कार्यालय: प्रधान आयुक्त सीमाशुल्क, मुन्द्रा,
सीमाशुल्क भवन, मुन्द्रा बंदरगाह, कच्छ, गुजरात- 370421
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS:
CUSTOM HOUSE, MUNDRA PORT, KUTCH, GUJARAT-370421.
PHONE : 02838-271426/271163 FAX :02838-271425
E-mail id- adj-mundra@gov.in

A	FILE NO.	GEN/ADJ/ADC/1122/2023-ADJN.
B	ORDER-IN- ORIGINAL NO	MCH/ADC/AK/11/2024-25
C	PASSED BY	ARUN KUMAR, ADDITIONAL COMMISSIONER OF CUSTOMS, CUSTOMS HOUSE, MUNDRA.
D	DATE OF ORDER	16-04-2024
E	DATE OF ISSUE	17-04-2024
F	SCN NO & DATE	GEN/ADJ/ADC/1122/2023-ADJN. dated 19.06.2023
G	NOTICEE / PARTY / IMPORTER	M/s. Adani Wilmar Ltd. Survey No.169/P-1, 2 & 3, Village- Dhrub, Taluka – Mundra, Dist. Kutuch, Gujarat-370421
H	DIN NUMBER	20240471MO00000040E5

1. The Order – in – Original is granted to concern free of charge.

2. Any person aggrieved by this Order – in – Original may file an appeal under Section 128 A of Customs Act, 1962 read with Rule 3 of the Customs (Appeals) Rules, 1982 in quadruplicate in Form C. A. 1 to

The Commissioner of Customs (Appeal), MUNDRA
4th floor, HUDCO Building, IshwarBhuvan Road,
Navrangpura, Ahmedabad– 380009.

3. Appeal shall be filed within Sixty days from the date of Communication of this Order.

4. Appeal should be accompained by a Fee of Rs. 5/- (Rupees Five Only) under Court Fees Act it must accompained by (i) copy of the Appeal, (ii) this copy of the order or any other copy of this order, which must bear a Court Fee Stamp of Rs. 5/- (Rupees Five Only) as prescribed under Schedule – I, Item 6 of the Court Fees Act, 1870.

5. Proof of payment of duty / interest / fine / penalty / deposit should

be attached with the appeal memo.

6. While submitting the appeal, the Customs (Appeals) Rules, 1982 and other provisions of the Customs Act, 1962 should be adhered to in all respect.

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

BRIEF FACTS OF THE CASE

M/s. Adani Wilmar Ltd., Survey No.169/P-1, 2 & 3, Village Dhrub, Taluka – Mundra, Dist. Kutch, Gujarat- 370421 (IEC No.0899000363) (hereinafter also referred to as "the importer" or "the Noticee" for the sake of brevity) is engaged in the import of goods availing the benefit of Exemption under Notification No.18/2015-Cus dated 01.04.2015 (as amended by Notification No.79/2017-Cus dated 13.10.2017) under the Advance Authorization Scheme. They had presented Bill of Entry bearing Nos. 6981363 dated 27.06.2018 and 9302647 dated 18.12.2018 through their Customs Broker M/s. Narendra Forwarders, at Custom House, Mundra, for clearance of goods i.e. RBD Palm Stearin classified under CTH No. 15119030 of First Schedule of the Customs Tariff Act, 1975.

1.1. During the course of Performance audit, Ahmedabad (Para-3.1.4.1 of Report No.10 of 2021 dated 24.05.2023), it was observed from the data analysis of Bills of Entry that the said importer had availed the benefit of exemption under Notification No.18/2015-Cus dated 01.04.2015 (as amended by Notification No.79/2017-Cus date 13.10.2017) under the Advance Authorization Scheme, but while going through the process of such imports and corresponding exports towards discharge of export obligation, they failed to comply with the pre-import condition, as demanded under the said Notification No.79/2017-Cus dated 13.10.2017, that extended such conditional exemption. Pre-import condition simply means that the goods should be imported prior to commencement of export to enable the exporter to manufacture finished goods, which could be consequently exported under the same Advance Authorization for discharge of Export Obligation. They had imported "RBD

Palm Stearin" classified under Chapter Heading 15119030 on Advance Authorization Scheme (Indirect Tax-Customs) and cleared the goods without payment of IGST. However, these goods are levied @ 5% IGST and the pre-import conditions imposed vide Notification No. 79/2017-Cus. dated 13.10.2017 is not fulfilled. Further, the exports were done first before import under Licenses issued under Advance Authorization Scheme, that quite naturally, they did not manufacture the goods which were exported under the mentioned Advance Authorizations and that the materials which were exported against the shipping bills, were not manufactured entirely out of the Duty free materials imported under the Advance Authorization in question; that resulted in non-compliance of the pre-import condition. The details are as shown below:-

TABLE-A

BE No.& Dt	**Importer Name**	**Item Description**	**Ass.Value (in Rs.)**	**Total amount @5% IGST (in Rs.)**
6981363 dtd.27.06.18	M/s.Adani Wilmar Ltd.	RBD Palm Stearin	6491816	5,17,398/-
9302647 dtd.18.12.18	M/s.Adani Wilmar Ltd.	RBD Palm Stearin	50687909	40,39,826/-
			Total	**45,57,224/-**

1.2 Whereas, it appeared that various importers had imported various input materials without payment of duty of Customs under cover of number of Advance Authorizations issued by regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importer availed benefit of exemption extended by Notification No.18/2015-Cus dated 01.04.2015, as amended by the Customs Notification No.79/2017 dated 13.10.2017, and did not pay any Customs Duty in the form of Integrated Goods & Service Tax (IGST) levied under Sub-Section (7) of Section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended subject to 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.

1.3 Whereas, it appeared that the importer was aware that Notification No.79/2017 dated 13.10.2017 under which pre-import and physical export condition was inserted on duty free import of goods; that for the purpose of availing the benefit of exemption from payment of IGST, one was supposed to comply with the pre-import condition.; that pre-import condition demands that the entire materials should be imported under Advance Authorizations and it should be utilized exclusively for the purpose of manufacture of finished goods, which would be exported out of India; that for the purpose of availing the benefit of exemption from payment of IGST, one was supposed to comply with the pre-import condition.

1.4. Whereas, it appeared that the goods were exported before the commencement of imports. Therefore, it was confirmed that for manufacture of the exported goods, the importer used domestically or otherwise procured materials, thereby contravening the provision of pre-import condition and went on to avail benefit of exemption. Therefore, the importer failed to comply with the pre-import condition and therefore, was not eligible for IGST exemption benefit.

1.5. Whereas, it appeared that in respect of above mentioned Advance Authorization, the importer failed to use Duty-free materials imported under the respective Advance Authorization for the purpose of manufacture of the finished goods, which were exported towards discharge of export obligation. It is also evident that the Duty free goods subsequently imported could not have been used for the specified purpose. Therefore, the importer failed to comply with the pre-import condition in respect of these Advance Authorization.

2. **Legal Provisions:-**

Following are the provisions of law, which are relevant to the Show Cause notice.

1. **Para 4.03 of the Foreign Trade Policy (2015-20)**
   Advance Authorization is issued to allow Duty Free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is

consumed/utilized in the process of production of export product, may also be allowed.

2. **Para 4.05 of the Foreign Trade Policy (2015-20)**

Para 4.05 of the Applicant/Export/Supply:-

a. Advance Authorization can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.
b. Advance Authorization 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 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), (t), (g) and (h) of this FTP.
iv. Supply of "Stores" on board of foreign going vessel/aircraft, subject to condition that there is specific Standard Input Output Norms in respect of item supplied.

3. **Para 4.13 of Foreign Trade Policy 2015-20**

Pre-import condition in certain cases:-

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

4. **Notification No. 33/2015, New Delhi dated 13.10.2017**

Subject: Amendments in Foreign Trade Policy 2015-20 reg.

S.O. (E): In exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 of the Foreign Trade Policy, 2015-2020 as amended from time to time, the Central Government hereby makes following amendments in Foreign Trade Policy 2015-20. I. Para 4.14 is amended to read as under:

"4.14: Details of Duties exempted Imports under Advance Authorization

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"

NOTIFICATION NO. 31 (RE-2013)/ 2009-2014 NEW DELHI, 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 4.7.14". The amended para would be as under:
"Provisions of paragraphs 4.1.11, 4.1.12, 4.1.13, 4.1.14 and 4.1.15 of FTP shall be applicable for DFIA holder."

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

Policy Circular No.03 (RE-20131/2009-2014 Dated 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 Ist 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.

