की जानी चाहिए। उस पर सीमा शुल्क (अपील) नियमावली, 1982 के नियम 3 के उप नियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त

अपील को चार प्रतियोँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए)। अपील से सम्बंधित सभी दस्तावेज भी चार प्रतियोँ में अग्रेषित किए जाने चाहिए।

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

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं, चार प्रतियों में दाखिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलगन की जाएंगी (उनमें से कम से कम एक प्रमाणित प्रति होगी) ।

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. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

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

6. केंद्रिय सीमा शुल्क अधिनियम, 1962 की धारा 129 ऐ के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

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. इस आदेश के विरूद्ध सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारे मे विवाद है उसका भुकतान करके अपील की जा सकती है।

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

8. न्यायालय शुल्क अधिनियम, 1870 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर उपयुक्त न्यायालय शुल्क टिकट लगा होना चाहिए।

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

Subject: - Show-Cause-Notice File No. VIII/10-22/Commr./O&A/2022-23 dated 19/10/2022 issued by the Commissioner of Customs, Customs, Ahmedabadto M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004.

BRIEF FACTS OF THE CASE: -

M/s. Sakar Industries Pvt. Ltd., an importer having IEC No.0802000703 and having their registered office at H10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004(hereinafter referred to as ' the Importer' or 'the Noticee' for the sake of brevity)are engaged in theimport of Aluminium Scrap and Aluminium Ingot for manufacture of Aluminium Alloy Ingots and Aluminium Cast Granulates through several ports, without payment of duty of Customs under cover of Advance Authorizations, on the strength of the Customs Notification No.18/2015-Cus dated 01.04.2015, as amended by the Customs Notification No.79/2017-Cus dated 13.10.2017 and availed benefit of exemption from payment of IGST and/or Compensation Cess on the goods so imported.

2. Whereas intelligence was developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter referred to as DRI) to the effect that M/s. Sakar Industries Pvt. Ltd.(importer), had imported various input materials without payment of Duty of Customs under cover of a number of Advance Authorizations issued by regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importer availed benefit of exemption extended by Notification No.18/2015-Cus dated 01.04.2015, as amended by the Customs Notification No. 79/2017-Cus 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 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 However, the intelligence developed by DRI, Kolkata, clearly indicated that although M/s. Sakar Industries Pvt. Ltd. availed such exemption in respect of 08 Advance Authorizations, 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, investigation was initiated by the Officers of ICD, Customs, Khodiyar by way of issuance of Summons under Section 108 of the Customs Act, 1962.The importer was requested by the Superintendent of Customs (Imports), ICD Khodiyar vide letters dated 19.01.2021 and 12.11.2021 and also summoned vide summons dated 20.06.2022for production of documents in connection with such imports. **Shri Ramesh R. Shah, Director (Import Export-Operation)** of the said Company vide letter dated 30.06.2022requested for some time to submit the information. They have submitted the required information vide letter dated 21.7.2022 and emails dtd.16.07.2022, 20.07.2022and 27.07.2022.The summary of the details are as under:-

Table-1

Advance Authorization specific No. & date of the first Bill of Entry and first Shipping Bill						
Sr. No	**AA No**	**AA Date**	**First BE No**	**BE Date**	**First SB No**	**SB Date**
1	0810141768	12.01.2018	7805350	27.08.2018	9825907	10.11.2017
2	810140486	13.06.2017	3737972	24.10.2017	9655077	02.11.2017
3	810142182	20.03.2018	7778704	24.04.2018	4345807	24.07.2018*
4	810143679	10.10.2018	8551446	22.10.2018	8399865	22.10.2018
5	810143680	10.10.2018	8439129	12.10.2018	5881275	29.07.2019*
6	810144084	13.12.2018	9297254	17.12.2018	9881906	26.12.2018*
7	0810142253	27.03.2018	6216969	02.05.2018	3721862	24.03.2018
8	0810141977	12.02.2018	5951050	12.04.2018	3093090	24.02.2018

2.3 Under the Advance Authorizations mentioned in the above chart there are various Shipping Bills and corresponding Bills of Entry. Under Advance Authorizations except Advance Authorisation mentioned above at Sr. No. 3,5&6, they made exports

first before imports were made. Quite naturally, they did not manufacture the goods which were exported under the subject 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 those Shipping Bills, were not manufactured of the Duty-free materials imported under the Advance Authorization in question. This prima facie resulted in non-compliance of the pre-import condition.

2.4 Also, in the letter dated 30.06.2022, the importer stated that they have fulfilled the condition of physical export in terms of Notification No.79/2017-Cus. It appears that in respect of Advance Authorization at Sr. No.3 of the above chart, the importer has paid IGST in some cases and in all other cases of said Advance Authorizations, it appears that they have first imported raw materials and then exported finished goods. Therefore, it appears that pre-import conditions was fulfilled by the importer in respect of said Advance Authorisation. In respect of Advance Authorisation at Sr. No.5 and Sr. No.6,it appears that they have first imported the raw-materials and then exported finished goods. Therefore, these three Advance Authorizations are not considered for calculation of IGST not paid.

2.5 It appears that in respect of the Advance Authorizations mentioned above at Sr. No. 1,2,4,7 & 8, 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 implied 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. Further, the detailed study of the data revealed the following:-

Table-2

Advance Authorization specific No. &Bill of Entry No./Date and IGST benefit taken									
Sr. No	**AA No**	**AA Date**	**Shipping Bill No.**	**Shipping Bill date**	**BE No**	**BE Date**	**Port Code**	**Taxable Value Rs.**	**IGST Exemption Rs.**
1	810141768	12.01.2018	1229495	29.11.2017	5487461	3/7/2018	INSBI6	3670359	660665
2					5581575	3/14/2018	INSBI6	3582130	644783
3					5587162	3/15/2018	INSBI6	2505133	450924
4					5656658	3/20/2018	INSBI6	3324920	598486
5					5848324	4/4/2018	INSBI6	8352368	1503426
6			1419511	08.12.2017	5960215	4/12/2018	INSBI6	8435034	1518306
7					5958552	4/12/2018	INSBI6	8123517	1462233
8					5960214	4/12/2018	INSBI6	8122579	1462064
9					5958240	4/12/2018	INSBI6	8435503	1518391
10			1710990	21.12.2017	6218514	5/2/2018	INSBI6	4082624	734872
11					6216962	5/2/2018	INSBI6	4125342	742562
12					6216965	5/2/2018	INSBI6	4100931	738168
13					6219248	5/2/2018	INSBI6	2794813	503066
14					6320412	5/10/2018	INSBI6	7830322	1409458
15					6319715	5/10/2018	INSBI6	4348035	782646
16			1843310	28.12.2017	6323152	5/10/2018	INSBI6	3930660	707519
17					6322179	5/10/2018	INSBI6	7481075	1346594
18					6322807	5/10/2018	INSBI6	8011895	1442141
19					6608017	5/31/2018	INSBI6	8817334	1587120
20			1994974	04.01.2018	6753610	6/11/2018	INSBI6	2256879	406238
21					6852648	6/18/2018	INSBI6	9899744	1781954
22					6850702	6/18/2018	INSBI6	9897942	1781630
23			2188644	13.01.2018	6850705	6/18/2018	INSBI6	9892540	1780657
24					6908987	6/22/2018	INSBI6	4974140	895345
25			2283734	18.01.2018	6993900	6/28/2018	INSBI6	4092122	736582
26					7044178	7/2/2018	INSBI6	7945186	1430133

27			2750846	09.02.2018	7123079	7/7/2018	INSBI6	8589658	1546138
28					7120875	7/7/2018	INSBI6	8598940	1547809
29					7264289	7/18/2018	INSBI6	8184720	1473250
30			2808240	12.02.2018	7407139	7/28/2018	INSBI6	8132789	1463902
31					7494506	8/3/2018	INSBI6	3955564	712002
32					7491392	8/3/2018	INSBI6	4435508	798391
33	810140486	6/13/2017	9755994	07.11.2017	3984818	11/13/2017	INSBI6	3341423	601456
34					3984693	11/13/2017	INSBI6	7233278	1301990
35					3984671	11/13/2017	INSBI6	7261415	1307055
36			9655077	02.11.2017	3737972	10/24/2017	INSBI6	3806673	685201
37					3892845	11/6/2017	INSBI6	7188497	1293929
38					3892742	11/6/2017	INSBI6	7189025	1294025
39	810143679	10/10/2018	8399865	22.10.2018	8551446	10/22/2018	INSBI6	8088515	1455933
40			8730358	05.11.2018	8466631	10/15/2018	INSBI6	12403209	2232578
41					8511782	10/18/2018	INSBI6	5307675	955382
42					8513198	10/18/2018	INSBI6	5734171	1032151
43					8511781	10/18/2018	INSBI6	4320357	777664
44			8849198	13.11.2018	8511814	10/18/2018	INSBI6	4336791	780622
45					8511811	10/18/2018	INSBI6	4424244	796364
46					8633738	10/27/2018	INSBI6	2296703	413407
47					8634871	10/27/2018	INSBI6	2337306	420715
48					8662340	10/30/2018	INSBI6	8613450	1550421
49					8696131	11/1/2018	INSBI6	2049398	368892
50					8698506	11/1/2018	INSBI6	4266864	768036
51					8695757	11/1/2018	INSBI6	2114558	380620
52					8695681	11/1/2018	INSBI6	2229092	401237
53			9096731	24.11.2018	8695679	11/1/2018	INSBI6	5850437	1053079
54					8791686	11/9/2018	INSBI6	1940948	349371
55					8838133	11/13/2018	INSBI6	2396956	431452
56					8837978	11/13/2018	INSBI6	3145227	566141
57			9423948	07.12.2018	8909870	11/19/2018	INSBI6	4604655	828838
58					8950142	11/22/2018	INSBI6	5664979	1019696
59					9010889	11/26/2018	INSBI6	4164958	749692
60					9011179	11/26/2018	INSBI6	2979553	536320
61					9101441	12/3/2018	INSBI6	3694470	665005
62			9881906	26.12.2018	8958113	11/22/2018	INSBI6	7141035	1285386
63					9032864	11/28/2018	INSBI6	1825935	328668
64					9068181	11/30/2018	INSBI6	4349442	782900
65			5253017	01.07.2019	9101556	12/3/2018	INSBI6	3711318	668037
66	810141977	2/12/2018	3093090	24.02.2018	5951050	4/12/2018	INSBI6	2261768	407118
67					6109951	4/24/2018	INSBI6	1263648	227457
68			3577926	19.03.2018	5566900	3/13/2018	INSBI6	6557123	1180282
69					5569640	3/14/2018	INSBI6	2010562	361901
70					5569625	3/14/2018	INSBI6	2408995	433619
71					5569892	3/14/2018	INSBI6	2220601	399708
72					5569915	3/14/2018	INSBI6	2570666	462720
73					5569634	3/14/2018	INSBI6	5801212	1044218
74					5569888	3/14/2018	INSBI6	2354815	423867
75					5597128	3/15/2018	INSBI6	2143150	385767
76					5637247	3/19/2018	INSBI6	4076958	733852
77			3692843	23.03.2018	5548344	3/12/2018	INSBI6	2652158	477388
78					5655704	3/20/2018	INSBI6	2058876	370598
79					5660907	3/20/2018	INSBI6	6484433	1167198
80					5672721	3/21/2018	INSBI6	2274805	409465
81					5667467	3/21/2018	INSBI6	2379456	428302

82					5709399	3/23/2018	INSBI6	2435703	438427
83					5932139	4/10/2018	INSBI6	2323207	418177
84					5940758	4/11/2018	INSBI6	2220407	399673
85					5938144	4/11/2018	INSBI6	1899743	34195
86					5946142	4/11/2018	INSBI6	2209982	397797
87					6022808	4/17/2018	INSBI6	2254818	405867
88			4082596	09.04.2018	5738738	3/26/2018	INSBI6	2284217	411159
89					5756197	3/27/2018	INSBI6	2297633	413574
90					5755657	3/27/2018	INSBI6	1893554	340840
91					5755869	3/27/2018	INSBI6	1987330	357719
92					5755904	3/27/2018	INSBI6	2174849	391473
93					5755905	3/27/2018	INSBI6	2107707	379387
94					5755562	3/27/2018	INSBI6	2372087	426976
95					5760430	3/27/2018	INSBI6	2219260	399467
96					5829223	4/2/2018	INSBI6	2323757	418276
97					5843310	4/4/2018	INSBI6	2438837	438991
98					5842916	4/4/2018	INSBI6	2213213	398378
99					5842915	4/4/2018	INSBI6	2276412	409754
100			4338455	20.04.2018	5867321	4/5/2018	INSBI6	2262805	407305
101					5878152	4/6/2018	INSBI6	2338362	420905
102					5894805	4/7/2018	INSBI6	1979474	356305
103					5894819	4/7/2018	INSBI6	2083130	374963
104					5919155	4/9/2018	INSBI6	2346877	422438
105					5932286	4/10/2018	INSBI6	2311125	416003
106					5931486	4/10/2018	INSBI6	2395898	431262
107					5931623	4/10/2018	INSBI6	2025393	364571
108			3147511	27.02.2018	5951627	4/12/2018	INSBI6	4590677	826322
109					5961988	4/12/2018	INSBI6	4789338	862081
110					5962027	4/12/2018	INSBI6	5115556	920800
111					5969644	4/13/2018	INSBI6	2046628	368393
112					6051176	4/19/2018	INSBI6	2407082	433275
113	810142253	3/27/2018	3721862	24.03.2018	6216969	5/2/2018	INSBI6	4088726	735971
114					6216975	5/2/2018	INSBI6	4097880	737618
	TOTAL (A) ICD KHODIYAR :--							**491273756**	**88429279**
115	810143679	10.10.2018	9096731	24.11.2018	8713141	11/2/2018	INSAU6	8178208	1472077
116					8713070	11/2/2018	INSAU6	5364502	965610
117					8901647	11/17/2018	INSAU6	5084274	915169
118			9423948	07.12.2018	8902065	11/17/2018	INSAU6	4357526	784355
119					8901877	11/17/2018	INSAU6	6558862	1180595
	TOTAL (B) ICD SANAND :--							**29543372**	**5317806**
120	810141768	12.01.2018	2750846	09.02.2018	7146221	7/9/2018	INMUN1	4494307	808975
	TOTAL (C) MUNDRA:--							**4494307**	**808975**
121	810141768	12.01.2018	2808240	12.02.2018	7317061	7/21/2018	INNSA1	9039487	1627108
122			1994974	04.01.2018	6602542	5/31/2018	INNSA1	8822784	1588101
	TOTAL (D) JNPT NHAVA SHEVA:--							**17862271**	**3215209**
	TOTAL (A) TO (D) JNPT NHAVA SHEVA:--							**543173706**	**97771269**