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

G.S.R. 254 (E).- in exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India against a valid Advance Authorisation issued by the Regional Authority in terms of paragraph 4.03 of the Foreign Trade Policy (hereinafter referred to as the said authorisation) from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 88, 8C and 9A of the said Customs Tariff Act, subject to the following conditions, namely

i. that the said authorisation is produced before the proper officer of customs at the time of clearance for debit;
ii. that the said authorisation bears,-

a. the name and address of the importer and the supporting manufacturer in cases where the authorisation has been issued to a

merchant exporter; and

b. the shipping bill numbers) and date(s) and description, quantity and value of exports of the resultant product in cases where import takes place after fulfillment of export obligation; or
c. the description and other specifications where applicable of the imported materials and the description, quantity and value of exports of the resultant product in cases where import takes place before fulfillment of export obligation;

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

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

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

Provided that if the importer pays additional duty of customs leviable on the imported materials but for the exemption contained herein, then the

imported materials may be cleared without furnishing a bond specified in this condition and the additional duty of customs so paid shall be eligible for availing CENVAT Credit under the CENVAT Credit Rules, 2004;

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

(vii) that the imports and exports are undertaken through the seaports, airports or through the inland container depots or through the land customs stations as mentioned in the Table 2 annexed to the Notification No.16/ 2015- Customs dated 01.04.2015 or a Special Economic Zone notified under section 4 of the Special Economic Zones Act, 2005 (28 of 2005):
Provided that the Commissioner of Customs may, by special order or a public notice and subject to such conditions as may be specified by him, permit import and export through any other sea- port, airport, inland container depot or through a land customs station within his jurisdiction;

(viii) that the export obligation as specified in the said authorisation (both in value and quantity terms) is discharged within the period specified in the said authorisation or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorisation;
Provided that an Advance Intermediate authorisation holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.05 (c) (ii) of the Foreign Trade Policy;

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

Notification No. 79/2017-Cus. Dated 13.10.2017:

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table, namely

(Relevant Provisions only) –

Sr. No.	**Notification number Amendments and date**	**Amendments**
2	18/2015-Customs, In the said notification, in the opening dated the 1stApril, 2015	In the said notification, in the opening paragraph:- (a) for the words, brackets, figures and 254 (E) dated letters "from the whole of the additional duty the 1stApril, 2015 leviable thereon under sub-sections (1), (3) and (5) of section 3, safeguard duty leviable thereon under section 8B and anti-dumping duty leviable thereon under section 9A",the words, brackets, figures and letters "from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of section 3,integrated tax leviable thereon under sub-section (7)of section 3, goods and services tax compensation cess leviable thereon under sub-section (9) of section 3, safeguard duty leviable thereon under section 8B, countervailing duty leviable thereon under section 9 and anti-dumping duty leviable thereon under section 9A"shall be substituted. (b) in condition (vili), 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 :-"(xi) 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; (xini) 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.

3. Discussion on provisions of Law:-

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

3.1.1 Whereas Advance Authorizations are issued by the

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

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

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

that it is necessary in the public interest so to do, made the following further amendments in each of the Notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table. Only the relevant portion pertaining to the Customs Notification No. 18/2015 dated 01-04-2015 is reproduced in para 3(j), which may be referred to.

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

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

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

1. All exports under the Advance Authorization should be physical

exports, therefore, debarring any deemed export from being considered towards discharge of export obligation;

2. 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;

3.2 Physical Export condition in relation to the Foreign Trade Policy (2015-20) and the Notification No. 79/2017-Cus dated 13-10-2017:

3.2.1 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.

3.2.2. Therefore, the definition has been further extended in specific terms under Chapter 4 of the Policy and the supplies made to SEZ, despite not being an event in which goods are being taken out of India, are considered as Physical Exports. However, other three categories defined under (c) (i), (ili) & (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).

3.2.3. 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 Export Obligation are physical exports. In case the entire exports made, do not fall in the category of physical exports, the Advance Authorization automatically sets disqualified for the purpose of exemption.

3.3 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.

3.3.1 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 in force.

3.3.2 The definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20). 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).

3.3.3 Advance Authorizations 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, and 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.

3.3.4. 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 4.03 of the Policy (2015-2020] and stipulated further condition which clarified the ambit of the aforesaid Para 4.03. Inputs actually imported must be used in the export product.

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

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

3.3.7. Specific provision under the said Para 4.27 (d) was made, which states

that -

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

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

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

4. 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.

4.1. 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."

4.2. 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".**

4.3 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:

4.4. 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;"

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

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

4.5 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.

4.6. 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.

4.7. 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**.

5. Whereas 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 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.

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

i. If the importer fulfils a part or complete export obligation, in respect of an Advance Authorization, even before commencement of any import under the subject Advance Authorization, **it is implied that such imported materials have not gone into production of goods that have been exported,** by which the export obligation has been discharged. Therefore, pre-import condition is violated.
ii. Even if the date of the first Bill of Entry under which goods have been imported under an Authorization is prior to the date of the first Shipping Bill through which exports have been made, indicating exports happened subsequent to import, but if documentary evidences establish that the consignments, so imported, were received at a later stage in the factory after the commencement of exports, then the goods exported under the Advance Authorization could not have been manufactured out of the Duty free imported goods. This aspect can be verified from the date of the Goods Receipt Note (GRN), which establishes the actual date on which materials are received in the factory. Therefore, in absence of the imported materials, it is implied that the export goods were manufactured out of raw materials, which were not imported under the subject Advance Authorization. Therefore, pre-import condition is violated.
iii. In cases, where multiple input items are allowed to be imported under an Advance Authorization and out of a set of import items, only a few are imported prior to commencement of export, it implies that in the production of the export goods, except for the item already imported, the importer had to utilize materials other than the Duty-free materials imported under the subject Advance Authorization. The other input materials are imported subsequently, **which do not and could not have gone into production of the finished goods exported under the said Advance Authorization.** Therefore, pre-import condition is violated.
iv. In some cases, preliminary imports are made prior to export.

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

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

6.1 Whereas 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 18/2015 dated 01-04-2015. The said condition was introduced by the Notification No.79/2017-Cus dated 13-10-2017,by amending the principal Customs Notification. Therefore, for the Advance Authorizations issued prior to 13-10-2017, logically there was no obligation to comply with the pre-import condition. At the same time, there was no exemption from the IGST either during that period. Notifications are published in the public domain, and every individual affected by it is aware of what benefit it extends and in return, what conditions are required to be complied with. To avail such benefits extended by the Notification, one is duty bound to observe the formalities and/or comply with the conditions imposed in the Notification

6.2 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.

6.3 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

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

7.1 Whereas Advance Authorization Scheme has always been Advance Authorization specific. The goods to be imported/exported, quantity of goods required to be imported/exported, value of the goods to be imported/exported, nos. of items to be allowed to be imported/exported, everything is determined in respect of the Advance Authorization issued.

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

7.2. **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 wrt 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.

7.3. 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

7.4. 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.

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

7.6. 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,

8. 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:-

8.1 Whereas Customs Notification No.79/2017 dated 13-10-2017, was issued extending benefit of exemption of IGST (Integrated Goods & Service Tax), on the input raw materials, when imported under Advance Authorizations. The original Customs Notifications No. 18/2015 dated 01-04-2015, that governs imports under Advance Authorizations, has been suitably amended to incorporate such additional benefit to the importers, by introduction of the said Notification. It was of course specifically mentioned in the said Notification that "the exemption from integrated tax and the goods and services tax compensation 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.**

8.2. 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 subsection (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued bu 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.

8.3. For the purpose of availing the benefit of exemption from payment of IGST in terms of Para 4.14 of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No. 79/2017-Cus dated 13-10-2017, it is obligatory to comply with the pre-import as well as physical export conditions. Therefore, if for reasons as elaborated in Paragraph 4.3 above, the Duty-free materials are not subjected to the process of manufacture of finished goods, which are in turn exported under the subject Advance Authorization, condition of pre-import gets violated.

8.4. Combined provisions of the Foreign Trade Policy and the subject Customs Notifications, clearly mandate that 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.

9. Quantification of Duty foregone: -

From the discussion made in the foregoing paras, it appears that M/s. Adani Wilmar Ltd., Survey No.169/P-1, 2 & 3, Village Dhrub, Taluka – Mundra, Dist. Kutch, Gujarat-370421 imported Duty free goods availing the benefit of License issued under Advance Authorisation Scheme during the period from **June, 2018 to December-2018.** The details of the License and goods imported availing the benefit of this License is mentioned as per above Table-A.

10. Contravention of the statutory Provisions: -

10.1 Whereas in terms of Section 46 of the Customs Act, 1962, while presenting the Bills of Entry before the Customs Authority for clearance of the imported goods, it was the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorizations under which imports were being made availing benefit of IGST exemption. The law demands true facts to be declared by the importer. It was the duty of the

importer to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorizations. 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 dtd. 13-10-2017. This has therefore, resulted in violation of Section 46 of the Customs Act, 1962.

10.2 M/s. Adani Wilmar appear to have wilfully suppressed the facts that they had not used Duty free imported materials in manufacturing of exported goods. It was the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorizations under which imports were being made availing benefit of IGST exemption. The above acts of omission and commission on the part of the importer appear to have rendered the imported goods cleared under two Bills of Entry as listed in Table-A. The IGST amounting to Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) not paid by the importer is liable to be recovered under Section 28(4) of the Customs Act, 1962.

10.3 The importer failed to comply with the conditions laid down under the relevant Customs Notification as well as the DGFT Notification and the provisions of the Foreign Trade Policy (2015-20), as discussed in the foregoing paras. Therefore, the amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with interest.