Table-3

Port	Advance Authorization No.	AA Date	Taxable Value Rs.	IGST Benefit Rs.
ICD Khodiyar	810141768	12.01.2018	20 09 30 306	3 61 67 455
	810140486	13/06/2017	3 60 20 311	64 83 656
	810143679	10/10/2018	11 99 92 246	2 15 98 607
	810141977	12/02/2018	12 61 44 287	2 27 05 972
	810142253	27/03/2018	81 86 606	14 73 589

Total (A) ICD Khodiyar :--			**49 12 73 756**	**8 84 29 279**
ICD Sanand	810143679	10.10.2018	2 95 43 372	53 17 806
Total (B) Sanand :--			**2 95 43 372**	**53 17 806**
Mundra	810141768	12.01.2018	44 94 307	8 08 975
Total (C) Mundra :--			**44 94 307**	**8 08 975**
Nhava Sheva	810141768	12.01.2018	1 78 62 271	32 15 209
Total (D) Nhava Sheva :--			**1 78 62 271**	**32 15 209**
Total (A) to (D):--			**54 31 73 706**	**9 77 71 269**

2.6 As evident from Table-2above, the importer have violated such pre-import condition, leading to non-payment of IGST in 122 (One hundred and Twenty-two) Bills of Entry under cover of which imports were made involving IGST amount of **Rs.9,77,71,269/-** against the 05 (five) Advance Authorizations mentioned above. From Table-3, out of these 122 Bills of Entry, 114 (One Hundred and Fourteen) Bills of Entry pertain to ICD Khodiyar, Ahmedabad involving IGST amount of Rs. **8,84,29,279**/-; while 05 (Five) Bills of Entry pertain to Sanand Port involving IGST amount of Rs. **53,17,805**/-, 01 (one) Bill of Entry pertains to Mundra Port involving IGST amount of **Rs. 8,08,975/-**and 02 (Two) Bills of Entry pertain to Nhava Seva Port involving IGST amount of **Rs. 32,15,209/-.**

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

a) Para 4.03 of the Foreign Trade Policy (2015-20);
b) Para 4.05 of the Foreign Trade Policy (2015-20);
c) Para 4.13 of the Foreign Trade Policy (2015-20);
d) Para 4.14 of the Foreign Trade Policy (2015-20);
e) 9.20 of the Foreign Trade Policy (2015-20);
f) Para 4.27 of the Hand Book of Procedures (2015-20);
g) Section 2(e) of the Foreign Trade (DR) Act, 1992;
h) DGFT Notification No. 33/2015-20 dated 13.10.2017;
i) DGFT Notification No. 31/2013 (RE-2013) dated 01.08.2013;
j) DGFT Circular No. 3/2013 (RE-2013) dated, 02.08.2013;
k) Notification No 18/2015-Customs dated 01.04.2015;
l) Notification No 79/2017-Customs dated 13.10.2017;
m) Section 17 of the Customs Act, 1962;
n) Section 46 (4) of the Customs Act, 1962;
o) Section 111(o) of the Customs Act, 1962;
p) Section 112(a) of the Customs Act;
q) Section 124 of the Customs Act, 1962;

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

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

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

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

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

4.13 re-import condition in certain cases-

(i) DGFT may, by Notification, impose pre-import condition for inputs under this Chapter.
(ii) Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).
(iii) Import of drugs from unregistered sources shall have pre-import condition.

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

4.14 Details of Duties exempted-

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

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

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

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

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

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

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

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

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

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

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

S.O. (E): In exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby makes following amendments in Foreign Trade Policy

2015-20. 1. Para 4.14 is amended to read as under: "4.14: Details of Duties exempted Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorization for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition."

.....

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

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

2.After para 4.1.14 of FTP a new para 4.1.15 is inserted.
"4.1.15 Wherever SION permits use of either (a) a generic input or (b) alternative inputs, unless the name of the specific input(s) [which has (have) been used in manufacturing the export product] gets indicated / endorsed in the relevant shipping bill and these inputs, so endorsed, match the description in the relevant bill of entry, the concerned Authorisation will not be redeemed. In other words, the name/description of the input used (or to be used) in the Authorisation must match exactly the name/description endorsed in the shipping bill. At the time of discharge of export obligation (EODC) or at the time of redemption, RA shall allow only those inputs which have been specifically indicated in the shipping bill."

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

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

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

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

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

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

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

G.S.R. 254 (E).- In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India

against a valid Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the said Customs Tariff Act, subject to the following conditions, namely :-

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

(ii) that the said authorisation bears,-

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

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

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

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

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

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

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

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

be, then the imported materials may be cleared without furnishing a bond specified in condition (v);

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

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

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

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

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

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

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

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

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

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

Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table:-

-: Table:-

S. No.	*Notification number and date*	*Amendments*
(1)	*(2)*	*(3)*

1	16/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 252(E), dated the 1 st April, 2015]	In the said notification,- (a) in the opening paragraph, after clause (ii), the following shall be inserted, namely:- "(iii) the whole of integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the said Customs Tariff Act: Provided that the exemption from integrated tax and the goods and services tax compensation cess shall be available up to the 31st March, 2018."; (b) in the Explanation C (II), for the words "However, the following categories of supplies, shall also be counted towards fulfilment of export obligation:", the words "However, in authorisations where exemption from integrated tax and goods and service tax compensation cess is not availed, the following categories of supplies, shall also be counted towards fulfilment of export obligation:" shall be substituted.
2.	18/2015-Customs, dated the 1 st April, 2015 [vide number G.S.R. 254 (E), dated the 1 st April, 2015]	In the said notification, in the opening paragraph,- (a) for the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub- 2 sections (1), (3) and (5) of section 3, safeguard duty leviable thereon under section 8B and anti-dumping duty leviable thereon under section 9A", the words, brackets, figures and letters "from the whole of the additional duty 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 31st March, 2018.".

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

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

(2) The proper officer may verify the entries made under section 46 or section 50 and the self-assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

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

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

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

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

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

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

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

"111. Confiscation of improperly imported goods, etc. -
The following goods brought from a place outside India shall be liable to confiscation: -
.....
(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

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

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

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

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

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

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

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

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

4.1 Whereas Advance Authorizations are issued by the Directorate General of Foreign Trade (DGFT) to importers for import of various raw materials without payment of Customs Duty and the said export promotional scheme is governed by

Chapter 4 of the Foreign Trade Policy (2015-20), applicable for the subject case and corresponding Chapter 4 of the Hand Book of Procedures (2015-20). Prior to GST regime, in terms of the provisions of Para 4.14 of the prevailing Foreign Trade Policy (2015-20), the importer was allowed to enjoy benefit of exemption in respect of Basic Customs Duty as well as Additional Customs Duties, Anti-dumping Duty and Safeguard Duty, while importing such input materials under Advance Authorizations.

4.2 With the introduction of GST w.e.f 01.07.2017, Additional Customs Duties (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Accordingly, Notification No.26/2017-Customs dated 29thJune 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. It was a conscious decision to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of Duty during supply to DTA, or to take refund of such IGST amount within a specified period. The corresponding changes in the Policy were brought through Trade Notice No.11/2018 dated 30.06.2017. It is pertinent to note here that while in the pre-GST regime, blanket exemption was allowed in respect of all Duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

4.3 However, subsequently, the Government of India decided to exempt imports under Advance Authorizations from payment of IGST, by introduction of the Customs Notification No. 79/2017-Cus dated 13.10.2017. However, such exemption from the payment of IGST was made conditional. The said Notification No. 79/2017-Cus 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, in the manner as specified in the corresponding entry in column (3) of the said Table. Only the relevant portion pertaining to the Customs Notification No.18/2015 dated 01.04.2015 is reproduced in Para 3(j) above, which may be referred to.

4.4 Therefore, by issuing the subject Notification No.79/2017-Cus dated 13.10.2017, the Government of India amended inter-alia Notification No.18/2015-Cus dated 01.04.2015, and extended exemption from the payment of IGST at the time of import of input materials under Advance Authorizations. But such exemption was not absolute. As a rider, certain conditions were incorporated in the subject Notification. One being the condition that such exemption can only be extended so long as exports made under the Advance Authorization are physical exports in nature and the other being the condition that to avail such benefit one has to follow the pre-import condition.

5. The Director General of Foreign Trade, in the meanwhile, issued one Notification No. 33/2015-20 dated 13.10.2017, which amended the provision of Para 4.14 of the Foreign Trade Policy (2015-20), to incorporate the exemption from IGST, subject to compliance of the pre-import and physical export conditions. It is pertinent to mention, that the principal Customs Notification No.18/2015-Cus, being an EXIM Notification, was amended by the Notification No.79/2017-Cus dated 13.10.2017, in tandem with the changed Policy by integrating the same provisions for proper implementation of the provisions of the Foreign Trade Policy (2015-20).

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

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

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

6. Physical Export condition in relation to the Foreign Trade Policy (2015-20) and the Notification No.79/2017-Cus dated 13.10.2017, and whether it was followed by the importer.

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

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

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

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

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

6.3 This implies that to avail the benefit of exemption as extended through amendment of Para 4.14 of the Policy by virtue of the DGFT Notification No. 33/2015-20 dated 13.10.2017, one has to ensure that the entire exports made under an Advance Authorization towards discharge of EO are physical exports. In case the entire exports made, do not fall in the category of physical exports, the Advance Authorization automatically sets disqualified for the purpose of exemption.

7. Pre-import condition in relation to the Foreign Trade Policy (2015-20) and the Notification No.79/2017-Cus dated 13.10.2017; Determination of whether the goods imported under the impugned Advance Authorization comply with the pre-import condition, and whether it was followed by the importer.

7.1 Pre-import condition has been part of the Policy for long. In terms of Para 4.13 of the Policy, there are certain goods for which pre-import condition was made applicable through issuance of DGFT Notification way before the Notification dated 13.10.2017 came into being.

7.2 The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)]. It demands that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage.This Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only

possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built, which is required to be followed, barring where otherwise use has been allowed in terms of Para 4.27 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.12 of the Policy (2009-14)].

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

7.4 DGFT Notification No. 31/2013 (RE-2013) dated 01.08.2013, was issued to incorporate a new Para No. 4.1.15 in the Foreign Trade Policy. The said Para is an extension of the Para 4.1.3[Para 4.03 of the Policy (2015-2000] and stipulated further condition which clarified the ambit of the aforesaid Para 4.1.3. Inputs actually imported must be used in the export product.

7.5 A Circular No. 3/2013 (RE-2013) dated, 02.08.2013, was also issued by the Ministry of Commerce in line with the aforesaid Notification. The Circular reiterates that Duty free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the Notification No. 31 issued on 1.8.2013.

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

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

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

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

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

7.9 The pre-import condition requires the imported materials to be used for the manufacture of finished goods, which are in turn required to be exported towards discharge of export obligation, and the same is only possible when the export happens subsequent to the commencement of imports after allowing reasonable time to

manufacture finished goods out of the same. Therefore, when the law demands pre-import condition on the input materials to be imported, goods cannot be exported in anticipation of Advance Authorization. Provisions of Para 4.27(a) & (b), i.e export in anticipation of Authorization and the pre-import condition on the input materials are mutually exclusive and cannot go hand in hand.

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

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

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

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

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

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

8.3 Conditions No. (v) & (vi) of the Notification No. 18/2015-Cus dated 01.04.2015, prescribe the modalities to be followed for import of Duty-free goods under Advance Authorization, in cases, where export obligation is discharged in full, before the commencement of imports. This is to ensure that the importer does not enjoy the benefit of Duty exemption on raw materials twice for the same export. It is but natural that in such a situation the importer would have used domestically procured materials for the purpose of manufacture of goods that have been exported and on which required Duties would have been paid and credit of the same would also have been availed by the importer. The importer has in this kind of situation, two options in terms of the above Notification:

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

> *"(v)that in respect of imports made after the discharge of export obligation in full, if facility under rule 18 (rebate of duty paid on materials used in the*

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

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

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

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

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

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

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

9. 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) and also the conditions of the newly introduced condition (xii) of Customs Notification No. 18/2015-Cus 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.

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

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

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

iii) In cases, where multiple input items are allowed to be imported under an Advance Authorization, and out of a set of import items, only a few are imported prior to commencement of export, it implies that in the production of the export goods, except for the item already imported, the importer had to utilize materials other than the Duty-free materials imported under the subject Advance Authorization. The other input materials are imported subsequently, which do not and could not have gone into 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 priorto export.Subsequently, exports are effected on a scale which is not commensurate with the imports already made. If the quantum of exports made is more than the corresponding imports made during that period, then it indicates that materials used for manufacture of the export goods were procured otherwise. Rest of the imports are made later which never go into production of the goods exported under the subject Advance Authorization.It is then implied that the imported materials have not been utilized in entirety for manufacture of the export goods, and therefore, pre-import condition is violated.

10. Whether the Advance Authorizations issued prior to 13.10.2017 should come under purview of investigation.

10.1 It is but natural that the Advance Authorizations which were issued prior to 13.10.2017, would not and could not contain condition written on the body of the Authorization, that one has to fulfill pre-import condition, for the bare fact that no such pre-import condition was specifically incorporated in the parent Notification No.18/2015-Cus dated 01.04.2015. The said condition was introduced by the Notification No. 79/2017-Cus dated 13.10.2017, by amending the principal Customs Notification. Therefore, for the Advance Authorizations issued prior to 13.10.2017, logically there was no obligation to comply with the pre-import condition. At the same time, there was no exemption from the IGST either during that period.Notifications are published in the public domain, and every individual affected by it is aware of what benefit it extends and in return, what conditions are required to be complied with. To avail such benefits extended by the Notification, one is duty bound to observe the formalities and/or comply with the conditions imposed in the Notification.

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

10.3 Therefore, it is not a matter of concern whether an Advance Authorization was issued prior to or after 13.10.2017, to ascertain whether the same is entitled for benefit of exemption from IGST, the Advance Authorization should pass the test of complying with both the pre-import and physical export conditions.

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

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

11.2 Allowing exemption for part compliance is not reflective in the Legislative intent. For proportional payment of Customs Duty in case of partial fulfilment of EO, specific provisions have been made in the Policy, which, in turn has been incorporated in the Customs Notification.No such provision has been made in respect of imports w.r.t Advance Authorizations with "pre-import and physical exports" conditions. In absence of the same, compliance is required in respect of the Authorization as a whole. In other words, if there are multiple shipments of import & multiple shipments

of export, then so long as there are some shipments in respect of which Duty-free imports have taken place later & exports corresponding to the same have been done before, then, the pre-import condition stipulated in the IGST exemption Notification gets violated.Once that happens, then even if there are some shipments corresponding to which imports have taken place first & exports made out of the same thereafter, the IGST exemption would not be available, as the benefits of exemption applies to the license as a whole.Once an Advance Authorization has been defaulted, there is no provision to consider such default in proportion to the offence committed.

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

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

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

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

12. Violations in respect of the Foreign Trade Policy (2015-20) and the condition of the Notification No.79/2017-Cus dated 13.10.2017 in respect of the imports made by the importer:-

12.1 Customs notification No. 79/2017-Cus 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 Notification 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.

12.2 DGFT Notification No. 33/2015-20 dated 13.10.2017 amended the Para 4.14 of the Foreign Trade Policy (2015-20). It has been clearly stated in the said Para 4.14 of the Policy that-

*"imports under Advance **Authorisation for physical exports** are also exempt from whole of the integrated tax and Compensation 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."*

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

12.3 For the purpose of availing the benefit of exemption from payment of IGST in terms of Para 4.14 of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No.79/2017-Cus dated 13.10.2017, it is obligatory to comply with the Pre-import as well as physical export conditions. Therefore, if for reasons as elaborated in earlier paras, the Duty-free materials are not subjected to the process of manufacture of finished goods, which are in turn exported under the subject Advance Authorization, condition of pre-import gets violated.

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

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

13.1 Para 4.13 (i) states that:-

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

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

13.2 Para 4.13 of the Foreign Trade Policy states that to impose pre-import condition the Directorate General of Foreign Trade is required to issue Notification for that purpose. The DGFT has followed the said principle and accordingly issued Notification No.33/2015-20 dated 13.10.2017. The said Notification is general in nature and does not exclude any goods from the purview of the same. Only condition that is imposed that for one and all goods, is that pre-import condition has to be followed in case the importer wants to avail the benefit of IGST exemption. In absence of any specific negative list containing specific mention of set of goods, which may not be covered by the said provision, it has been ensured that all goods are covered by the said Notification, provided that the importer intends to avail exemption of IGST. It is a common practice and understanding that in case of general provision, the same is applicable to one and all except those covered by a specific clause in the form of negative list.It is neither practicable nor possible to specify each and every single item on earth for the purpose. In absence of any such negative list offered by the said Notification, such pre-import condition becomes applicable for all goods to be imported.

13.3 Therefore, the question of specific mention of a particular set of items does not arise. It is impracticable and impossible to issue a Notification mentioning all possible goods, which could be imported under Advance Authorization, to bring them within the ambit of pre-import condition. Much simpler and conventional way to cover goods across board is to issue Notification in general, without any negative list. The DGFT authority has done the same, and issued the subject Notification No. 33/2015-20 dated 13.10.2017, which without any shadow of doubt covers all goods including the one being imported by the Noticee. Therefore, to mis-interpret the scope of Para 4.13

of the Foreign Trade Policy, and to make an attempt to confine the scope of the said Para to infer that the goods imported are not covered by the said Para is not in consonance with the Policy in vogue.

13.4 Interpretation that the reference to "inputs with pre-import condition" in the Foreign Trade Policy and Hand Book of Procedures should be construed to mean only those inputs which have been notified under Appendix-4J also appears to be distorted, misleading and contrary to the spirit of the Policy. Para 4.13 states that "DGFT may, by Notification, impose pre-import condition for inputs...". The term Inputs has been used in general without confining its' scope to the set of limited items covered by Appendix-4J. As discussed below, the purpose of Appendix-4J is to specify export obligation period of a few inputs, for which pre-import condition has also been imposed. But that does not mean, the item has to be specified in Appendix-4J, for being considered as inputs having pre-import condition imposed. The basic requirement of the Para is to issue a Notification under Foreign Trade Policy, declaring goods on which such pre-import condition is imposed. Such requirement was fulfilled by the Policy makers and DGFT Notification No. 33/2015-20 dated 13.10.2017, was issued accordingly. The Notification, by not incorporating any negative list or exclusion clause, made it clear that any inputs imported under Advance Authorization, would require to follow pre-import condition in case the importer wants to avail benefit of IGST exemption. Appendix-4J has nothing to do with it.

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

13.6 From the heading of the said Appendix-4J, which states that"ExportObligationPeriod for Specified Inputs....." it clearly refers to Para 4.22 of the Foreign Trade Policy / Para 4.42 of the Hand Book of Procedures, it becomes clear that the purpose of the same is to define EO period of specified goods.Simply, because Appendix 4J demands for compliance of pre-import condition, does not mean that the same becomes the list meant for goods for which pre-import condition is applicable. Therefore, to say that the goods imported by the importer are not covered by the Appendix 4J, and therefore, are beyond the purview of the subject Notification is incorrect and baseless.

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

14.1 In terms of Section 46 of the Customs Act, 1962, while presenting the Bills of Entry before the Customs Authority for clearance of the imported goods, it was the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorizations under which imports were being made availing benefit of IGST exemption. The law demands true facts to be declared by the importer. It was the duty of the importer to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorization. As the importer has been working under the regime of self-assessment, where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of the goods, it was the sole responsibility of the importer to place correct facts and figures before the assessing authority. In the material case, the importer has failed to comply with the requirements of law and incorrectly availed benefit of exemption of Notification No.79/2017-Cus dated 13.10.2017. This has therefore, resulted in violation of Section 46 of the Customs Act, 1962.

14.2 The importer failed to comply with the conditions laid down under the relevant Customs Notification as well as the DGFT Notification and the provisions of the Foreign Trade Policy (2015-20), as would be evident from the discussion at para-15 of

this Notice. The amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with interest.

14.3 With the introduction of self-assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the importer, it was 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 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.

14.4 The importer failed to comply with the pre-import condition of the Notification and imported goods Duty free by availing benefit of the same without observing condition, which they were duty bound to comply. This has led to contravention of the provisions of the Notification No.79/2017-Cus dated 13.10.2017, and the Foreign Trade Policy (2015-20), which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

14.5 Section 114A of the Customs Act, 1962, stipulates that where the Duty has not been levied or has been short-levied by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the Duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the Duty or interest so determined. It appears that the Noticee has deliberately suppressed the fact of their failure to comply with the conditions of pre-import/physical export in respect of the impugned Advance Authorizations, which they were well aware of at the time of commencement of import itself, from the Customs Authority. Such an act of deliberation appears to have rendered them liable to penalty under Section 114A of the Customs Act, 1962.

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

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

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

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

14.7 Therefore, while Section 28 gives authority to recover Customs Duty, short paid or not-paid, and Section 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 andimposition of penalty in terms of Section112(a) of the Customs Act, 1962.

14.8 In conclusion, it appears that the Noticee M/s. Sakar Industries Pvt. Ltd, Ahmedabad, have contravened the provisions of Sections 17 and 46 of the Customs Act, 1962, and also the provisions of Customs Notification No.18/2015-Cus dated 01.04.2015, as amended by the Customs Notification No.79/2017-Cus dated 13.10.2017, read with provisions of Para 4.03, 4.13 & 4.14 of the Foreign Trade Policy (2015-20), as amended by the DGFT Notification No.33/2015-20 dated 13.10.2017, issued in terms of the provision of Para 4.13 of the Foreign Trade Policy (2015-20), as they imported Aluminium Scrap and Aluminium Ingot for manufacture of Aluminium Alloy Ingots and Aluminium Cast Granulates through several ports, without payment of Duty of Customs under cover of Advance Authorizations, on the strength of the subject Notification and availed benefit of exemption from payment of IGST and/or

Compensation Cess on the goods so imported, leviable in terms of Sub-section (7) & Sub-section (9) of Section 3 of the Customs Tariff Act, 1975, but failed to comply with pre-import and/or physical export conditions laid down in the subject Notification. Their act of omission and/or commission appears to have resulted in non-payment of duty of Customs in the form of Integrated Goods & Service Tax (IGST)totally to the extent of **Rs. 9,77,71,269/- (ICD Khodiyar -Rs. 8,84,29,279/-, ICD Sanand Port - Rs.53,17,806/-,Mundra Port- Rs.8,08,975/- and Nhava Sheva Port- Rs.32,15,209/-)** which appears to be recoverable under Section 28(4) of the Customs Act, 1962, along with applicable interest, and also appears to attract the provisions of Section 111(o) of the Customs Act, 1962, making the goods valued at **Rs.54,31,73,706/- (ICD Khodiyar - Rs.49,12,73,756/-, ICD Sanand Port - Rs.2,95,43,372/-, Mundra Port - Rs.44,94,307/- and Nhava Sheva Port - Rs. 1,78,62,271/-)** liable for confiscation and the Noticee liable to penalty under Section 112 (a) of the Act ibid.

15. As recorded hereinabove, a Show Cause Notice dated 19/10/2022 from File No. VIII/10-22/Commr./O&A/2022-23 was issued by the Commissioner of Customs, Customs, Ahmedabadto M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004. In the show cause notice so issued following proposals were made on the noticee:

(a) Customs Duty amounting to **Rs. 8,84,29,279/-** (Rupees Eight Crore, Eighty Four Lakh, Twenty Nine Thousand, Two Hundred and Seventy Nine only)in the form of IGST saved in course of imports of the goods through **ICD Khodiyar port** under the Advance Authorizations and the corresponding Bills of Entry as detailed in Table-2 above in para 2.5, 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) Customs Duty amounting to **Rs. 53,17,806/-** (Rupees Fifty Three Lakh, Seventeen Thousand, Eight Hundred and Six only)in the form of IGST saved in course of imports of the goods through **ICD Sanand port** under the Advance Authorizations and the corresponding Bills of Entry as detailed in Table-2 above in para 2.5, 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;

(c) Customs Duty amounting to **Rs 8,08,975/-** (Rupees Eight Lakh, Eight Thousand, Nine Hundred and Seventy Five only)in the form of IGST saved in course of imports of the goods through **Mundra Sea port** under the Advance Authorizations and the corresponding Bills of Entry as detailed in Table-2 above in para 2.5, 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;

(d) Customs Duty amounting to **Rs.32,15,209/-** (Rupees Thirty Two Lakh, Fifteen Thousand, Two Hundred and Nine only) in the form of IGST saved in course of imports of the goods through **JNCH, Nhava Sheva Sea Port** under the Advance Authorizations and the corresponding Bills of Entry as detailed in Table-2 above in para 2.5, 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;

(e) Subject goods having assessable value of **Rs.49,12,73,756/-** (Rupees Forty Nine Crore, Twelve Lakh, Seventy Three Thousand, Seven Hundred and Fifty Six only) importedthrough **ICD Khodiyar Port**, under the subject Advance Authorizations shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962 for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017, without complying with obligatory pre-import condition laid down under the said Notification;

(f) Subject goods having assessable value of **Rs.2,95,43,372/-** (Rupees two Crore, Ninety Five Lakh, Forty Three Thousand, Three Hundred and Seventy Two only)imported through **ICD Sanand Port**, under the subject Advance Authorizations shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962 for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017, without complying with obligatory pre-import condition laid down under the said Notification;

(g) Subject goods having assessable value of **Rs.44,94,307/-** (Rupees Forty Four Lakh, Ninety Four Thousand, Three Hundred and Seven only)imported through **Mundra Sea Port**, under the subject Advance Authorizations shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962 for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017, without complying with obligatory pre-import condition laid down under the said Notification;

(h) Subject goods having assessable value of **Rs.1,78,62,271/-** (Rupees One Crore, Seventy Eight Lakh, Sixty Two Thousand, Two Hundred and Seventy One only) imported through **JNCH, Nhava Sheva Sea Port**, under the subject Advance Authorizations shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962 for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017, without complying with obligatory pre-import condition laid down under the said Notification;

(i) Interest should not be demanded and recovered from them under Section 28AA of the Customs Act, 1962 on the Customs Duty demanded at (a) to (c) above;

(j) Penalty should not be imposed upon them under Section 114A of the Customs Act, 1962, for improper importation of goods availing exemption of Notification and without observance of the conditions set out in the Notification, and also by reasons of misrepresentation and suppression of facts 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;

(k) Penalty should not be imposed upon them under Section 112(a) of the Customs Act, 1962 for improper importation of goods availing exemption under Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017, without observance of the pre-import and/or physical export conditions set out

in the Notification, resulting in non-payment of Customs Duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962.

(l) Bonds executed by them 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 and interest as mentioned above.