10.4 With the introduction of self-assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the importer, it was the duty of the importer to present correct facts and declare to the Customs Authority about their inability to comply with the conditions laid down in the Customs Notification, while seeking benefit of exemption under Notification No. 79/2017-Cus dated

13-10-2017. However, contrary to this, they availed benefit of the subject Notification for the subject goods, without complying with the conditions laid down in the exemption Notification in violation of Section 17 of the Customs Act, 1962. Amount of Customs Duty attributable to such benefit availed in the form of exemption of IGST, is therefore, recoverable from them under Section 28(4) of the Customs Act, 1962 along with appropriate interest under Section 28AA of the Customs Act, 1962.

10.5 The importer failed to comply with the pre-import condition of the Notification and imported goods Duty free by availing benefit of the same without observing 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.

10.6. Section 114A of the Customs Act, 1962, stipulates that where the Duty has not been levied or has been short-levied by reason of collusion or any willful misstatement 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 Notice 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.

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

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

and

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

11. In view of the above, a Show Cause Notice No. GEN/ADJ/ADC/1122/2023-ADJN. Dated 19.06.2023 was issued whereby M/s. Adani Wilmar Ltd., Survey No.169/P-1,2 & 3, Village Dhrub. Taluka – Mundra, Dist. Kutch, Gujarat-370421 was called upon to show cause to the Additional Commissioner of Customs, Custom House, Mundra having office at PUB Building, Adani Port, Mundra, as to why

(i) Customs Duty amounting to Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) in the form of IGST saved in course of imports of the goods under the Advance Authorizations and the corresponding Bills of Entry as mentioned in above Table-A, 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 and the Customs Duty amounting to Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) in the form of IGST, paid by them (as per details in Table-A should not be appropriated against the above demand;

(ii) Interest should not be demanded and recovered from them under Section 28AA of the Customs Act, 1962 on the Custom's Duty demanded at (i) above;

(iii) Penalty should not be imposed upon them under Section 114A of the Customs Act, 1962

12. WRITTEN SUBMISSION

12.1 M/s Adani Wilmar Ltd. vide their letter dated 06.07.2023 and 20.10.2023 has submitted that they have made the payment of IGST total amounting to Rs. 45,57,224/- as against two Bills of Entry No. 9302647

dated 18.12.2018 & 6981363 dated 27.06.2018 along with applicable interest. They also submitted copy of e-Challan No. 2044766808 & 2044766815 both dated 04.07.2023 showing Payment of Differential Duty alongwith interest thereon total amounting to Rs. 75,53,622/-(Rupees Seventy Five Lakhs Fifty Three Thousand Six Hundred Twenty Two Only) and requested to drop the Show Cause Notice No. GEN/ADJ/ADC/1122/2023-Adjn-O/o Pr Commr-Cus-Mundra dated 19.06.2023.

12.2 Moreover, M/s Adani Wilmar Ltd. submitted written reply vide their letter dated 05.01.2024 which is as under:-

A. **In the absence of a charging section for the imposition of a penalty under Section 3 of the Customs Tariff Act, 1975, a penalty under the provisions of the Customs Act, 1972 cannot be imposed.**

1.1. Section 3(7) of the Customs Tariff Act (the Customs Tariff Act) provides for levy of IGST on a like article on its supply in India. Additionally, Section 3(12) of the Customs Tariff Act borrowed the provisions of the Customs Act and the rules and regulations framed thereunder to the extent it applies to 'duty' or 'tax' or 'cess. It is noteworthy that there is no provision that borrows 'penalty' provisions from the Customs Act or provides a separate substantive provision to levy and collect the same (i.e., penalty). The relevant portion of Section 3(12) of the Customs Tariff Act is reproduced below "(12) The provisions of the Customs Act, 1962 (52 of 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 or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act."

1.2. On reading of Section 3(12) of the Customs Tariff Act, it can be viewed that it does not borrow the provision for 'penalty' from the Customs Act.

1.3. Further, the use of the words 'so far as may be, apply to the **duty or tax** or cess, as the case may be, chargeable under this Section as they apply in relation to the duties leviable under that Act' shows that the applicability of provisions of the Customs Act has been restricted to the levy of duties or taxes under Section 3 of the Customs Tariff Act as they would apply to the levy of Customs Duty under the Customs Act.

1.4. In addition to the provisions relating to levy, provisions relating to drawbacks, refunds and exemptions have specifically been included. In other words, the scope of borrowing provision is restricted by the use of the words 'so far as may be' only to the duties and taxes and does not extend to other provisions relating to the imposition of penalty.

1.5. The Company wishes to highlight that this is substantiated by the fact that for other similar provisions under the Customs Tariff Act like Countervailing duty on subsidized articles under Section 9 of the Customs Tariff Act and Anti-Dumping Duty under Section 9A, specific amendments were brought vide the Finance Act, 2009 to retrospectively incorporate applicability of interest and penal provisions from the Customs Act to Section 9 and 9A of the Customs Tariff Act. Notably, similar amendments have intentionally not been carried out for duties of Customs including IGST on import of goods as leviable under Section 3 of the Customs Tariff Act.

1.6. In this regard, the Company draws attention to the landmark judgment in the case of **Mahindra and Mahindra v. Union of India and Others, [2022 (10) TMI 212]**, rendered by the Bombay High Court, which dealt with a comparable dispute regarding the imposition of interest and penalty on various Additional Customs Duties and Surcharge collected under the Customs Tariff Act for the import of goods, in the absence of any specific substantive provision. The High Court determined that the provisions related to imposing interest and penalty on such Additional Customs Duties and Surcharge were not incorporated into the Customs Tariff Act. Consequently, the High Court ruled that taxing provisions must be expressly provided for in the statute, and recoveries can only be made when the language of the statute explicitly permits it. Based on this, the High Court set aside the demand for interest and penalty on such levies under the Customs Tariff Act. Against the aforesaid decision of the Bombay High Court, the Revenue filed an SLP before the Supreme Court which was also dismissed by holding that no merit was found. [Special Leave Petition (Civil) Diary No(s). 18824/2023],

1.7. Basis above, the Company would like to state that in the absence of substantive provisions for charging penalty, the imposition of penalty is not justified. The current provisions under the Customs Tariff Act are inadequate regarding the imposition of penalty on IGST levied on the import of goods.

1.8. It is also submitted that the mere fact that there is machinery for assessment. collection and enforcement of tax and penalty under the Customs Act does not mean that the provisions of penalty as contained

under the Customs Act are treated as applicable for penalty under the Customs Tariff Act. The meaning of penalty under the Customs Tariff Act cannot be enlarged by the provisions of the machinery of the Customs Act incorporated for working out the Customs Tariff Act.

1.9. In this regard, the Noticee relied on the decision of the Hon'ble Supreme Court in the case of **M/s. Khemka and Co. (Agencies) Pvt. Ltd. V/s. State of Maharashtra [(1975) 2 SCC 22]**. In the instant case, the question put forth before the Hon'ble Supreme Court was whether the assesses under the Central Sales Tax Act could be made liable for penalty under the provisions of the State Sales Tax Act. The petitioner contended that there is no specific provision under the Central Sales Tax Act regarding imposition of penalty for delay or default in payment of tax, therefore, imposition of penalty by taking recourse to the penalty provisions of the State Sales Tax Act for delay or default in payment of tax is illegal. The rival contention on behalf of the Revenue was that the provisions regarding penalty for default in payment of tax as enacted in the State Sales Tax Act were applicable to the payment and collection of the tax under the Central Sales Tax Act and were incidental to and part of the process of such payment and collection.

1.10. The Hon'ble Supreme Court has held that penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. It is in addition to tax and is a liability under the Act. There must be a charging section to create liability. There must be, first, a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. *The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act.*
The relevant extract of the ruling is reproduced hereunder:

"25. ***Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment, It is not merely machinery. Penalty is in addition to tax and is a liability under the Act.*** *Reference may be made to section 28 of the Indian Income-tax Act, 1922 where penalty is provided for concealment of income. Penalty is in addition to the amount of income- tax. This Court in Jain Brothers & Ors. v. Union of India said that penalty is not a continuation of assessment proceedings and that penalty partakes of the character of additional tax.*

26. *The Federal Court in Chatturam & Ors. v. Commissioner of Income-tax, Bihar said that liability does not depend on assessment.* ***There must be a charging section to create liability. There must be, first a liability created by the Act. Second, the Act must provide for assessment. Third, the Act must provide for enforcement of the taxing provisions. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in the State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act.***

.....

28. ***For the foregoing reasons we are of opinion that the provision in the state Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act***. There is no lack of sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax, would be subjected to recovery proceedings under the public Demands Recovery Act. A penalty is a statutory liability. The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties. These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions. The Central Act is a self-contained code which by charging section creates liablity for tax and which by other sections creates a liability for penalty and impose penalty. Section 9(2) of the Central Act creates the State authorities as agencies to carry out the assessment, reassessment, collection and enforcement of tax and penalty by a dealer under the Act."

(emphasis supplied)

1.11. The Noticee would also like to place reliance on the case of **Collector of Central Excise, Ahmedabad V/s. Orient Fabrics Pvt. Ltd. [2003 (158) E.LT. 545 (SC)].** In the instant case, the question that came up before the Hon'ble Supreme Court for consideration was as regards to jurisdiction of the authorities under the Central Excise Act i.e., whether it is permissible to resort to the penalty proceedings or forfeiture of goods for non-payment of additional duty in terms of the provisions of Additional Duties of Excise (Goods of Special Importance) Act, 1957 by taking recourse to the provisions of the Central Excise Act and Rules framed thereunder. It is important to note here in this case that, the provisions of Section 3 of the Additional Duties of Excise (Goods of Special Importance)

Act, 1957 were similar to the provisions of Section 3 of the Customs Tariff Act.

1.12. While interpreting the provisions, the Hon'ble Supreme Court held that it is no longer res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific, explicit and expressly provided. The Act created liability for additional duty for excise but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law. The relevant excerpt from the judgment is presented below:

"5. In order to appreciate the issue, it is relevant to set out the sub-section (3) of Section 3 of the Act, as applicable in this matter and which runs as under:

"SECTION 3: Levy and collection of additional duties :

1. …….
2. …….
3. *The provisions of the Central Excises and Salt Act, 1944 and the rules made there under including those relating to refunds and exemptions from duty shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1).*

6. *A perusal of the said provision shows that the breach of provision of the Act has not been made penal or an offence and no power has been given to confiscate the goods. It only provides for application of the procedural provisions of the Central Excises and Salt Act, 1944 and the Rules made thereunder.* ***It is no longer res integra that when the breach of the provision of the Act is penal in nature or a penalty is imposed by way of additional tax, the constitutional mandate requires a clear authority of law for imposition for the same. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. The authority has to be specific and explicit and expressly provided. The Act created liability for additional duty for excise but created no liability for any penalty. That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law."***

7. The Parliament by reason of Section 63(a) of the Finance Act, 1994 (Act No. of 32 1994) substituted sub-section (3) of Section 3 of the said Act, which now reads as under:

3. **Levy and collection of Additional Duties:**

(1)……

(2)…….

3. *The provisions of the Central Excise Act, 1944 (I of 1944), and the rules made thereunder, including those relating to refunds, exemptions from duty,* ***offences and penalties,*** *shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1).*

8 . ***A comparison of the amended provisions with the unamended ones would clearly demonstrate that the words offences and penalties' have consciously been inserted therein.*** *The cause of action for imposing the penalty and directions of confiscation arose in the present case in the year 1987. The amended Act, therefore, has no application to the facts of this case."*

(emphasis supplied)

2.13. It was submitted that similar to Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 which has created liability for additional duty of excise but not created any liability for the penalty, as specified in para 2.11 above, Section 3 of the Customs Tariff Act has created liability of IGST on any article imported into India, but has not created any liability for penalty.

2.14 Additionally, it was submitted that while Section 3(12) of the Customs Tariff Act borrowed certain provisions from the Customs Act, it has specifically failed to borrow provisions related to penalties and has not been suitably amended to include the word 'penalties' similar to the amendments made in Section 3(3) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957.

2.15. Accordingly, it is submitted that the ratio decidendi of the aforesaid case is squarely applicable to the Noticee's case. Therefore, the penalty proposed to be demanded by the learned Additional Commissioner against

the Company is unwarranted and without the authority of law. Request your good self to set aside the same.

2.16. Further, the Company submitted that in the case of **Pioneer Silk Mills Private Limited v/s. Union of India [1995 (80) E.L.T. 507 (Del.)]**, while dealing with the similar provisions under the Central Excises and Salt Act, 1944 and the Rules made thereunder read with Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Hon'ble Delhi High Court had noted that when a penalty is additional tax, Article 265 of the Constitution requires a clear authority of law for imposition thereof. Subsequently, the Hon'ble Delhi High Court held that there is no authority for confiscation and levy of penalty under the Additional Duties Act as: -

- Section 3(3) of the Additional Duties Act merely adopts provisions of the Central Excises and Salt Act, relating to "levy and collection" including those relating to refund and exemption from duty and; -

- The provisions relating to confiscation and penalty in the Central Excise Act, 1944 are not made applicable to Additional Excise Duties.

The relevant excerpt from the judgment is presented below:

"32. Considering the ratio of the decisions aforesaid we are of the opinion that there is no provision in the Additional Duties Act which creates a charge in the nature of penalty. We further find that the term "levy and collection" in Section 3(3) of the Additional Duties Act has a restricted meaning in view of the use of the words "including those relating to refund and exemptions from duty". Otherwise these words were rather unnecessary. In Orissa Cement v. State of Orissa, the question before the Supreme Court was whether rebate provided in section 13 (8) of the Orissa Sales Tax Act was available to dealers if they paid the tax under the CST Act before due date of payment. The court said that rebate for payment of tax within the prescribed time under the State Act was available to dealers for payment of tax under the CST Act on the reasoning that the power to collect the tax assessed in the same manner as the tax on the sale and purchase of goods under the general sales tax law of the State would include within itself all concessions given under the State Act for payment within the prescribed period. The Supreme Court in Khemka's case observed respecting this case that the reason why rebate was allowed and penalty was disallowed was that rebate was a concession whereas penalty was an imposition. The concession did not impose liability but penalty did. It, therefore, stood to reason that rebate was included within the procedural part of collection and enforcement of payment, and penalty like imposition of tax could not be

included within the procedural part.

.....

36. *We are, thus, of the opinion that the argument that various sections falling in Chapter II of the Central Excises Act which has the heading "Levy and Collection" would all be construed as provisions for levy and collection of additional duty as well, is of no avail to the revenue and we reject this argument. In fact, as noted above, Chapter II contains no provision for levy of penalty.*

37. When penalty is additional tax, constitutional mandate requires a clear authority of law for imposition thereof. If long drawn arguments are needed to explain the Act by referential legislation, or legislation by incorporation levies penalty or not, it is better for the court to lean in favor of the tax payer. There is no room for presumption in such a case. The mere fact that all these years the Additional Duty Act has not been challenged on this ground is of no consequence if authority of law as mandated by the Constitution is lacking. We may also note in the passing that it was submitted before us that penalty so realised earlier has never been distributed among the States as part of act proceeds of the collection of the additional duties of excise under the Additional Duties Act. This statement, made at the Bar was not challenged. Since, however, this point was not raised in the writ petition and the revenue had no opportunity to reply in its counter- affidavit, we leave the matter at that, Levy of penalty which is an additional tax has to be under the authority of law which should be clear, specific and explicit.

.....

39. *We have given our considerable thought to various arguments raised by the parties. We find there is no mandate in the Additional Duties Act for levy of penalty and the Central Excises Act and the Rules made there under cannot be imported in the Additional Duties Act for the purpose of levy of penalty. We have spent anxious moments as the interpretation we have put has grave consequences for the revenue as similar terminology as used in section 3(3) of the Additional Duties Act has been used in various Finance Acts and other enactments, but then Article 265 of the Constitution mandates that no tax shall be levied and collected except by author of law. There being no such authority of law to levy penalty, we have to hold so.*

40. *Accordingly, these petitions are allowed to the extent that show cause notices calling upon the petitioners to show cause as to why (a) the plant, machinery, land and building utilised in the manufacture, etc. of the fabrics as aforesaid should not be confiscated to Government under Rule 173Q(2) of Central Excise Rules, 1944, and (b) penalties should not be imposed on them*

under Rules 9(2) and 173Q of the Central Excise Rules, 1944, are set aside. A writ of prohibition issued to the respondents restraining them from proceeding under the show cause notices for the purpose of confiscation and penalties as aforesaid. To this extent rule is made absolute. Parties shall bear their own costs.

(emphasis supplied)

2.17. Further, it is important to note that the Revenue had filed a Special Leave Petition ('SLP) before the Hon'ble Supreme Court **[2002 (145) E.L.T. A74]** against the aforesaid decision of the Hon'ble Delhi High Court, which was dismissed by the Hon'ble Supreme Court. Given the above, the Company submits that the ratio decidendi of the aforesaid ruling is squarely applicable under the present case. Accordingly, in view of the above clear and undisputable settled position in respect of non-applicability of penalty, it is humbly requested to your good self to kindly drop the demand.

2.18. The Noticee also relies on the judgment pronounced by the Hon'ble Bombay High Court in the case of **Indo Swiss Embroidery Industries Ltd. V/s. Commissioner of Central Excise, Vapi [2017 (356) E.L.T. 226 (Bom.)]**. In the instant case, the Hon'ble Bombay High Court was dealing with the levy of interest and penalty on the additional duties of excise leviable under Section 3 of the Additional Duties of Excise (Textiles & Textile Articles) Act, 1978 (ADE (T&TA) Act). Section 3(3) of the ADE (T&TA) Act is pari materia to Section 3(12) of the Customs Tariff Act. The ADE (&TA) Act did not contain any provision for the imposition of interest and penalty. By following the decision of the Hon'ble Supreme Court pronounced in the case of **Orient Fabrics** *(supra),* the Hon'ble Bombay High Court held that, in the absence of specific provisions in the ADE (T&TA) Act for the imposition of interest and penalty, there could be no levy of interest or penalty on the additional duties of excise payable under Section 3 of the said Act. It was held that taxing statutes must be construed strictly and that Section 11AC (for penalty) and Section 11AB (for interest) of the Central Excise Act were inapplicable.