TRANSFER OF CASE IN CALL-BOOK AND RETRIEVAL OF CASE FROM CALL-BOOK FOR ADJUDICATION PROCEEDINGS:

16. On the similar issue, the Hon'ble High Court, Gujarat in the case of M/s. Shri Jagdamba Polymers Ltd. Vs. Union of India and in the case of M/s. Maxim Tubes Company Pvt. Ltd. had held that mandatory fulfilment of a 'pre-import condition', during October 13, 2017 to January 9, 2019, incorporated in the Foreign Trade Policy of 2015-2020 ("FTP") and Handbook of Procedures 20152020 ("HBP) by Notification No. 33/2015-20 and Notification No. 79/2015-Customs, both dated 13.10.2017, in order to claim exemption of Integrated Goods and Services Tax ("IGST") and GST compensation cess on input imported into India for the production of goods to be exported from India, on the strength of an advance authorization ("AA") was arbitrary and unreasonable. However, the aforesaid judgment and order of Hon'ble Gujarat High Court was challenged by the department before Hon'ble Supreme Court and the Hon'ble Apex Court had stayed the Hon'ble Gujarat High Court decision ibid. During the pendency of SLP/appeals filed by the department, all the Show Cause Notices issued (SCNs) by the department on the similar grounds (including the subject Show Cause Notice) were ordered to be kept in abeyance and transferred to call book. The Noticee vide letter File No. VIII/10-22/Commr./O&A/2022-23 dated 15/11/2022 was accordingly informed about the reason for non-determination in terms of provisions of Section 28(9A) of the Customs Act, 1962.

16.1 Further, the Hon'ble Supreme Court in the case ofUnion of India Vs. M/s. Cosmos Films Ltd. reported as 2023 (72) GSTL 147 (SC) has overruled judgement 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. In pursuance of the said judgement passed by the Hon'ble Supreme Court the subject Show-Cause-Notice was retrieved from Call Book for adjudication proceedings.Accordingly, the time limit specified in Section 28 (9) ibid shall apply from the date when the reason specified under Section 28 (9A) has been ceased to exist i.e. 28.04.2023.

DEFENSE SUBMISSIONS

17. M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004 (Noticee) had furnished their written submissions dated **16/11/2022**, wherein the following was submitted: -

17.1 That they have provided all the necessary data and information. Show cause notice state that the importer has violated such pre-import condition, leading to non-payment of IGST in 122 (One hundred and Twenty-two) Bills of Entry under cover of which imports were made involving IGST amount of Rs.9,77,71,269/- against the 05 (five) Advance Authorizations mentioned in the notice.

17.2 Out of these 122 Bills of Entry, 114 (One Hundred and Fourteen) Bills of Entry pertain to ICD Khodiyar, Ahmedabad involving IGST amount of Rs. 8,84,29,279/-; while 05 (Five) Bills of Entry pertain to Sanand Port involving IGST amount of Rs. 53,17,806/, 01 (one) Bill of Entry pertains to Mundra Port involving IGST amount of Rs. 8,08,975/-and 02 (Two) Bills of Entry pertain to Nhava Seva Port involving IGST amount of Rs. 32,15,209/-.

17.3 They draw attention regarding the demand computed i.e. whole IGST amount saved on imports made against specific advance licence has been added, even if certain bill of entries were generated before the date of filling.of shipping bill.

17.4 The Gujarat High Court, in case of Maxim tube Pvt Ltd - has held that pre-import condition contained in the Foreign Trade Government Policy (FTP) in respect of Advance Authorisation is ultra vires the scheme in case of Maxim Tubes Co. Pvt. Ltd.

It is argued that if the pre-import condition, as interpreted by DRI, is accepted then it would mean that the exemption would not be available in case of manufacturer exporter who undertakes manufacture and export of goods in continuous cycle, where the goods are manufactured & exported in anticipation of licence/authorisation i.e. exports are made first and duty free import against the authorisation are made subsequently.

Observations by the Hon'ble Gujarat High Court

The Court also observed that the approximate time taken to complete a cycle from receipt of export order to transportation for export to overseas buyers place is approximately six months. If the exporter has to manufacture goods for export only after receipt of the AA and against inputs imported under the respective AA, then it will not be possible for the exporter to give delivery to overseas buyer within the agreed reasonable delivery period i.e. three to four months time period, in which case the overseas buyer would not be interested in purchasing the goods from them

On account of pre-import condition for availing IGST and cess exemption, imports under the AA scheme (which has been operating successfully since many years without the condition of pre-import) have become next to impossible. This does not serve the objective of the FTP

On account of the stringent interpretation adopted by DRI, it is more or less impossible to make any exports under an AA without violating the condition of pre-import. In effect and substance, what is given by one hand is taken away by other and therefore, the IGST and cess exemption under the AA scheme becomes more or less illusionary.

With this, the court has held that all proceedings initiated for violation of pre-import condition would no longer survive.

17.5 The Special leave petition by the department is pending with the apex court, hence they requested to keep the matter in abeyance until the judgement by supreme court. They would like to appear in person to provide necessary clarification.

18. M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004 (Noticee) in continuation of his earlier defence submission dated 16/11/2022, made additional submissions in support of their case vide letter **dated 15/01/2024** as under:

18.1 The Noticee having IEC No. 0802000703 are engaged in the import of Aluminium Scraps and Aluminium Ingot for manufacture of Aluminium Alloy Ingots and Aluminium Cast Granulates through several ports.

(I) MATTER MAY BE TRANSFERRED IN CALL BOOK

A. Their Matter may be transferred to the Call Book based on a similar matter i.e., ***M/s. Yasho Industries Limited v. Union of India R/ Special Civil Application No. 10097 of 2023,*** wherein Hon'ble Gujarat High Court has stayed the adjudication proceedings,as a similar issue is pending before the Hon'ble Supreme Court in the case of ***Canon India Private Limited*** in the Review Application filed by the Union of India.

B. That Hon'ble Gujarat High Court in ***M/s Cosmo First Limited v Union of India R/SCA Special Civil Application No. 18320 of 2023*** has passed an ad-interim relief restraining the Respondents from passing final order without court's permission. Subsequent to the order, the SCN has been kept in abeyance and the matter had been transferred to the Callbook.

(II) SUBMISSION ON INTEREST

A. By virtue of impugned SCN, interest under Section 28AA of the Customs Act, 1962 is sought on duty of customs in the form of IGST benefit which was incorrectly availed by the Noticee.

B. At the outset, the Noticee submitted that the SCN issued by the authorities is bad in law. Hence, the demand of interest would be required to be struck down as no tax liability would arise in the hands of the Noticee.

C. Furthermore, in ***Scorpio Engineering Pvt. Ltd. s. CCE, Bangalore 2010 (261) ELT 423 (Tri.-Bang.),*** the Hon'ble Bangalore Tribunal held that *"once the impugned order is set aside on merits and it* ***has been held that there is no sustainable demand, the question of demand of interest does not arise****, in absence of any appeal against such an order."* Similar view was also taken in the case of ***Mahindra & Mahindra Ltd. v. CCE, Mumbai 2010 (262) ELT 533 (Tri-Mum)***, wherein it was said that when demand itself is not payable, the demand for interest is not sustainable. Further, the Hon'ble Bombay High Court in ***Mahindra & Mahindra Ltd. V. Union of India and Ors. 2022 (10) TMI 212 (Bom HC),*** held that imposing interest and penalty on the portion of demand pertaining to surcharge or additional customs or special additional duty of customs is incorrect and without jurisdiction. It was also stated that in the absence of specific provisions relating to levy of interest in the respective legislation, interest cannot be recovered by taking recourse to machinery relating to recovery of duty. Subsequently, the Respondents in the abovementioned matter had filed a SLP which was dismissed by the Hon'ble Supreme Court.

D. No interest is payable on payment of amount equivalent to the IGST exemption availed by the Noticee.The transaction becomes revenue neutral for the Government and this litigation becomes a needless exercise. Therefore, it is beyond the scope of doubt that the exchequer would have, and in the instant case has, suffered any loss of revenue.

E. Interest is inherently compensatory in nature and levy of interest in case of a revenue neutral transaction is illegal, arbitrary, and must be discouraged. Without prejudice to other submissions, if the Noticee had paid IGST at the time of import, ITC on the said IGST amount paid could be availed immediately by the Noticee and claimed as refund in the next month. There is no question of charging interest as the exchequer will not suffer any loss. Noticee places reliance on the decision of Hon'ble Karnataka High Court in the case of ***CCE vs Bill Forge Pvt. Ltd., [2012 (279) ELT 209 (Kar)].***

F. Further, the Hon'ble Supreme Court in ***Pratibha Processors vs UOI,[1996 (88) ELT 12]*** held that *"interest is compensatory in nature and is imposed on a person who has withheld payment of any tax as and when it is due and payable."*

G. The SCN fail to appreciate that IGST paid by the Noticee will be eligible as ITC to the Noticee in terms of third proviso to Section 16(2) of the CGST Act. Therefore, the entire exercise is revenue neutral.

H. The Hon'ble Supreme Court's decision in ***Jet Airways (I) Ltd. vs Commissioner of Service Tax, Mumbai, [2016 (44) S.T.R. 465]*** which has been affirmed by the Hon'ble Supreme Court in ***[2017 (7) G.S.T.L. J35 (S.C.)]***. In this case, it was held that Facility of Computer Reservation System (CRS) availed from CRS/GDS companies situated abroad, falls under ambit of 'Online Information and Database Access or Retrieval service.' Service tax payable under reverse charge on such service being available as credit for discharging tax on output service. Entire issue was revenue neutral. Therefore, the demand and consequent interest and penalty were considered as not sustainable. Relevant extract of the decision is reproduced below:

> *"11. In view of the foregoing, we hold against the appellant on the Revenue neutrality situation. With regard to service tax liability, interest thereof and penalty, we hold in favour of the appellant and set aside the demands, interest and penalties imposed and allow the appeals."*

I. In ***Commissioner of Central Excise Pune vs Coca-Cola India Pvt Ltd, [2007 (213) ELT 490 (SC)]*** the Hon'ble Supreme Court held as under:

"6. It is stated by the learned counsel for the assessee that the excise duty paid and the Modvat credit availed under Notification No. 5/94-C.E.(N.T.), dt. 1-3-1994 were identical and therefore consequences of payment of excise duty after availing Modvat credit was revenue neutral.

7. In view of the stand taken by the assessee in the counter-affidavit and the statement made by the learned counsel for the assessee, the appeals are dismissed leaving the question of law open. However, there shall be no order as to costs."

J. Further, the Hon'ble Supreme Court's decision in ***Star India Private Limited v. CCE, Mumbai & Goa, [(2005) 7 SCC 203]*** wherein it was observed as under:

"8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect."

K. Lastly, the Noticee submitted that interest if any would be applicable only on the correct value which must be re-determined basis the timing of import and export. Further, the period for which interest could be levied could be only the differential period between the date when tax was payable and the date on which the refund would have been allowed. For instance, it could be about a month. Further, as an alternate submission, interest can be levied only from the period subsequent from the date of the decision of the Hon'ble Supreme Court for Pre-import condition and the date of finalisation of the proceedings i.e., conclusion of the hearing.

L. Similar writ on the applicability of Interest has been decided by the Hon'ble Bombay High Court in ***Kuloday Plastomers Private Limited v. Union of India & Ors (WP/262/2020)***.

The matter may be transferred to the call book with respect to interest as well as interest is not applicable in case of revenue neutral transactions.

(III) SUBMISSION ON IMPOSITION OF PENALTY

A. In the SCN, it has been specified that the Noticee should show cause as to why penalty should not be imposed under Section 114A and Section 112(a) of the Customs Act, 1962. The relevant extract has been reproduced hereunder for your ready reference.

"114A. Penalty for short-levy or non-levy of duty in certain 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, 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:

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

B. The Noticee submitted that none of the reasons mentioned in the above provision are applicable to them as they have not undertaken any collusion or have given any willful mis-statement or suppression of facts to evade tax.

C. Further, the Noticee submitted that all the details were duly provided and requisite co-operation was extended during the course of investigation proceedings conducted by DRI authorities. The authorities pointed out the discrepancies in imports under Advance Authorization for the material period only on the basis of verification of data provided by the Noticee and therefore, there is no wilful mis-statement or suppression of facts by the Noticee which requires levy of penalty under Section 114A of the Customs Act, 1962.

D. Accordingly, the Noticee submitted that the question of malafide intent to evade payment of tax does not arise in the case of Noticee. In view of this, the Noticee requests your good self to drop the demand of penalty as set out in the SCN.

(IV) SUBMISSION ON INVOCATION OF EXTENDED PERIOD OF LIMITATION

A. The Noticee submitted that as per Section 28(4) of the Customs Act, 1962, the proper officer may serve a notice to a person within a period of 5 years from the relevant date in case of non-payment, short payment or erroneous refund of duty by reason of collusion, willful misstatement or suppression of facts. The relevant extract has been reproduced hereunder for your ready reference.

"(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."

B. The Noticee submitted that the proceedings initiated under 28(4) of the Customs Act, 1962 in the guise of collusion or any wilful-misstatement or suppression of facts is unsubstantiated and illegal. There is no material or cogent evidence relied upon to prove collusion or wilful misstatement or suppression of facts to evade payment of duty by the Noticee.

C. At this juncture, it is essential to understand what could be contemplated as evasion of tax since the primary intent of collusion, wilful misstatement or suppression of facts is to evade the tax liability. Thus, in absence of such definitions in Customs legislation, the Noticee referredthe dictionary meanings as available on public domain, which are reproduced hereunder, for ready reference.

The free dictionary suggests that 'evade' means *"to escape or avoid, especially by cleverness or deceit"*
The Oxford dictionary suggests that 'evade' means *"escape or avoid(someoneor something), especially by guile or trickery"*
The Cambridge dictionary suggests that 'avoid' means *"topreventsomethingfrom happening or to not allow yourself to do something"*
The free dictionary suggests as one of the meanings that 'avoid' means *"torefrain from (doing something)"*

D. From the above, the Noticee submitted that the terms 'evade' or 'avoid' signifies malafide intent or to prevent oneself from doing something. Therefore, the Noticee submitted that the notice under Section 28(4) can be issued only if it is proved that there is presence of guilty, dishonest, and wilful intent to defraud Revenue either by positive action or prevention.

E. The Noticee submitted that the authorities have failed to discharge their burden to prove that there is suppression of facts on the part of Noticee with intent to evade payment of tax. To mean, the department is mandated to show positive act on the part of Noticee to suppress the facts so as to defraud the revenue. This view is upheld by Hon'ble Apex Court in the case of ***Tamilnadu Housing Board v. CCE [1994 (74) ELT 9 (SC)]***.