2.19. Taking into consideration the facts of the case, discussed legal position and the judicial precedents, it is crystal clear that no penalty can be levied on the Company, in the absence of a charging section for the imposition of a penalty under Section 3 of the Customs Tariff Act, 1975 and hence in view of all the aforesaid reasons, it is humbly prayed before your goodself to drop the demand of penalty.

B. The penalty cannot be imposed in a case which is pertaining to the interpretation of law:

2.20. Without prejudice to the above, the Noticee submitted that a penalty is not imposable in a case where the issue pertains to the interpretation of the law. On perusal of the issue involved, it can be understood that there was an interpretation issue on how to determine whether the 'pre-import' condition is satisfied or not, as it was introduced for the first time, and whether the IGST exemption can be claimed even if the 'pre-import' condition is not satisfied.

2.21. Initially, the Gujarat High Court, in its decision on **Maxim Tubes Company Private Limited Versus Union of India [TS-79-HC(GUJ)-2019-NT]**. held such pre-import conditions to be arbitrary, ultra vires, and violative of the Constitution of India.

2.22. Subsequently, it is on account of the Supreme Court ruling in the case of **Union of India V. Cosmo Films [TS-162-SC-2023-GST]** that clarity was received regarding the mandatory applicability of the pre-import condition. Thus, the Company places reliance on the following judicial precedents wherein it has been held that if the matter involves the interpretation of law, then no penalty can be levied:

a) Euro Ceramics Ltd. vs CCE, Rajkot [2013 (32) S. T.R. 642 (Tri. - Ahmd.)]

"Having acknowledged that the issue involved in this case is the interpretation of the law, I find that upholding penalty under Section 78 of the Finance Act, 1994 seems to be incorrect."

b) Lanxess Abs Ltd. Vs. CCE, 2011 (22) S.T.R. 587 (Tri. - Ahmd.)

Tribunal revoked the larger period of limitation and set aside the penalty on the grounds that if the legal interpretation of any provisions is capable of two different interpretations, and if the assessee has interpreted the same to his benefit, it cannot be said that there was any suppression or mala fide on his part

c) Rajhans Metals (P) Ltd.VS. CCE 2007 (8) S.T.R. 498 (Tri. - Ahmd.)

Imposition of penalty is not justified in a case where the issue is of interpretation of law.

d) Mech & Fab Industries Vs. CCE 2014 (303) E.L.T. 282 (Tri. - Del.)

"Since the matter has involved an interpretation of law, we waive the penalty imposed on the Appellant confirming the duty element."

e) CCE Vs. Motherson Sumi Systems Ltd. 2014 (34) S.T.R. 70 (Tri. - Mumbai)

As the issue related to interpretation of law there cannot be a case of mandatory penalty.

f) Moon Network Pvt. Ltd. Vs. 2011 (24) S.T.R. 723 (Tri. - Del.)

Tribunal took a lenient view since as the classification dispute was persisting and that was involving interpretation of law. Accordingly, penalty under Section 78 was set aside.

g). CCE Vs. Maersk India Pvt Ltd, 2014-TIOL-1751-CESTAT-MUM

Penalty under section 78 is not warranted in the case where the dispute is pertaining to classification matter.

2.23 The reference is drawn to the judgment of the service tax regime, considering the excerpt from Justice G.P. Singh, 13th edition of Principles of Statutory Interpretation, reproduced hereunder:

Page 305:

"... use of the same words in similar connection in a later statute gives rise to a presumption that they are intended to convey the same meaning as in the earlier statute. On the same logic when words in an earlier statute have received in similar context in later Act will give rise to a presumption that the same interpretation should also be followed for construction of those words in the later statute."

(emphasis supplied)

2.24. Taking into consideration the above submission, it is amply clear that penalty cannot be imposed under the present case as issue pertains to the interpretation of law.

C. Penalty not leviable when there is mass unawareness:

2.25. Without prejudice to the above, attention is drawn to the case of **H.M. Singh And Co. vs Commissioner of Customs, C. Ex. & Service Tax [2015 37) S.T.R. 172 (All.]** wherein, the appellant was engaged in providing 'manpower recruitment and supply of agency service. The appellant had received an amount of Rs. 6,54,343/- from the service recipient. The service receiver had paid the appellant amounts on account

of provident fund in respect of the manpower supplied. Service tax was not paid by the appellant on the provident fund component which had been received from the service receiver. There was also a mass unawareness among the service providers on whether the service tax was also liable to be deposited on the component of the provident fund received from the recipient of the service to whom the manpower services were provided. The question of law before the High Court was whether a penalty could be imposed under Section 77 and 78 of the Act. The Hon'ble High Court took into consideration the fact that nearly 200 notices had been issued which indicated that there was mass unawareness among the service providers. Also, the service tax dues together with interest were paid even before the order of adjudication was passed. Accordingly, the Hon'ble High Court held that the penalty could not be imposed.

2.26. Reference is drawn to the judgments of the service tax regime, considering the excerpt from Justice G.P. Singh, 13th edition of 'Principles of Statutory Interpretation, as reproduced under para 2.23 above.

2.27. Accordingly, applying the principle of the aforementioned ruling in the given context, it can be understood that the Company was also unclear whether the pre-import condition needs to be satisfied or not. There was also no clarity among the industry at large on what constitutes the 'pre-import' condition as it was introduced for the first time under the GST regime. Similar to the observations made by the Hon'ble High Court in the judgment of H.M. Singh *(supra),* there were several proceedings initiated by the Directorate of Revenue Intelligence and several notices issued across the industry in the present case demanding IGST payment on account of the violation of the pre-import condition or lapse in the procedural requirements associated with the pre-import condition, and hence there was mass awareness.

2.28. It is also worth noting that the Noticee has paid the IGST and the interest due within a reasonable period on the availability of the Supreme Court ruling in the case of Cosmo Films *(supra)* and within thirty days of receiving the SCN. Thus, in view of the aforementioned High Court ruling, it is humbly pleaded before your good self to drop the penalties levied.

D. No case of suppression of facts to invoke penal proceedings:

2.29. Without prejudice to the above, the Company would like to state that, the learned Additional Commissioner has demanded a penalty under Section 114A of the Customs Act, 1962, the relevant portion of which is reproduced hereunder:

*"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:"***

Emphasis Supplied

2.30. Further, in para 10.6 of the SCN, the learned Additional Commissioner has alleged that Noticee has deliberately suppressed the fact of their failure to comply with the condition of pre-import, in respect of which they were well aware at the time of the commencement of import itself, from the Customs Authority.

2.31. The Company humbly submits that it has not suppressed the fact as there was no procedure prescribed under the Customs law, which required the Company to inform the Customs Authorities that the pre-import condition was not satisfied. Further, the Company was of the firm view that the pre- import condition was arbitrary, considering the Hon'ble Gujarat High Court decision in the case of Maxim Tubes *(supra).*

2.32 The Appellant respectfully submits that it cannot be faulted with the allegation of wilful suppression if the Customs law itself does not provide the procedure for the disclosure of not satisfying with the pre- import condition which in the view of the Company is arbitrary in nature and for which writ petitions were filed with the jurisdictional High Court. It is a settled position in law that a penalty cannot be imposed by alleging wilful suppression or misstatement for not disclosing the details which the statute itself does not require to disclose.

2.33. The following judicial precedents are being submitted herewith which strongly support the Noticee's view.

a. **Rajasthan Textile Mills vs CCE, Jaipur [2006 (205) E.L.T. 839 (Tri. - Del.)]**

"During the relevant period there was no prescribed form for classification declaration and there was no requirement to indicate characteristics of yarn or its intended use. Thus, the assessee could not be found fault with for not stating those particulars. It is well

settled that failure to disclose particulars which are not legally required to be disclosed does not constitute suppression of facts."

b. **Hindustan Lever Ltd. vs CCE, Nagpur [2012 (275) E.L.T. 477 (Tri. - Mumbai)]**

"Where the department did not expect the assessee to disclose information relevant to valuation of the goods under Section 4 of the Act, it cannot be said that any non-disclosure of such information amounted to suppression. We are, therefore, clear in our mind that the allegation of suppression levelled against the assessee in the relevant show-cause notice is baseless and, if that be so, the demand of duty is unsustainable in law. It goes without saying that the Revenue cannot expect any penalty to be imposed on the assessee."

2.34. In view of the above, it is prayed to your good self to kindly drop the penalty as there was no suppression of fact on the part of the Company.

E. It is not mandatory to levy a penalty:

2.35. The Company submitted that it is a well-settled position in law that the imposition of a penalty is the result of quasi-judicial adjudication. It is not a mechanical process and cannot be imposed just because there is an enabling provision to impose a penalty. On the contrary, in the present case, as mentioned under para 2.3 to 2.19, even there is absence of provisions for imposing / levying and collecting penalty. The element of *mens rea* or malicious intent must be necessarily present to justify the imposition of a penalty. The penalty may not be imposed on the assessee in the absence of any dishonesty or willful intent to defraud revenue or evade the payment of duty.