F. Additionally, the Noticee referred to the judicial precedents of various Courts including Apex Court wherein there were similar provision to invoke extended period of limitation.

G. The Judgement of Hon'ble Supreme Court in the case ***Larsen & Toubro Ltd. Vs. CCE Pune II 2007 (211) ELT 513 (SC)*** clearly applies wherein it was held that allegations with regards to suppression of facts must be clear and explicit. It is well established law that extended period of limitation cannot be invoked in absence of fraud, collusion, willful misstatement or suppression of facts on the part of the assessee. In order to invoke the extended period of limitation a positive act of suppression has to be proved on their part. The decision in case of ***Padmini Products vs. CCE [1989 (43) ELT 195 (S.C.)]*** is relied upon wherein the Hon'ble Supreme Court had expressly held that:

> *"Mere failure or negligence on the part of the manufacturer either not to take out a license or not to pay duty in case where there was scope for doubt does not attract the extended limitation."*

H. In the case of ***Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur [2013 (288) ELT 161 (SC)]***, it was held that specific and explicit averments challenging the *fides* of the conduct of the assessee are required to be made in the show cause notice in order to invoke extended period of limitation.

(V) ***No extended period of limitation where divergent views are held by the judicial bodies***

At this juncture, it would be imperative to understand the relevant provisions, as amended from time to time, relating to pre-import condition for exemption of duties under Advance Authorization scheme.

A. Firstly, the Noticee would like to refer Notification No. 79/2017 – Customs dated October 13, 2017, which amended Notification No. 18/2015 – Customs dated April 01, 2015, wherein the exemption from payment of IGST has been granted to input materials imported under Advance Authorization subject to fulfilment of the following conditions:

- Export obligation under Advance Authorization should be fulfilled by way of physical exports
- Pre-import condition has to be followed which requires that the materials should be imported prior to fulfilment of export obligation

B. In the meantime, the DGFT issued Notification No. 33/2015-20 dated October 13, 2017, which amended the provisions of Para 4.14 of the Foreign Trade Policy (2015-20) in order to incorporate the exemption from IGST subject to compliance of the conditions relating to pre-import and physical exports. The relevant extract of the Notification has been reproduced hereunder for your ready reference:

> *"1. Para 4.14 is amended to read as under:*
> *4.14: Details of Duties exempted*

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

C. The Noticee submitted that pre-import condition is discriminatory and inconsistent with the position which was adopted prior to introduction of GST wherein exemption under Advance Authorization was available on import of inputs without requirement to fulfil such pre-import condition (except for specified goods). Hence, the said condition was challenged before various High Courts.

D. Later, the Government vide Notification No. 01/2019 - Customs dated January 10, 2019, removed the pre-import condition for availing the exemption from IGST under Advance Authorization with a prospective effect. Hence, the question regarding validity of pre-import condition was relevant only for the period starting October 13, 2017, to January 09, 2019.

E. In this regard, the Gujarat High Court in the case of ***Cosmo Films Limited(2019-VIL-80-GUJ dated February 02, 2019)*** had quashed the pre-import condition provided in the Foreign Trade Policy for availing benefit of exemption from levy of IGST and GST compensation cess on import under Advance Authorization. The relevant extract of the judgement has been reproduced hereunder for your ready reference:

"48. In the light of the above discussion, this court is of the view that paragraph 4.14 of the Foreign Trade Policy whereby a condition of pre-import has been put for availing the benefit of exemption from levy of integrated tax and GST compensation cess vide Notification No.33/2015-2020 dated 13th October, 2017 as well as the condition (xii) inserted in Notification No.18/2015 dated 1st April, 2015 vide Notification No.79/2017 dated 13.10.2017, are ultra vires the scheme of the Foreign Trade Policy, 2015-2020 and the Handbook of Procedure and are, therefore, required to be quashed and set aside."

F. In this connection, the Supreme Court pronounced the judgement in the case of ***Union of India vs. Cosmo Films Ltd. (Civil Appeal No. 290 of 2023)*** wherein the order of Gujarat HC was set aside and held that pre-import condition in Foreign Trade Policy for availing benefit of exemption is not ultra-vires and is valid. The Supreme Court further directed to issue a Circular which outlines the procedure for claiming refund or ITC by the respondents by approaching the jurisdictional Commissioner. The relevant extract of the judgement has been reproduced hereunder for your ready reference.

"67. Therefore, there is no constitutional compulsion that whilst framing a new law, or policies under a new legislation – particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given should necessarily be continued in the same fashion as they were in the past. When a new set of laws are enacted, the legislature's effort is to on the one hand, assimilate- as far as practicable, the past regime. On the other hand, the object of the new law is creation of new rights and obligations, with new attendant conditions. Inevitably, this process is bound to lead to some disruption. In this case, the disruption is in the form of exporters needing to import inputs, pay the two duties, and claim refunds. Yet, this inconvenience is insufficient to trump the legislative choice of creating an altogether new fiscal legislation, and insisting that a section of assessees order their affairs, to be in accord

with the new law. Therefore, the exclusion of benefit of imports in anticipation of AAs, and requiring payment of duties, under Sections 3 (7) and (9) of Customs Tariff Act, 1975, with the 'pre-import condition', cannot be characterized as arbitrary or unreasonable."

G. From the above, the Noticee submitted that the validity of pre-import condition was ambiguous and subject matter of litigation since different Courts had divergent views. The judgement by the Madras High Court was favorable to the Revenue wherein it was held that the importer is mandatorily required to comply with the pre-import condition. On the other hand, the Gujarat High Court was favorable to the exporters wherein it has been held that the pre-import condition is arbitrary and ultra vires to the Foreign Trade Policy. The issue regarding legality of pre-import condition was put to rest by the Apex Court by pronouncement of judgement in the case of Cosmo Films Ltd. (supra).

H. The Noticee submitted that the extended period of limitation cannot be invoked where divergent rulings are pronounced by the judicial bodies in respect of a specific matter. In this regard, the Noticee would like to refer the following judicial precedents wherein similar view has been upheld.

- **M/s Jaiprakash Industries Ltd. vs. Commissioner of Central Excise (Appeal (Civil) 665-666 of 2000 dated November 22, 2002) [Supreme Court]**

"In this case, there was a ***divergent view of the various High Courts*** *whether crushing of bigger stones or boulders into smaller pieces amounts to manufacture. In view of the divergent views, of the various High Courts, there was a bona fide doubt as to whether or not such an activity amounted to manufacture. This being the position,* ***it cannot be said that merely because the Appellants did not take out a licence and did not pay the duty the provisions of Section 11A got attracted."***

- **M/s Rathi Steel & Power Ltd. vs. Commissioner of CGST & Excise, Bhubaneswar (Final Order #75392-75393/2022 dated July 19, 2022) [CESTAT Kolkata]**

"7. As regards invocation of extended period, I find that the Appellant had made categorical submissions in this regard which finds mention in the order in appeal but there is no finding on the same. In any case, when the issue is no more res integra that where the assessee is entitled to claim cenvat credit of the tax paid under RCM, there cannot be any question of invocation of extended period. ***It is also a settled legal position that where there were divergent views on the issue and even if it is ultimately settled against the assessee, extended period cannot be invoked.*** *It is also an admitted fact that the entire case was made out on the basis of information available in statutory books of account. I find that the very basis of the show cause notice is the audit objection meaning thereby that the entire demand was raised on the basis of information found available in statutory books of the Appellant and hence even otherwise, there cannot be any scope for invocation of extended period. In this regard, the judgment of Hon'ble Allahabad High Court in the case of Triveni Engineering & Ind (supra) is squarely applicable to the facts of the present case."*

- **South City Motors Ltd. vs. Commissioner of Service Tax, Delhi (Final Order #ST/602/2011(PB) dated November 22, 2011) [CESTAT Delhi]**

"13. The period involved in this appeal is prior to 10-9-2004. The Show Cause Notice was issued on 20-4-2006. The Appellant is paying service tax from 10-9-2004. This matter relates to scope of the entry for "Business Auxiliary Services". There was considerable doubt about its coverage because of the very nature of the entry. ***There are contrary decisions of the Tribunal in the matter.*** *In most of the decisions like Bridgestone*

Financial Service and Roshan Motors Ltd., Tribunal has taken the view that it is a case involving interpretation of the taxing entry and no mala fide or element of suppression or mis-statement is involved. The Higher Courts have been taking the view that in such situations the extended period of time cannot be invoked for raising demand. ***In this case also the demand is raised beyond the time limit of one year and such demand cannot be sustained.*** *However, demand if any, which is within the normal period of one year is sustainable. Interest is payable on such amount but no penalty is imposable."*

(VI) ***Mere delay in submission of documents does not amount to suppression of facts and therefore, there cannot be invocation of extended period of limitation***

A. The Noticee submitted that the authorities have alleged that the Noticee failed to submit the documents in a timely manner which expresses their malafide intent of evading the Customs duty.

B. In this regard, the Noticee submitted that they have submitted all the required documents for verification of imports and exports from time to time.

C. Also, the discrepancies were identified by the DRI officials post examination of data submitted by the Noticee. This is evident from Para 2.2 of the SCN which has been reproduced hereunder for your ready reference:

"2.2..Accordingly, investigation was initiated by the Officers of ICD, Customs, Khodiyar by way of issuance of Summons under Section 108 of the Customs Act, 1962. The importer was requested by the Superintendent of Customs (imports), ICD Khodiyar vide letters dated 19.01.2021 and 12.11.2021 and also summoned vide summons dated 20.06.2022 for production of documents in connection with such imports. Shri Ramesh R. Shah, Director (Import-Export Operation) of the said company vide letters dated 30.06.2022 requested for some time to submit the information. They have submitted the required information vide letter dated 21.7.2022 and emails dated 16.07.2022, 20.07.2022 and 27.07.2022."

D. From the above, the Noticee submitted that the Noticee did not attempt to conceal the facts and alsoprovided necessary clarifications and information, on being asked from the authorities. This clearly proves that the intention of the Noticee was bonafide and did not intend to suppress any of the material facts, as alleged in the impugned SCN. Further, the letter requesting for time was submitted considering the voluminous nature of information.

E. The Noticee placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***M/s. Anand Nishikawa Co. Ltd.*** **v.** ***Commissioner of Central Excise, Meerut[2005-TIOL-118-SC-CX]*** wherein the Hon'ble Court elaborated on what amounts to suppression of facts and when liability for the same can be drawn by using a precedent as given hereunder.

"28. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was

not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts"."

F. Reliance is also placed on the decision of ***M/s. Delta Power Solutions India Pvt. Ltd. vs. Commissioner, Customs, Central Excise & Service Tax, Commissionerate, Hapur (TS-490-CESTAT-2021 (DEL)-EXC)*** wherein it was held that Revenue cannot be permitted to invoke extended period of limitation by merely stating that it is a case of self-assessment. Suppression in self-assessment matters can arise only when information sought in the prescribed form is not supplied, or incorrect information is supplied. The relevant extract of the judgement has been reproduced hereunder for your ready reference.

"25. ... Even in a case of self-assessment, the Department can always call upon an assessee and seek information and in this case an audit objection was raised, to which a reply was submitted. The Department cannot be permitted to invoke the period of limitation by merely stating that it is a case of self-assessment. This apart, an assessee is called upon to provide only that information that is required to be furnished in the self-assessment form. There is no averment in the show cause notice, nor there is any finding in the order passed by the Commissioner (Appeals) that the appellant had provided incorrect information to any matter required to be stated in the self-assessment form with intent to evade payment of service tax. All that has been stated is that the transaction details were not supplied to the Department and merely because of this, it has been assumed that the appellant suppressed facts with intent to evade payment of service tax. Suppression in self-assessment matters can arise only when information sought in the prescribed form is not supplied or incorrect information is supplied.

26. Thus, in view of the aforesaid discussions, it cannot be said that the appellant had suppressed any information with intent to evade payment of tax."

Accordingly, the Noticee submitted that extended period of limitation cannot be invoked where there is no suppression of facts on the part of assessee.

(VII) ***No extended period of limitation can be invoked when the facts are not disclosed in absence of any reporting mechanism for the same***

A. The Noticee submitted that as per the impugned SCN, it has been alleged that the Noticee has not disclosed the fact that the pre-import condition has been violated and suppressed such facts in order to claim the benefit of exemption from IGST.

B. In this regard, the Noticee submitted that they have disclosed all the requisite details as sought in the bill of entry prescribed under the legislation. The Noticee further submitted that the bill of entry so prescribed under the legislation does not provide for disclosing the information regarding fulfillment of pre-import condition. Thus, the allegation of suppression cannot be imposed on the Noticee for not disclosing the details which the statute itself does not require to disclose. Following judicial precedents are being submitted herewith which strongly supports their view.

- ***Apex Electricals (P.) Ltd. vs. UOI - 1990 taxmann.com 679 (Gujarat - HC)***

Hon'ble Gujarat High Court has held that the Department will not be justified in proceeding on the basis that there was suppression of true facts and, therefore, the show cause notice could be issued within the larger period of five years when the only facts not disclosed by the assessee were such which he was not required to disclose. Accordingly, the show cause notice and the subsequent order was set aside.

- ***M/s Neptune Equipments Pvt. Ltd. vs. CCE, Ahmedabad – 2011-TIOL-504-CESTAT-AHM***
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"14. ... It is well settled law that for invoking the longer period of limitation, there has to be positive suppression or mis-statement with intent to evade duty. The non-disclosure of the fact of supply of generator and filter, which they were not legally obliged to disclose, would not amount to positive suppression on their part. Accordingly, we hold that longer period was not available to Revenue."

- ***Balsara Extrusions (P.) Ltd. vs. CCE & C, Surat-II -2001 taxmann.com 1715 (CEGAT- MUMBAI)***

Extended period not invokable for omission to declare a fact which the law does not require to be declared

(VIII) *The present matter is revenue neutral and invocation of extended period of limitation is not proper*

A. At this juncture, the Noticee submitted that pursuant to the directions of the Supreme Court in the case of Cosmo Films Ltd. (supra), Circular No. 16/2023-Cus dated June 07, 2023 was issued by CBIC outlining the process to be undertaken for re-assessment of bill of entry for payment of applicable tax and availment of input tax credit thereof in case where the imports does not satisfy the pre-import conditions.

B. The above circular prescribes that once the payment of tax and cess, along with interest, is made vide electronic challan in Customs EDI system, a notional Out-of-Charge for bill of entry would be created by port of import for transmission of details of IGST and Compensation cess to GST portal (auto-population in GSTR 2B) including date of payment for determining eligibility for availment of credit.

C. In this regard, the Noticee submitted that the present situation is revenue neutral since the Noticee would have availed the credit of IGST paid by them in respect of the imports where the pre-import conditions are not fulfilled and utilize such credit in discharge of output tax liability under the GST law.

D. Considering the same, the Noticee submitted that there cannot be the case of evasion of payment specifically when the duty paid would be eligible as input tax credit and entire exercise is revenue neutral. Reliance can be placed on the following decisions in order to substantiate their view.

- **Chiripal Polyfilms Ltd. vs. Commr. Of C. Ex. & S.T., Vadodara-I - (2022) 1 Centax 125 (Tri.-Ahmd)**

*"5.4... In such facts of case, **it cannot be said that the appellant had any mala fide intentions to evade Service Tax payment, which was otherwise available to appellant themselves as Cenvat Credit** and that appellant have suppressed any fact with intention to evade payment of service tax. There is nothing on record to show that any suppression of facts or wilful misstatement were made on the part of the appellant who has filed periodical ST-3 return regularly and disclosed all necessary details as required. In these circumstances charge of suppression or willful misstatement with Intention to evade Service Tax cannot be alleged against Appellant. For this reason no mala fide can be attributed to appellant. Hence longer period of demand cannot be invoked..."*

- **Mec Shot Blasting Equipment Ltd. vs. Commissioner Of CGST, Jodhpur - (2022) 1 Centax 130 (Tri.-Del)**

*"8. Having considered the rival contentions, I find that the demand of tax of Rs. 70,140/- have been wrongly raised as the premises are residential premises and being used for residence of the director. So far the other two demands are concerned, I hold that the **situation is wholly revenue neutral and accordingly, invocation of extended period of limitation is not available to the Revenue** in the facts and circumstances."*

- **Varaha Infra Ltd. vs. Commissioner Of CGST, Jodhpur - (2023) 3 Centax 69 (Tri.-Del)**

"3. Learned Counsel, Mr. O.P. Agarwal, assailing the impugned order inter alia urges:-

3.1 that demand of Rs. 2,90,628/- have been confirmed on payment of rent for office to Director of the Company during the period April 2014 to June 2017. The demand have been raised by invoking the extended period of limitation, on reverse charge basis vide SCN dated 13/07/2020. Admittedly, under the facts, the appellant on payment of service tax on the rent was entitled to Cenvat Credit of the same. Thus, the situation is wholly revenue neutral.

3.2 Appreciating the facts and circumstances, ***I allow this ground finding that situation is wholly neutral, this ground is allowed and the demand is set aside."***

(IX) ***Invocation of extended period of limitation is not sustainable due to inaction on the part of the Department***

A. The Noticee submitted that they have correctly disclosed all the required details in the bill of entry during import of goods under Advance Authorization. Further, the details of exports under the respective Advance Authorization is also provided by the Noticee.

B. It has been submitted that if the department believes that there has been violation of pre-import condition, they could have sought additional information from the Noticee. The inaction on the part of authorities would not warrant basis of suppression of facts on the part of the Noticee.

C. Reliance can be placed on following judicial precedents wherein it has been upheld that when the assessee has shown all the particulars in return then Revenue cannot contend on the ground of suppression of facts.

- **CCE, Kolkata-VI Vs. ITC Ltd. [2013 (291) E.L.T. 377 (Tri. - Kolkata)]**

The limited issue involved in the present case for determination is, whether the demand for recovery of cenvat credit availed on inadmissible input services, is barred by limitation or otherwise. It is the case of the Revenue that the respondent had not disclosed the details of the input services in their monthly returns, resulting into suppression of facts and hence, extended period of limitation is applicable to the facts of the present case. I find that the ld. Commissioner (Appeals) had observed that since the respondent had been filing ER-1 returns regularly indicating the total amount of credit availed by them and nothing prevented the Department from calling for details of the said input services on which credit was availed and the respondents were under a bona fide belief that the credit of service tax paid by the service provider on the said input services were available to them as credit, no suppression on the part of the respondent could be sustained. In my opinion, the said reasoning is sound and in consonance with the principle of law laid by this Tribunal.

- **Commissioner of Central Excise, Jaipur-I v. Pushp Enterprises 2011 (22) S.T.R. 299 (Tri.-Del.)**

There is no dispute about the fact that the ER-I Returns had disclosed the availment of Cenvat Credit but since there is no requirement for enclosing the invoices or giving the details of such credit or neither such details were given nor the invoices were enclosed. However, once ER-I Return is filed, even though it is filed under self-assessment system, the officers are supposed to scrutinize the same. Just because the respondent had taken Cenvat credit in respect of certain input services, which according to the Department was not admissible to them, it cannot be concluded that the credit had been taken knowing very well that the same was not admissible, unless there is some evidence in this regard. ***Moreover when the quantum of service tax credit availed had been disclosed, the officers were always free to inquire from the respondent about details of the same and satisfy themselves about its correctness.*** *In view of these circumstances, I am of the view that there is no infirmity in the impugned order. Revenue's appeal is dismissed."*

- **Commissioner of Central Excise, Indore v. Medicaps Ltd. [2011 (24) S.T.R. (572) (Tri. – Del.)**

Admittedly the credit availed by the assessee was reflected in the monthly returns. If there is no column in the monthly return to show the nature of service on which the credit was availed, the assessee cannot be blamed for not disclosing the said fact. ***For invoking the longer period of limitation, there has to be a suppression or mis-statement with an intent to evade payment of duty. When the respondents have reflected the amount of credit availed by them in their monthly returns, it cannot be said that there was any positive act of suppression on mis-statement on their part."***

C. Basis the above judicial precedents, the fact may be appreciated that in case where all the details regarding bill of entry (for imports) and shipping bill (for exports) in respect of a particular Advance Authorization is duly submitted by the Noticee and is available with the Customs authority, there cannot be an allegation regarding suppression of facts on the part of the Noticee.

D. In addition to above, the Noticee placed reliance on the judgement of Hon'ble Supreme Court in the case of ***Northern Plastic Ltd. vs. Collector of Customs and Central Excise (Civil Appeal No. 4196 of 1989 with C.A. No. 3325 of 1990)*** wherein it has been held that there cannot be an intention to evade duty since the appellant has disclosed full and correct particulars of the goods in the Bill of Entry for claiming benefit of exemption notification. The relevant extract has been reproduced hereunder for ready reference:

"22. ...While dealing with such a claim in respect of payment of customs duty we have already observed that the declaration was in the nature of a claim made on the basis of the belief entertained by the appellant and therefore, cannot be said to be a mis-declaration as contemplated by Section 111(m) of the Customs Act. ***As the appellant had given full and correct particulars as regards the nature and size of the goods, it is difficult to believe that it had referred to the wrong exemption notification with any dishonest intention of evading proper payment of countervailing duty.***

23. We, therefore, hold that the appellant had not mis-declared the imported goods either by making a wrong declaration as regards the classification of the goods or by claiming benefit of the exemption notifications which have been found not applicable to the imported goods. We are also of the view that the declarations in the Bill of Entry were not made with any dishonest intention of evading payment of customs and countervailing duty."

In view of the aforesaid legal and factual submission, the Noticee submitted that the invocation of extended period of limitation is bad in law and hence, the SCN is liable to be set aside solely on this ground.

(X) APPENDIX 4J IGNORED

The SCN addresses Appendix 4J stated in Para 4.13 Foreign Trade Policy (2015-20) which contains the list of goods on which Pre-import condition is applicable. It should be noted that their goods do not fall under the category where pre-import condition is applicable.

(XI) COMPUTATIONAL ERROR

Noticee does not agree with the Computation done in the SCN as various licenses have been wrongly included. Further, the Pre-import condition has been met and determination of timing has been ignored in the SCN.

Particularly, Table-1 in para 2.2 of the SCN includes Advance Authorisation No. 810140486 which was issued prior to the pre-import condition coming into force.

The SCN wrongly computes the amount by ignoring the fact that the Pre- import Condition cannot be seen qua the import license but must be seen with the timing of the import and export.

(XII) EODC COMPLIANCE

It is further submitted that all the DGFT compliances have been done in all the Advance licenses. Noticee has received EODC certificates from DGFT in all the advance licenses which inherently implies that noticee has done all the related compliances. If any pre-import related non-compliance had been found DGFT would not have given them EODC's for the respective Advance Licenses

(XIII) RECENT TRADE NOTICE

Noticee referred a recent Trade Notice No. 27/2023 dated 25.09.2023 issued by DGFT with respect to applicability of pre-import conditions for various scenarios. It has been clarified that imports made on or after January 10,2019 would not be subject to pre-import condition in case if certain imports under an advance authorisation is partly made upto January 09,2019 and remaining imports were made on or after January 10,2019.

From the above, the Noticee submitted that pre-import condition is to be analysed for each import transaction separately. This implies that compartmentalization of an Advance Authorisation is very well allowed and the imports which are compliant to pre-import condition would continue to enjoy benefit of exemption of IGST even though certain import under same Advance Authorisation is in violation of pre-import condition.

Noticee also referred the order passed in Writ Petitions on similar issue of Pre-import conditions decided by the Hon'ble Bombay High Court in ***Kuloday Plastomers Private Limited v. UOI &Ors (WP/10333/2023)*** (Copy of Order dated 28.08.2023 is enclosed herewith as **EXHIBIT K**) and ***Laxmi Organic Industries Ltd. v. Union of India &Ors (WP/13304/2023)*** (Copy of Order dated 8.11.23is enclosed as EXHIBIT L).Basis the above submissions, the adjudication may proceed with due consideration to all the legal status of the precedents in case of interest.

(XIV) Under the above circumstances, they requested to:-

A. Quash the Show Cause Notice and drop the proceedings initiated against the Noticee.
B. Refrain from imposing penalty upon the Noticee.

PERSONAL HEARING: -

19. The noticee vide letter File No. VIII/10-22/O&A/2022-23 dated 24/11/2023was granted opportunity to be heard in person on **06/12/2023.** However, none appeared for hearing on 06/12/2023.Another Personal Hearing in the matter was fixed on **17/01/2024**. Ms. Enita Ann Alex, Appointed Advocate, Shri Ankit Jain, Internal Auditor of M/s. Sakar Industries Pvt. Ltd., Ahmedabad and Shri Mahesh Punjabi, Accounts Head of M/s. Sakar Industries Pvt. Ltd. appeared before me on 17/01/2024 for Personal Hearing on the behalf of M/s. Sakar Industries Pvt. Ltd.

19.1 Ms. Renita Ann Alex, Advocate, Shri Ankit Jain, Internal Auditor of M/s. Sakar Industries Pvt. Ltd., Ahmedabad and Shri Mahesh Punjabi, Account Head of M/s. Sakar Industries Pvt. Ltd. had attended the Personal Hearing on 17/01/2024 in the matter and reiterated the submissions as detailed in their written submission dated 15/01/2024.

19.2 Regarding transfer of SCN to call Book as point No. 1 of their written submission, on being asked they submitted that the issue where Hon'ble High Court has stayed the proceedings is different from the present case as in that case SCN was issued by the DRI, whereas in the present case, SCN has been issued by the Commissioner of Customs, Ahmedabad. So, they had not argued on the said issue any further.

19.3 They submitted that they will submit additional written submission by 25/01/2024.

20. M/s. Sakar Industries Pvt. Ltd., H-10, New Madhavpura Market, Shahibaug Road, Ahmedabad-380004 (Noticee) in continuation of his earlier defence submission dated 16/11/2022 and 15/01/2024, made an additional submission in support of their case vide letter **dated 25/01/2024,** wherein they enclosed EODC issued by the DGFT in respect of Advance Authorizations No. 0810141977, 0810142253 and 0810141768 and informed that they have fulfilled pre-import condition against Advance Authorization No. 081014977 and 0810143679.

DISCUSSION AND FINDINGS

21. I have carefully gone through the facts of the case and the submissions made by the noticee in writing as well as the record of personal hearing held on 17/01/2024.

22. The issues for consideration in the Show Cause Notice File No. VIII/10-22/Commr./O&A/2022-23 dated 19/10/2022 before me are as under: -

(i) Whether the Noticee, during October 13, 2017 to January 9, 2019, was eligible to claim exemption of Integrated Goods and Services Tax ("IGST") and GST compensation cess on inputs imported into India for the production of goods to be exported from India, on the strength of an advance authorization, without fulfilment of such mandatory 'pre-import condition';

(ii) If not, whether such Duty amounting to **Rs. 9,77,71,269/-**(Rupees Nine Crore, Seventy Seven Lakh, Seventy One Thousand, Two Hundred and Sixty nine only) **(Rs. 8,84,29,279/- in respect of import through ICD Khodiyar Port, Rs. 53,17,806/- i.r.o. import through ICD Sanand Port, Rs. 8,08,975/- i.r.o. import through Mundra Sea Port and Rs. 32,15,209/- i.r.o. import through Nhava Sheva Sea Port)** in the form of IGST saved in course of imports of the goodsunder the subject Advance Authorizations is liable to be demanded and recovered from them under Section 28 of the Customs Act, 1962 along with interest thereon under Section 28AA ibid;

(iii) whether such goods having assessable value of **Rs. 54,31,73,706/-** (Rupees Fifty Four Crore, Thirty One Lakh, Seventy Three Thousand, Seven Hundred and Six Only) **(Rs.49,12,73,756/- in respect of import through ICD Khodiyar Port, Rs.2,95,43,372/- i.r.o. import through ICD Sanand Port, Rs.44,94,307/- i.r.o. import through Mundra Sea Port and Rs. 1,78,62,271/- i.r.o. import through Nhava Sheva Sea Port)** are liable for confiscation under Section 111(o) of the Customs Act, 1962;

(iv) Whether the Noticee is liable for penalty under Section 114A & Section 112(a) of the Customs Act, 1962;

(v) Whether Bonds executed by them at the time of import is liable to be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty and interest as mentioned above.