2.36. In view of the amendments in the Foreign Trade Policy, 2015-20, as the pre-import condition was introduced for the first time, there was tremendous confusion among the industry at large on what constitutes the pre-import' condition. There were several writ petitions being filed in the various High Courts for striking down the 'pre-import' condition. In fact, initially, the Gujarat High Court, in its decision on Maxim Tubes *(supra)*, held such pre-import conditions to be arbitrary, ultra vires, and violative of the Constitution of India. It was subsequently only on account of the Supreme Court ruling in the case of Cosmo Films (supra) the clarity was received regarding the mandatory applicability of the pre-import condition.

2.37. Thus, it can be viewed that the Noticee did not have an element of mens rea or malicious intent. In fact, the Noticee was vigilant about the

law. Thus, the penalty cannot be imposed under Section 114A of the Customs Act in absence of mens rea or malafide intent.

2.38. The submission of the Company is supported by the following judicial precedents rendered under the Customs law, wherein it has been held that the element of mens rea or malicious intent is a necessary element for imposing the penalty.

2.39. In **CCE v. Indian Aluminium [(2010) 259 ELT 12 (SC)]** it was held that the penalty under section 114A of the Customs Act is punishment for an act of deliberate deception by the assessee with the intent to evade duty. In case of absence of mens rea, where there is a bona fide mistake, section 114A of the Customs Act is not applicable. The same view was followed in **CCE v. Kisan Mouldings [(2010) 260 ELT 167 (SC)].**

2.40. In **CCE v. Pepsi Foods Ltd. [(2011) 30 STT 284]** it has been re-confirmed by 3 bench member of the Hon'ble Supreme Court that mens rea is a necessary ingredient for imposing a penalty under section 114A of the Customs Act.

2.41. The Noticee would also like to rely on the judicial precedents rendered in the erstwhile excise and service tax regime, where the provisions of the imposition of penalty are similar.

2.42. The following is the relevant extract of the Supreme Court judgment in the case of **Devans Modern Breweries Ltd. vs CCE, Chandigarh 2008 (10) S. T.R. 511 (S.C.).**

"10. So far as point of penalty is concerned, Section 11AC of the Act reads as follows:

"11AC. Penalty for short-levy or non-levy of duty in certain cases' — Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11A, shall also be liable to pay a penalty equal to the duty so determined."

11. ***A bare reading of the above section shows that penalty can be levied only if the excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty."-***

Emphasis Supplied.

2.43. The penalty would not be imposable in absence of any deliberate act on part of the Appellant. This view finds support in the decision of the Supreme Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa [1978 (2) ELT (J 159) (SC)]**, which was subsequently followed by the Supreme Court in Akbar Badruddin Jiwani vs. Collector of Customs [1990 (47) ELT 161 (SC)]. The Supreme Court had held that:

"Penalty would not ordinarily be imposed unless the assessee acted deliberately in defiance of law or was guilty of conduct contumacious, or dishonest, or acted in conscious disregard of his obligations. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of the relevant circumstances. ***Penalty will not be imposed where there is a technical or venial breach of the provisions of the Act or where the breach flows from the bona fide belief that the assessee was not liable to act in the manner prescribed by the statute."***

Emphasis Supplied

2.44. In the case of **Majestic Mobikes Pvt. Ltd. vs CST, Bangalore [2008 (11) S. T.R. 609 (Tri. - Bang.)]** the penalties were set aside in the absence of mala fide and intention to evade payment of service tax.

2.45. Basis above, it is submitted that the element of mens-rea or any positive act or intent to evade duty is evidently absent in the instant case and thus, it is humbly submitted that the penalty imposed be dropped.

2.46 Noticee further made additional submission vide letter dated 16.02.2024 which is as under :-

I. Adani Wilmar Limited (the 'Noticee') initially received a notice dated June 02, 2023, from the learned Assistant Commissioner, Customs House Mundra, demanding payment of IGST on imported goods against two Bill of Entries ('BOEs') due to non-fulfilment of the pre-import condition under the Advance Authorization License issued to them. Subsequently, the learned Additional Commissioner, Customs House Mundra, issued an SCN dated June 19, 2023, demanding payment of IGST along with interest under Section 28AA of the Customs Act and penalty under Section 114A of the Customs Act on this matter.
II. Based on the SCN, the Noticee made the payment of IGST along with an amount equivalent to interest and filed a reply to the SCN

on July 10, 2023, capturing details of such payment. The details of these bills of entries for which the demand of IGST was made in the SCN and against which the payment of IGST was duly made is tabulated as follows:

Bill Of Entry No.	Bill Of Entry date	IGST amount	Amount equivalent to interest deposited	Total amount	Challan No
9302647	18/12/2018	40,39,826	26,09,838	66,49,664	2044766808
6981363	27/06/2018	5,17,398	3,86,560	9,03,958	2044766815
Total		45,57,224	29,96,398	75,53,622	

A copy of the aforementioned bill of entries and the payment receipts evidencing the payment made through the above-mentioned challan number are enclosed as Annexure C.

III. With respect to the applicability of the penalty, the Noticee, during the personal hearing held on January 05, 2024, provided detailed additional submissions in a letter dated January 05, 2024, explaining why the penalty should not be levied under Section 114A of the Customs Act. Hence, it is humbly prayed that since the demand for IGST, as made in the SCN, has been duly deposited and based on the detailed additional submission dated January 05, 2024, regarding the non-leviability of the penalty, the demand for IGST and penalty as specified in the SCN should be dropped. A copy of letter submitted dated January 05, 2024 is enclosed as Annexure D.

IV. With regard to the remaining demand of interest under Section 28AA of the Customs Act, the Noticee would like to state that this interest is applicable solely to customs duty leviable under Section 12 of the Customs Act, 1962, and not on IGST leviable under Section 3(7) of the Customs Tariff Act, 1975 (the 'Customs Tariff Act').

V. The Noticee submits that there are no statutory provisions for charging interest on the IGST component under the Customs Act, and accordingly, no interest can be imposed upon the Noticee. Therefore, the amount equivalent to the interest deposited should be refunded along with interest. The detailed rationale behind this stance is submitted in detail in the subsequent paragraphs.

VI. The Noticee would like to state that Section 3 of the Customs Tariff Act relates to the additional duty of customs. Further,

Section 3(7) of the Customs Tariff Act provides for the levy of additional duty of integrated tax as leviable under Section 5 of the IGST Act on a like article on its supply in India. Additionally, Section 3(12) of the Customs Tariff Act borrowed the provisions of the Customs Act, 1962 and the rules and regulations framed thereunder to the extent it applies to 'duty' or 'tax' or 'cess'. It is noteworthy that there is no provision that borrows 'interest' provisions from the Customs Act or provides a separate substantive provision to levy and collect the same (i.e., interest). The relevant portion of Section 3(12) of the Customs Tariff Act is reproduced below:

"(12) The provisions of the Customs Act, 1962 (52 of 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 or tax or cess, as the case may be, chargeable under this section as they apply in relation to the duties leviable under that Act.

VII. The Noticee would like to state that on reading Section 3(12) of the Customs Tariff Act, it is crystal clear that it does not borrow the provision for 'interest' from the Customs Act. Further, the use of the words 'so far as may be, apply to the duty or tax or cess, as the case may be, chargeable under this Section as they apply in relation to the duties leviable under that Act' shows that the applicability of provisions of the Customs Act has been restricted to the levy of duties or taxes under Section 3 of the Customs Tariff Act as they would apply to the levy of Customs Duty under the Customs Act. In addition to the provisions relating to levy, provisions relating to drawbacks, refunds and exemptions have specifically been included. In other words, the scope of borrowing provision is restricted by the use of the words 'so far as may be' only to the duties and taxes and does not extend to other provisions relating to imposition of interest.

VIII. The Noticee wishes to highlight that this is substantiated by the fact that for other similar provisions under the Customs Tariff Act like Countervailing duty on subsidized articles under Section 9 of the Customs Tariff Act and Anti-Dumping Duty under Section 9A, specific amendments were brought vide the Finance Act, 2009 to retrospectively incorporate applicability of interest and penal provisions from the Customs Act to Section 9 and 9A of the Customs Tariff Act. Notably, similar amendments have intentionally not been carried out for duties of Customs (other than the Basic Customs Duty) including IGST on import of goods as leviable under Section 3 of the Customs Tariff Act.

IX. In this regard, the Noticee refers to the judgment in the case of Mahindra and Mahindra v. Union of India and Others, [2022 (10)

TMI 212], delivered by the Bombay High Court, which addressed a similar dispute concerning the imposition of interest on various Additional Customs Duties and Surcharge collected under the Customs Tariff Act for the import of goods, in the absence of any specific substantive provision. In this case, interest was levied under Section 28AB of the Customs Act, which is akin to the provision of interest levied under Section 28AA of the Customs Act in the present case. Consequently, the ratio decidendi of the judgment rendered in the case of Mahindra and Mahindra (supra) would be mutatis mutandis applicable in the present case. The comparative table specifying interest under Section 28AB and Section 28AA of the Customs Act is reproduced below:

Section 28AA of the Customs Act	Section 28AB of the Customs Act
Notwithstanding anything contained in any judgment, decree, order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.	(1) Where any duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person who is liable to pay the duty as determined under sub-section (2), or has paid the duty under sub-section (2B), of section 28, shall, in addition to the duty, be liable to pay interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, from the first day of the month succeeding the month in which the duty ought to have been paid under this Act, or from the date of such erroneous refund, as the case may be, but for the provisions contained in sub-section (2), or sub-section (2B), of section 28, till the date of payment of such duty :

X. The High Court determined that the provisions related to imposing interest and penalty on such Additional Customs Duties and Surcharge were not incorporated into the Customs Tariff Act. Consequently, the High Court ruled that taxing provisions must be expressly provided for in the statute, and recoveries can only

be made when the language of the statute explicitly permits it. Based on this, the High Court set aside the demand for interest and penalty on such levies under the Customs Tariff Act. Against the aforesaid decision of the Bombay High Court, the Revenue filed an SLP before the Supreme Court which was also dismissed by holding that no merit was found. [Special Leave Petition (Civil) Diary No(s). 18824/2023]. Further, the Hon'ble Supreme Court also dismissed the review petition filed by the Revenue against the aforementioned order [Special Leave Petition (Civil) No(s). 16214/2023]. Thus, the Noticee would like to state that the ruling of Mahindra and Mahindra (supra) is law of the land.

XI. Taking into consideration the ratio decidendi of the aforementioned judgement, the Noticee would like to state that it is crystal clear that no interest can be levied on the Noticee, in the absence of a charging section for the imposition of interest under Section 3 of the Customs Tariff Act, 1975 and hence, it is humbly prayed before your goodself to drop the demand of interest and grant the refund of amount paid equivalent to interest of Rs. 29,96,298/- along with the interest.

XII. The Noticee would also like to state that in the case of C.C.E. & C., Surat-I V/s. Ukai Pradesh Sahakari Khand Udyog Mandli Ltd. [2011 (271) E.L.T. 32 (Guj.)], while dealing with the provisions of the Central Excise Act read with the Sugar Export Promotion Act, 1958, the jurisdictional High Court (i.e., the Hon'ble Gujarat High Court) has held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. In Ukai Pradesh Sahakari Khand Udyog Mandli Ltd. (supra), Sub-section (4) of Section 7 of Sugar Export Promotion Act, 1958 reads as under :

"(4) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the duty of excise or any other sum referred to in this section as they apply in relation to the levy and collection of the duty on sugar or other sums of money payable to the Central Government under that Act or the rules made thereunder."

XIII. The Noticee would like to state that the aforesaid provision is similar to the provisions of Section 3(7) of the Customs Tariff Act, 1975. Paragraph 17 of Ukai Pradesh Sahakari Khand Udyog Mandli Ltd. (Supra) reads as under :

"17. From the principles enunciated in the above referred decisions, it is apparent that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. In the facts of the present case, as noted hereinabove, section 7 of the Sugar Export Promotion Act, 1958

does not make any provision for levy and charge of interest on the duty of excise payable under sub-section (1) thereof. In the circumstances, there being no substantive provision in the Act for levy of interest on late payment of tax, no interest thereon could be so levied based on the application of sub-section (4) of section 7 of the said Act. In the circumstances, the Tribunal was justified in holding that there being no provision for interest in the Act, there was no justification or warrant to confirm the interest, in the absence of any powers vested in the authorities under the Act."

XIV. Further, the Noticee would also like to rely on the judgement rendered by the Hon'ble Supreme Court in the case of J.K. Synthetics Ltd. V/s. Commercial Taxes Officer 1994 SCC (4) 276, wherein, it has been held by the Hon'ble Supreme Court that any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as substantive law and not adjectival law.

XV. Similarly, in the case of India Carbon Ltd. & Ors. V/s. State of Assam [1997 (6) SCC 479], after quoting para 16 of the judgement pronounced in the case of J.K. Synthetics Ltd. (supra), the Hon'ble Supreme Court held that the proposition which may be derived from the case of J.K. Synthetics Ltd. (supra) is that the interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this behalf. The Hon'ble Supreme Court held that where there is no substantive provision requiring the payment of interest, the authorities cannot, for the purpose of collecting and enforcing payment of tax, charge interest thereon.

XVI. The Noticee also relies on the judgment pronounced by the Hon'ble Bombay High Court in the case of Indo Swiss Embroidery Industries Ltd. V/s. Commissioner of Central Excise, Vapi [2017 (356) E.L.T. 226 (Bom.)]. In the instant case, the Hon'ble Bombay High Court was dealing with the levy of interest and penalty on the additional duties of excise leviable under Section 3 of the Additional Duties of Excise (Textiles & Textile Articles) Act, 1978 ('ADE (T&TA) Act'). Section 3(3) of the ADE (T&TA) Act is pari materia to Section 3(12) of the Customs Tariff Act. The ADE (T&TA) Act did not contain any provision for the imposition of interest and penalty. The Hon'ble Bombay High Court held that, in the absence of specific provisions in the ADE (T&TA) Act for the imposition of interest and penalty, there could be no levy of interest or penalty on the additional duties of excise payable under Section 3 of the said Act. It was held that taxing statutes must be construed strictly and that Section 11AC (for penalty) and Section 11AB (for interest) of the Central Excise Act were inapplicable.

XVII. Taking into consideration the facts of the case, discussed legal position and the judicial precedents, it is crystal clear that the provision of interest is not borrowed under Section 3 of the Customs Tariff Act and hence no interest can be levied on the portion of the demand pertaining to levy of additional duty of integrated tax as leviable under Section 3(7) of the Customs Tariff Act. Therefore, in view of all the aforesaid reasons, it is humbly prayed before your goodself to drop the demand of interest and penalty and grant the refund of the amount paid equivalent to interest.

XVIII. The Noticee would like to submit that it is a settled position in the Law that as per the principle of judicial discipline, any final order of the higher authorities i.e., Tribunal, High Court or Supreme Court, is required to be followed by the subordinate authority.

XIX. In this regard, the Noticee submits a few judicial precedents wherein it has been specified that in the case where the superior authority has issued any order under a given circumstance, then the subordinate authority must abide by those orders in similar circumstances.

XX. Supreme Court in the case of UOI vs. Kamlakshi Finance Corporation Ltd. [1991 (55) E.L.T. 433 (S.C.)] has made the following observation:

"6. … The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

XXI. Gujarat High Court in the case of Topland Engines Pvt. Ltd. vs. UOI [2008 (9) S.T.R 331 (Guj)] has held that:

"The principles of judicial discipline require that the orders of higher authority are required to be followed unreservedly by the subordinate authority, even if an appeal is filed, it cannot furnish a ground for not following the order of the superior forum unless the operation of the order has been stayed by a competent higher forum. Admittedly, the order of Tribunal has not been challenged further. In the circumstances, subordinate authority is bound to follow the same and implement it without any reservation."

XXII. Ahmedabad Tribunal in the case of Lubi Electricals Ltd. vs. Commissioner of Service Tax, Ahmedabad [2010 (17) S.T.R 217] has held that:

"Surprisingly, though Commissioner (Appeals) takes note of all the above judgments, while reiterating submissions of the Claimant, but does not deal with them, while arriving at findings against them. The adjudicating as well as appellate authorities, while deciding matters, have to keep in mind that once a law is declared by the higher appellate forum on a disputed issue, the same should be followed in deciding matters. Not doing the same amounts to not following the judicial discipline and putting the assessee/Claimants to unnecessary harassments and litigation expenses. If the appellate authorities were of the view that the law declared by the Hon'ble Supreme Court in the L.H. Sugar Factories case [2006 (3) S.T.R. 715 (S.C.) = 2005 (187) E.L.T. 5 (S.C.)] is not applicable, the least expected from him was to make a distinction while not following the same. Instead, the appellate authority has chosen to remain silent on the said relied upon judgment of the Hon'ble Supreme Court. If that is done, the entire system of judicial hierarchy gets defeated and the public / assessees / Claimants are not given their dues, which is just and fair."

XXIII. Accordingly, the Noticee submits that the learned Additional Commissioner should follow the judgements cited above and drop the demand of interest and grant the refund of amount paid equivalent to interest.

XXIV. Basis above, the Noticee would like to conclude that in the absence of substantive provisions for charging interest, the imposition of interest is not justified. The current provisions under the Customs Tariff Act are inadequate regarding the imposition of interest on additional duty of integrated tax as leviable under Section 3(7) of the Customs Tariff Act levied on the import of goods. Consequently, as the amount paid by the Noticee equivalent to interest, totalling Rs. 29,96,298/-, which is neither required nor liable to be paid is as a deposit with your good self. However, in order to buy peace of mind, the Noticee deposited the amount equivalent to interest and is entitled to refund along with applicable interest, which is ought to be granted by your goodself within a reasonable period of time.

XXV. The Noticee submits the following in order to substantiate its point that the refund of amount deposited equivalent to interest should be made available along with the interest at the rate of 12% p.a.. The Noticee submits that it is a settled principle that where any amounts are wrongfully withheld from an assessee without authority of law the revenue must compensate the assessee.