23. I find that Duty liability with interest and penal liabilities would be relevant only if the bone of contention that 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.

24. Genesis of Pre-Import Condition:

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

24.1.1 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.

24.1.2 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 4J or will be as indicated in Standard Input Output Norms (SION).

24.1.3 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.

24.1.4 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.***

24.2 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.

24.2.1 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.**"

24.2.2 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 [vide number G.S.R. 254 (E), dated the 1 st April,*	*In the said notification, in the opening paragraph,- (a) ..... (b) in condition (viii), after the proviso, the following proviso shall be inserted, namely:- "Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7)*

	2015]	*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;***

24.3 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.

24.4 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".**

24.5 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.

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

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

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

"Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to 'amend' the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospective."

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

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

24.7 Further I find that at Para 59 of the order of the Hon'ble Supreme Court dated 28-04-2023 in Civil Appeal No. 290 of 2023 in the matter of Union of India Vs Ms Cosmo Films Ltd., it is held that –

"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". One of the objects behind the impugned notifications was to ensure that the entire exports made under AAs towards discharge of export orders were physical exports. In case the entire exports were not physical exports, the AAs were automatically ineligible for exemption."

Therefore, the Apex court made it crystal clear that the condition of "Physical Export" has to be complied with in respect of the entire Authorization and if the entire exports made under the authorization is not physical export, irrespective of the extent of non-compliance, the Authorization automatically becomes ineligible for exemption. This observation of the Apex court is mutatis mutandis applicable in respect of the "Pre-import" condition too. Therefore, even if in view of the Noticee, they had partially complied with such condition in respect of a particular Authorization, non-compliance in respect of the other part makes it ineligible for the exemption in entirety.

24.8 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.

24.9 Further, I find thatDGFT 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".

24.10 Thus, from the findings and discussion in Para 24 to 24.9 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.** Therefore, I find that the importer was not eligible to avail exemption under Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 on inputs imported under Advance Authorizations without fulfilment of mandatory 'Pre-Import Condition'.

24.11 I find that the Hon'ble Supreme Court in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) have discussed exhaustively the provisions of the Customs Act as well as the provisions of the FTP and it has been held that pre import conditions is required to be complied with.

24.12 In view of above discussion, I hold that in the absence of fulfilment of the mandatory 'pre-import condition', the Noticee was not eligible to claim exemption of Integrated Goods and Services Tax ("IGST") and GST compensation cess on inputs imported into India for the production of goods to be exported from India, on the strength of an advance authorization. Accordingly, I hold that the Noticee is liable to pay the duty as demanded in the SCN.

25. Whether the Duty of Customs amounting to Rs. 9,77,71,269/- (Rupees Nine Crore, Seventy Seven Lakh, Seventy One Thousand, Two Hundred and Sixty Nine only) (Rs. 8,84,29,279/- in respect of import through ICD Khodiyar Port, Rs. 53,17,806/- i.r.o. import through ICD Sanand Port, Rs. 8,08,975/- i.r.o. import through Mundra Port and Rs. 32,15,209/- i.r.o. import through Nhava Sheva Port) as detailed in the Show Cause Notice is required to be demanded and recovered from them (invoking extended period) under Section 28(4) of the Customs Act, 1962 and whether Bonds executed by the Importer at the time of import should be enforced in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty alongwith interest?

25.1 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.

25.2 It is well settled principle of law that exemption notification has to be interpreted strictly. There are plethora of judgments pronounced by the different fora of courts in this regard. I rely upon the following judgments:

(i) Mars Plastic & Polymers Pvt. Ltd. V/s. Commr. of Customs Chennai reported at 2003 (156) E.L.T. 941 (Tri. - Mumbai), duly affirmed by the Apex court as reported at 2003 (158) E.L.T. A275 (S.C.)) held that:

"4. We find this argument strange. It is settled law that the benefit of establishing the eligibility to an exemption is upon the person who sets it up. This was the law when the goods were imported. It was therefore reasonable to expect of the importer that it substantiated the claim for exemption. It is not required that he be invited to do so. At no such stage therefore has the claim for the exemption been substantiated in satisfactory evidence. The certificates of the sellers are totally unacceptable"

(ii) Bharat Earth Movers Ltd. V/s Collr. Of C. Ex. Bangalore reported at 2001 (136) E.L.T. 225 (Tri. - Bang.) wherein it was held :

*" ..... **condition has to be fulfilled in toto and not partially.** It is the axiomatic principle of law that the exemption can be availed only if the conditions specified in a particular notfn. are fulfilled in whole and even if it is established that they have not partially fulfilled the same, the exemption cannot be availed.*
There is no room for flexibility in this regard as per the wordings employed in the notification."

(iii) The Hon'ble Supreme Court of India in the case of STAR INDUSTRIES Versus COMMISSIONER OF CUSTOMS (IMPORTS), RAIGAD reported at 2015 (324) E.L.T. 656 (S.C.), held that:

"31. .....It is rightly argued by the learned senior counsel for the Revenue that exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not enure to the assessee but would be given to the Revenue. *This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently.*

(iv) COMMISSIONER OF CUS. (IMPORT), MUMBAI Versus DILIP KUMAR & COMPANY, reported at 2018 (361) E.L.T. 577 (S.C.), **the larger bench** of

the Hon'ble Supreme Court of India held that:

*"**41.** After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity* ***must bestrictly interpreted in favour of the Revenue/State.***

43. *..... It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But,* ***in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue,*** *the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.*

44. *In Hansraj Gordhandas case (supra)-* [AIR 1970 SC 755 = (1969) 2 SCR 253 = 1978 (2) E.L.T. J350 (S.C.)], *the Constitutional Bench unanimously pointed out that an exemption from taxation is to be allowed based wholly by the language of the notification and exemption cannot be gathered by necessary implication or by construction of words; in other words,* ***one has to look to the language alone and the object and purpose for granting exemption is irrelevant and immaterial.***

45. *In Parle Exports case (supra), a Bench of two-Judges of this Court ..... pointed out the strict interpretation to be followed in interpretation of a notification for exemption. .....*

48. *..... Exemptions from taxation have tendency to increase the burden on the other unexempted class of taxpayers.* ***A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity.***

52. *To sum up, we answer the reference holding as under -*
(1) Exemption notification ***should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.***
(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of ***such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.***
(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

25.3 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. Further I find that by availing exemption wrongly by not completely disclosing the facts and misguiding the Department, is sufficient ground to invoke extended period, as held by the CESTAT, Bangalore Bench in the case of Bharat Earth

Movers Ltd. Versus Collector of C. Ex., Bangalore, reported at 2001 (136) E.L.T. 225 (Tri. – Bang.).

> ***"Exemption wrongly availed by not completely disclosing the facts and misguiding the Department - Extended period invokable"***

I further rely upon the judgment of the Hon'ble Patna High Court in the case of Tata Iron and Steel Co. Ltd. Versus Union of India and Others, 1988 (33) E.L.T. 297 (Pat.), wherein the Hon'ble Court held that:

> *"31. ..... It is not necessary to observe that there was fraud or collusion on the part of the company, but it is obvious that there was as least mis-statement and wilful suppression of facts. The petitioner was not entitled to the benefit of the exemption notification. It is not open to the petitioner to take up the position that it could not have conceded what it was contesting, ... namely, that a crane had been manufactured. The facts are so obvious that the petitioner was required to declare it specially when the department and the assessee work on self-assessment scheme. I have not the least doubt that the five-year rule must rule this case. The steps, therefore, for realisation of the duty are obviously within time. The stand of the petitioner in regard to the bar of limitation must be squarely rejected."*

In view of above, 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. 9,77,71,269/-** (Rs. 8,84,29,279/- i.r.o. import through ICD Khodiyar Port, Rs. 53,17,806/- i.r.o. import through ICD Sanand Port, Rs. 8,08,975/- i.r.o. import through Mundra Sea Port and Rs. 32,15,209/- i.r.o. import through Nhava Sheva Sea Port)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.

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

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

NOW THE CONDITIONS OF THE ABOVE BOND ARE THAT: -
1. I/We, the obligor(s) fulfil all 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."

25.5 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 non-compliance/failure to fulfill the conditions of the Notification. Therefore, I find that without prejudice to the extended time limit envisaged under Section 28 (4) of the Customs Act, 1962, said Importer is liable to pay differential duty 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 **Rs. 9,77,71,269/-** (Rs. 8,84,29,279/- i.r.o. import through ICD Khodiyar Port, Rs. 53,17,806/- i.r.o. import through ICD Sanand Port, Rs. 8,08,975/- i.r.o. import through Mundra Sea Port and Rs. 32,15,209/- i.r.o. import through Nhava Sheva Sea Port) alongwith interest.

25.6 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.

25.7 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. 9,77,71,269/-is liable to be recovered under Section 28(4) of the Customs Act, 1962. Therefore, I find that differential Customs Duty of Rs. 9,77,71,269/-is required to be demanded and recovered as determ+6ined under Section 28 (8) of the Customs Act, 1962 alongwith Interest under Section 28AA of the Customs Act, 1962.

25.8 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;".

25.9 The importer has also placed reliance on the judgement of Hon. Bombay High Court in the case of Mahindra and Mahindra Ltd. vs. The Union of India and Ors. WP No. 1848 of 2009 decided on 15.9.2022. They contested that Duty and interest is not liable to be paid and relied on the decision of Hon'ble Mumbai High Court in case of Mahindra & Mahindra v. Union of India, 2022 (10) TMI 212 wherein penalty and interest demanded was set aside in the absence of provision under Section 3 for Additional Duty of Customs, Section 3A for Special Additional Duty under the Customs Tariff Act, 1975 or Section 90 of the Finance Act, 2000 that created a charge in nature of penalty or interest. They have further stated that this judgement has been affirmed by Hon. Supreme Court and the Special Leave Petition filed by the Union of India has been dismissed by order dated 28.7.2023 passed in Special Leave Petition (C) No. 16214 of 2023. I find that this contention is not acceptable as the said decision is with regard to pre-GST era. Period covered in the said decision was November' 2004 to January' 2007 and period covered in present case is 13.10.2017 to 09.01.2019. Said decision of Mahindra & Mahindra Ltd reported in (2023) 3 CENTAX 261 (Bom.) 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."**

25.10 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 of Khemka & 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 expressly 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 (Atul Kaushik) 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."*

Therefore, I find that the differential Customs Duty amounting to **Rs. 9,77,71,269/-** (Rs. 8,84,29,279/- i.r.o. import through ICD Khodiyar Port, Rs. 53,17,806/- i.r.o. import through ICD Sanand Port, Rs. 8,08,975/- i.r.o. import through Mundra Sea Port and Rs. 32,15,209/- i.r.o. import through Nhava Sheva Sea Port) is required to be recovered under Section 28 (4) of the Customs Act, 1962 and I also find that the Section 28AA ibid provides for payment of interest automatically along with the Duty confirmed/determined under Section 28 ibid.

26. Whether the subject goods having assessable value of Rs. 54,31,73,706/- (Rs.49,12,73,756/- in respect of the import through ICD Khodiyar Port, Rs.2,95,43,372/- i.r.o. import through ICD Sanand Port, Rs.44,94,307/- i.r.o. import through Mundra Sea Port and Rs. 1,78,62,271/- i.r.o. import through Nhava Sheva Sea Port) as detailed in the Show Cause Notice, are liable for confiscation under Section 111(o) of the Customs Act, 1962?

26.1 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. 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. 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.

26.2 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 time 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..."

26.3 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".

26.4 I further 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 as under:

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).

26.5 I also find that 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 *inter alia* as under: -

".
.
.

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

"23. The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges,

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

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

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

> ***7.*** *Heard both the sides and perused the records of the case. We find that the appellant M/s. Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No. 230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road constrsites does not mean that the condition of the notification has been followed. In fact, the plant was never used for such contracts as canvassed by the appellant during the importation of goods and claiming exemption. The appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the State of U.P wherein the imported plant would be used. However, they never used the said imported equipments in State of U.P. for construction of road. Instead, they used the plant as a sub-contractor in State of Rajasthan and Tamil Nadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied.* ***It clearly shows that the appellant never complied with the conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed.*** *We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the appellant liable for penalty under Section 117 of C.A. 1962. Further we find that Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However, in case of Shri V.S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/connected with the decision to use machine and his role in violation of condition is also not visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order inasmuch as it has confirmed demand, confiscation of goods and penalties against M/s. Apco and Shri Anil Singh. However, the penalty imposed upon Shri V.S. Rao is set aside.*

The impugned order is modified to the above extent. The appeals filed by M/s. Apco Infratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed.

In the present case, it is clearly apparent that the importer/noticee never complied with the conditions of the exemption notification and has knowingly violated the conditions. The importer has knowingly cleared the imported goods without observing obligatory condition of 'Pre-Import' as envisaged under Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017. In view of the above, the impugned goods imported without observing obligatory condition of "Pre-import" as envisaged in the aforementioned notification are rightly liable for confiscation under Section 111(o) of the Customs Act, 1962. Therefore, the contention of the importer/noticee is not tenable.

26.7 In view of the above, I find that redemption fine under Section 125 (1) is liable to be imposed in lieu of confiscation of subject goods having assessable value of **Rs. 54,31,73,706/-** (Rupees Fifty Four Crore, Thirty One Lakh, Seventy Three Thousand, Seven Hundred and Six Only)(Rs.49,12,73,756/- i.r.o. import through ICD Khodiyar Port, Rs.2,95,43,372/- i.r.o. import through ICD Sanand Port, Rs.44,94,307/- i.r.o. import through Mundra Port and Rs. 1,78,62,271/- i.r.o. import through Nhava Sheva Port) under the subject Advance Authorizations as detailed in the Show Cause Notice.

27. Whether the importer is liable to Penalty under Section 114A of the Customs Act, 1962?

27.1 I find that demand of differential Customs Duty amounting to **Rs. 9,77,71,269/-** [(Rs. 8,84,29,279/- (ICD Khodiyar Port) +Rs. 53,17,806/- (ICD Sanand Port) +Rs. 8,08,975/- (Mundra Sea Port) +Rs. 32,15,209/- (Nhava Sheva Sea Port)] 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 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 quantum of penalty equal to the amount of Duty plus interest in terms of Section 114A ibid.

27.2 Further, I rely on the ratio of the decision of Hon'ble Tribunal Delhi in case of **Commissioner of Customs Vs. Ashwini Kumar Alia Amanullah reported as 2021 (376) E.L.T. 321 (Tri. - Del.),**wherein it 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 the present case, importer 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.

28. Whether importer is liable to Penalty 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 of the Customs Act, 1962 as penalty has been imposed on them under Section 114A of the Customs Act, 1962.

29. Further, I find that appellant have contended that the pre-import condition and Condition of Physical export introduced by DGFT Notification No. 33/2015 dated 13.10.2017 and Notification No.79/2017-Cus dared 13.10.2017 cannot and ought not to have been applied to the Advance Authorizations issued prior to 13.10.2017. In this regard, it is pertinent to mention that every 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. The Notification No. 79/2017-Cus dated 13.10.2017 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 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.

29.1 In addition, the Hon'ble Supreme Court of India in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) have discussed thoroughly the provisions of the Customs Act as well as the provisions of the FTP and it has been held that pre-import conditions, during October 13, 2017 to January 9, 2019, in Advance Authorisation Scheme imposed vide Notification No. 79/2017-Cus dated 13.10.2017 was valid and required to be complied with. In view of above discussion and the judgement passed by the Hon'ble Supreme Court of India in the instant matter, I find no substance in this argument put forth by the Noticee.

30. I also find that Importer has contested that the entire exercise is revenue neutral and there is no loss to the Government as the IGST payable is available as credit to the noticee or they would be eligible to claim the refund of such IGST under Rule 89(4) or 96(10). 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.*** *.....**We note that no such categorical assertion can berecorded 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 reversecharge.Thetax liability is governed by the legal provisions applicable duringthe*relevanttime 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 neutralitycannot 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 todecide on the manner of discharging such tax liability. We are not in agreement with such proposition."*

The Hon'ble Tribunal, Bombay bench in the case of ISMT Limited Versus Commissioner of Central Excise, Pune reported at 2017 (6) G.S.T.L. 298 (Tri. - Mumbai) held that:

> ***"9.*** *.....Admissibility of Cenvat Credit is subject to scrutiny and claimant does not get right to immunity ipso facto. There are two different jurisdictions relating to product developer and user thereof.* ***We may state that taxes paid today is more valuable for the country to fund public welfare than sacrificing public revenue on the pulpable plea of Revenue neutrality which is subject to scrutiny to grant Cenvat credit to a different unit.***

30.1 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*** **therewas 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.**"

Relying upon the above decision of the apex court, the CESTAT, Chandigarh bench in the case of Vogue Textiles Ltd. Versus Commissioner of Central Excise, Delhi-III, reported at 2017 (351) E.L.T. 310 (Tri. - Chan.), held that:

> *"**9.**As for the plea of the revenue neutrality, that cannot be an argument to justify wrong classification and availing the benefit of an exemption notification....."*

Further, in the case of Forbes Marshall Pvt. Ltd. Versus Commissioner Of Central Excise, Pune-I, reported at 2015 (38) S.T.R. 843 (Tri. - Mumbai), the Hon'ble CESTAT observed that:

> *6. ..... **Simply because a situation leads to revenue neutrality does not imply that tax need not be paid on time**. When law requires tax to be paid it has to be paid as per time specified. ..... It cannot be said that the Government has not lost interest between the two dates, notwithstanding the fact that Cenvat credit could have been availed on the same date if duty had been paid on time. ..... I hold that interest is payable under Section 75 of the Finance Act.*

In the above judgment, the Hon'ble tribunal while deciding the revenue neutrality contention has inclined to hold that even interest is payable.

30.2 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 issuedTrade 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.

30.3 I find that the ratio of case laws relied upon by the importer in support of their contentions are not squarely applicable to the facts and circumstances of the present case. I have gone through the facts of the case laws relied upon by the importer and compared the same with the factual details of the present case in hand. I find that there is quite difference in the facts and circumstances of their own case. In addition to the other facts and circumstances, the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC)is the major point which distinguish the issue involved in the present case viz-a-viz the issue involved in the case lawsrelied upon by the noticee. In this regard, I would like to rely on the judgment of the Hon'ble Supreme Court of India in the case of **Escorts Ltd. Versus Commissioner of Central Excise, Delhi-II, reported at 2004 (173) E.L.T. 113 (S.C.),** wherein the Hon'ble apex court observed that:

"10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Further reliance is placed on the judgment of the Hon'ble Apex court in case of **'Collector of Central excise, Calcutta Vs. Alnoori Tobacco Products' (2004(170)ELT 135 SC)**, where it was observed by the Hon'ble Apex Court-

"11.Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. ***Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.*** *In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed :*

"The matter cannot, of course, be settled merely by treating the ipsissimavertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

12.In Home Office v. Dorset Yacht Co. [1970 (2) All ER 294] Lord Reid said, "Lord Atkin's ***speech..... is not to be treated as if it was a statute definition. It will require qualification in new circumstances."*** *Megarry, J in (1971) 1 WLR 1062 observed:* ***"One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament."*** *And, in Herrington v. British Railways Board [1972 (2) WLR 537] Lord Morris said :*

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

*13.****Circumstantial flexibility, one additional or differentfact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper****.*

14.The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another*. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."*

*** *** ***

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.""

31. I find that the said noticee has also contested that they had received EODC certificates from DGFT in all the advance licenses which inherently implies that noticee has done all the related compliances. In this regard, I find that the contention of the noticee is totally incorrect and contrary to the law laid down by the Honourable Supreme Court of India in the case of **Sheshank Sea Foods Pvt. Ltd. Vs. UOI [1996**

(88) ELT 626 (SC)]. The Hon'ble Apex Court had in the said case held at para 10 of their judgment that:

> *"We do not find in the provisions of the Import and Export Policy or the Hand Book of Procedure issued by the Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away by the licensing authority. That the licensing authority is empowered [to] conduct such an investigation does not by itself preclude the Customs authorities from doing so".*

Further, at para 11 of the said judgment the Hon'ble Supreme Court held that :

> *"It is true that the terms of the said Exemption Notification were made a part of the appellants' licences and, in that sense, a breach of the terms of the said Exemption Notification is also a breach of the terms of the licence, entitling the licensing authority to investigate. But the breach is not only of the terms of the licence; it is also a breach of the condition in the Exemption Notification upon which the appellants obtained exemption from payment of Customs duty, and therefore, the terms of Section 111(o) enable the Customs authorities to investigate." [emphasis supplied]*

Further, relying upon the above decision, the apex court in the case of **'Commissioner of Customs, Hyderabad Vs. Pennar Industries Ltd.' [2004(170) ELT 135 SC], held that:**

> *"16. The aforesaid Order-in-Original of DGFT was under the provisions of EXIM Policy. It is held by this Court in Sheshank Sea Foods Pvt. Ltd. (supra) that the same would not be binding on the customs authorities and as far as action taken under the Customs Act is concerned, the same is to be covered by the provisions of the Customs Act."*

The ratio of the above decision in the case of Sheshank Sea Foods is squarely applicable to the facts of the present case and hence the contention of the Noticee is without any merit.

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

::ORDER::

a) I confirm the Duty of Customs amounting to **Rs. 8,84,29,279/-** (Rupees Eight Crore, Eighty Four Lakh, Twenty Nine Thousand, Two Hundred and Seventy Nine only)in the form of IGST saved in course of imports of the goods through **ICD Khodiyar Port**under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexure attached to the Notice, and order recovery of the same from M/s. Sakar Industries Pvt. Ltd. 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. 49,12,73,756/-** (Rupees Forty Nine Crore, Twelve Lakh, Seventy Three Thousand, Seven Hundred and Fifty Six Only)imported by M/s. Sakar Industries Pvt. Ltd.through **ICD Khodiyar Port** under the subject Advance Authorizations as detailed in the Annexure attached to the Notice 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.1,45,00,000/-** (Rupees One Crore and Forty Five Lakh only) under Section 125 of the Customs Act, 1962;

c) I confirm the Duty of Customs amounting to **Rs. 53,17,806/-** (Rupees Fifty Three Lakh, Seventeen Thousand, Eight Hundred and Six only)in the form of IGST saved in course of imports of the goods through **ICD Sanand port** under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexure attached to the Notice, and order recovery of the same from M/s. Sakar Industries Pvt. Ltd. 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;

d) I hold the subject goods having assessable value of **Rs.2,95,43,372/** (Rupees Two Crore, Ninety Five Lakh, Forty Three Thousand, Three Hundred and Seventy Two Only)imported by M/s. Sakar Industries Pvt. Ltd. through **ICD Sanand Port** under the subject Advance Authorizations as detailed in the Annexure attached to the Notice 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.8,80,000/-** (Rupees Eight Lakh and Eighty Thousand only) under Section 125 of the Customs Act, 1962;

e) I confirm the Duty of Customs amounting to **Rs.8,08,975/-** (Rupees Eight Lakh, Eight Thousand, Nine Hundred and Seventy Five only)in the form of IGST saved in course of imports of the goods through **Mundra Sea Port** under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexure attached to the Notice, and order recovery of the same from M/s. Sakar Industries Pvt. Ltd. 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;

f) I hold the subject goods having assessable value of **Rs. 44,94,307/-** (Rupees Forty Four Lakh, Ninety Four Thousand, Three Hundred and Seven Only)imported by M/s. Sakar Industries Pvt. Ltd. through **Mundra Sea Port** under the subject Advance Authorizations as detailed in the Annexure attached to the Notice 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.1,35,000/-** (Rupees One Lakh and Thirty Five Thousand only)under Section 125 of the Customs Act, 1962;

g) I confirm the Duty of Customs amounting to **Rs. 32,15,209/-** (Rupees Thirty TwoLakh, Fifteen Thousand, Two Hundred and Nine only)in the form of IGST saved in course of imports of the goods through **JNCH, Nhava Sheva Sea Port** under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Annexure attached to the Notice, and order recovery of the same from M/s. Sakar Industries Pvt. Ltd. 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;

h) I hold the subject goods having assessable value of **Rs. 1,78,62,271/-** (Rupees One Crore, Seventy Eight Lakh, Sixty Two Thousand, Two Hundred and Seventy One Only) imported by M/s. Sakar Industries Pvt. Ltd. through **JNCH, Nhava Sheva Sea Port** under the subject Advance Authorizations as detailed in the Annexure attached to the Notice 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.5,35,000/-** (Rupees Five Lakh and Thirty Five Thousand only) under Section 125 of the Customs Act, 1962;

i) I impose a penalty of **Rs. 9,77,71,269/-** (Rupees Nine Crore, Seventy Seven Lakh, Seventy One Thousand, Two Hundred and Sixty nine only) on M/s. Sakar Industries Pvt. Ltd.plus penalty equal to the applicable interest under Section 28AA of the Customs Act, 1962 payable on the Duty demanded and confirmed at (a), (c), (e) and (g) above under Section 114A of the Customs Act, 1962. However, in view of the first and second proviso to Section 114A of the Customs Act, 1962, if the amount of Customs Duty confirmed and interest thereon is paid within a period of thirty days from the date of the communication of this Order, the penalty shall be twenty five percent of the Duty, subject to the condition that the amount of such reduced penalty is also paid within the said period of thirty days;

j) I refrain from imposing penalty on M/s. Sakar Industries Pvt. Ltd.under Section 112 (a) of the Customs Act, 1962 for the reasons discussed in para 28 supra;

k) I order to enforce the Bonds executed by M/s. Sakar Industries Pvt. Ltd.in terms of Section 143(3) of the Customs Act, 1962, for recovery of the Customs Duty as mentioned at (a) above alongwith interest.

33. 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.

34. The Show Cause Notice No. VIII/10-22/Commr./O&A/2022-23 dated 19/10/2022 is disposed off in above terms.

18.04.2024

(Shiv Kumar Sharma)
Principal Commissioner
Customs, Ahmedabad

DIN-20240471MN0000999CB7
F. No. VIII/10-22/Commr./O&A/2022-23 Date: 18.04.2024.

By RPAD/Hand Delivery/Email/Speed Post/ Notice Board

To; (Noticee),

M/s. Sakar Industries Pvt. Ltd.,
H-10, New Madhavpura Market,
Shahibaug Road, Ahmedabad-380004

Copy to:-

1. The Chief Commissioner of Customs, Gujarat Zone, Ahmedabad for information please.
2. The Pr. Commissioner/Commissioner of Customs, **Nhava Sheva-V, Central Adjudication Cell (CAC),** Mumbai Zone- II, Jawaharlal Nehru Custom House, Nhava Sheva, Taluka: Uran, District -Raigad, Maharashtra-400707 for information and record please.
3. The Pr. Commissioner/Commissioner of Customs, **Nhava Sheva-I, Centralized Revenue Recovery Cell (CRRC),** Mumbai Zone- II, Jawaharlal Nehru Custom House, Nhava Sheva, Taluka: Uran, District -Raigad, Maharashtra-400707 for information and record please.
4. The Commissioner of Customs, Custom House, **Mundra,** 5B, Port User Building, Mundra Port, Mundra, Gujarat – 370421 for information and record please.
5. The Additional Commissioner of Customs (TRC), Ahmedabad for information please.
6. The Deputy Commissioner of Customs, **ICD Khodiyar**, Jamiyatpura Road, Nr. Khodiyar Railway Station, S.G. Highway, Ta.& Dist. – Gandhinagar-382423 Ahmedabad for information please.
7. The Deputy Commissioner of Customs, **ICD Sanand** (The Thar Dry Port),Kadi Road, Village -Nidhrad, Nr Manikrupa Ashram, Sanand, Ahmedabad -382110 for information please.
8. The Superintendent of Customs (Systems), Ahmedabad in PDF format for uploading on the website of Customs Commissionerate, Ahmedabad.
9. Guard File.