XXVI. To support the prayer of the Noticee reliance is placed on the Supreme Court ruling in the case of Sandvik Asia Ltd. vs CIT, [2006] 150 TAXMAN 591 (SC). In this case, the appellant had claimed refund of certain tax which the revenue authorities had

sanctioned along with interest. However, the payment of interest was withheld by the respondent for various periods ranging from 12 to 17 years. The appellant approached the Apex Court seeking compensation by way of interest on such delayed payment of interest. Thus, the main issue raised before the Apex Court was whether an assessee is entitled to be compensated by the Income Tax Department for the delay in paying to the assessee amounts admittedly due to it when such delay was for various periods ranging from 12 to 17 years. The Hon'ble Supreme Court answered the question of law in favour of the Appellant and granted compensation in the form of interest at the rate of 9% p.a. While delivering the judgement, the Hon'ble Supreme Court followed the Gujarat High Court ruling in the case of D.J. Works v. Dy. CIT [1992] 64 Taxman 9 (Guj), which inter alia held:

"6. … though there is no specific provision for payment of interest on the interest amount for which no order is passed at the time of passing the order of refund of excess amount and which has been wrongfully retained, interest would be payable…"

XXVII. The Hon'ble Supreme Court in the case of Sandvik Asia Ltd. (supra) also explained the meaning of Compensation at para 39 of the said judgement which has been reproduced hereunder:

"39. The word 'Compensation' has been defined in P. Ramanatha Aiyar's Advanced Law Lexicon 3rd Edition 2005 page 918 as follows:

'An act which a Court orders to be done, or money which a Court orders to be paid, by a person whose acts or omissions have caused loss or injury to another in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury; the consideration or price of a privilege purchased; something given or obtained as an equivalent; the rendering of an equivalent in value or amount; an equivalent given for property taken or for an injury done to another; the giving back an equivalent in either money which is but the measure of value, or in actual value otherwise conferred; a recompense in value; a recompense given for a thing received recompense for the whole injury suffered; remuneration or satisfaction for injury or damage of every description; remuneration for loss of time, necessary expenditures, and for permanent disability if such be the result; remuneration for the injury directly and proximately caused by a breach of contract or duty; remuneration or wages given to an employee or officer.'"

XXVIII. The Noticee also draws the attention towards the ruling pronounced by the jurisdictional High Court, i.e., Hon'ble Gujarat High Court in the case of Gujarat Flourochemicals Ltd. vs CIT [2015] 55 taxmann.com 204 (Gujarat). In this case, the Noticee had

paid excess tax, which was retained and used by the respondent for a period of approximately 3 years. After approximately 3 years, the refund was granted by the respondent, however, no interest was paid. The Noticee had claimed for compensation in the form of interest on the refund amount so withheld by the Noticee. The Hon'ble High Court held the ruling in favour of the assessee and granted compensation by way of interest at the rate of 9% p.a. On perusal of the ruling, following principles emerge:

- The assessee would be entitled to compensation for delayed payment of refund or the amount due to him;
- Such compensation could be provided in the form of interest and at such rates which the Court deems fit;

Below is the relevant extract from the ruling:

"18. In view of the aforesaid observations and discussion, we find that the Noticee Assessee would be entitled to compensation and the interest can be awarded by way of compensation …

19. Under these circumstances, we find that the Court can take a reasonable approach when the interest is to be awarded by way of compensatory measure …

21. In view of the aforesaid observations and discussion, the respondents are directed to grant compensation by way of interest at the rate of 9% p.a., to the Noticee on the amount refunded for the period from July 1, 1987 to November 13, 1990."

XXIX. The aforementioned principles have been derived from the various judicial pronouncements, made by various High Courts, which have been discussed in the ensuing paragraphs:

i. Jyoti Limited, Baroda vs UOI and Another [1979 (6) TMI 33 (Guj)]

In this case, it was prayed by the Noticee before the Hon'ble Gujarat High Court that a sum of Rs. 32,74,127.82 towards excise duty was collected without authority of law by the respondents and hence, it should be refunded. It would be apposite to note that the Noticee had merely claimed a refund of such amount from the respondents. There was no specific prayer with regard to granting of interest.

The Hon'ble High Court not only granted the refund of such amount collected without authority of law but also sanctioned interest at the rate of 12% p.a., which was to be calculated from the respective dates when the amounts were collected from the Noticee. It may be noted that the interest was granted suo-motto by the Court. Below is the relevant extract from the ruling:

"16. In the cases of Processing Houses, Special Civil Application Nos. 1552 of 1977 and 1553 of 1977 and Batch decided by a Division Bench of this Court on January 24, 1979, we have ordered that interest at twelve per cent per annum should be paid in all cases where the money was illegally collected by the Excise authorities from the citizens. The same principle will apply in this case also and the respondents are directed to refund the above mentioned amounts with interest at twelve per cent from the respective dates when the amounts were collected from the Noticee. …" – Emphasis supplied.

An appeal was filed by the respondent before the Supreme Court against the aforementioned ruling of Gujarat High Court which the Supreme Court disposed off (Refer U.O.I. v. Jyoti Limited [1997 (96) E.L.T. A73 (S.C)]).

ii. Shri Jagdamba Polymers Ltd. vs UOI [2013 (289) E.L.T. 429 (Guj.)]

In this case, the Noticee was granted refund of excess duty paid along with interest. However, the revenue authorities paid the interest amount after a significant period of time i.e. approximately 1.5 years. The Noticee had claimed interest on such interest amount.

The Hon'ble High Court relied upon the ruling of Sandvik Asia Ltd. (supra) and D.J. Works (supra) and held that when the revenue authorities act unjustly and also withholds the interest payable, such delayed interest payable should be paid to the Noticee along with interest on such delayed interest. In other words, the Noticee was granted interest on interest inspite of non-existence of any such statutory provisions. Below is the relevant extract of the ruling:

"19. In case of Sandvik Asia Ltd. (supra), the Apex Court considering the gross delay caused by the Department in realising the interest, held that such interest would be paid with interest. It was observed as under: -

'28. In our view, there is no question of the delay being 'justifiable' as is argued and in any event if the revenue takes an erroneous view of the law, that cannot mean that the withholding of monies is 'justifiable' or 'not wrongful'. There is no exception to the principle laid down for an allegedly 'justifiable' withholding, and even if there was, 17 (or 12) years delay has not been and cannot in the circumstances be justified.'

20. Way back in the year 1992, a Division Bench of this court in

case of D.J. Works (supra) had similarly in the background of the Income Tax Act, 1961 held that the assessee would be entitled to interest on delayed payment of interest.

21. We are conscious that ordinarily grant of interest flows either from statutory provision or contractual relations between the parties. In the present case, there is no statutory provision providing for interest on interest. In the present case, however, we find that the excise authorities acted rather unjustly and initially delayed not only the refund, but thereafter, unjustly withheld the interest payable thereon.

22. In sum and substance, in the facts of the present case, the Department cannot avoid the liability of accounting for interest on the delayed payment of interest to the extent the same was paid late. …" – Emphasis supplied.

iii. Vijay Textile vs UOI [1979 (4) E.L.T. (J 181) (Guj.)]

In this case, the Excise Authorities had collected certain amount without authority of law. Such money was used by the Government for a period of 3 years. In this regard, the Hon'ble High Court directed the respondents to refund the amount so collected without authority of law along with interest at the rate of 12% p.a., from the dates of the collection of the said amounts till the date of actual repayment. Below is the relevant extract:

"22. The excise duty paid in excess of such ad valorem duty under Item 68 during the period of three years immediately preceding the institution of the respective Special Application is ordered to be refunded to the Noticees concerned in each of these petitions. It must be emphasized that these amounts which we are directing to be refunded, were collected by the Excise authorities without the authority of law and were illegal levies. The Central Government had use of these amounts during this period of three years and correspondingly the Noticee concerned was kept out of the use of these amounts during the said period. It is therefore just and proper that the respondents should pay interest at twelve per cent per annum (which is the proper rate looking to the conditions in the money market) from the dates of the collection of the said amounts directed to be refunded till the date of actual repayment. Rule is therefore made absolute in each of these petitions and the respondents in each of these matters will pay the costs of the Noticees."

– Emphasis supplied.

XXX. Considering the submissions made in the foregoing paragraphs, the Noticee

requests the learned Additional Commissioner to not only grant the refund of amount deposited equivalent to interest (i.e., Rs. 29,96,298/-) but also to compensate the Noticee by way of paying interest at the rate of 12% p.a. from the date of deposit of the amount till the date of refund.

13. PERSONAL HEARING

Following the principles of natural justice, opportunities of personal hearing were given to the noticee in the subject case. Shri Mahendra Verma, Assistant General Manager, Commercial, M/s Adani Wilmar Ltd., appeared to defend the case on 20.10.2023. During the personal hearing he, inter-alia reiterated their earlier submission dated 06.07.2023 and intimated that they had already paid the IGST amount alongwith applicable interest as per the directions dated 28.04.2023 by the Hon'ble Supreme Court of India in the matter of Civil Appeal No. 290 of 2023 relating to "Pre Import Condition" and Circular No. 16/2023- Cus dated 07.06.2023 issued by CBIC. Further all the procedures and formalities were also complied by them. He further added that as per the findings of Hon'ble Supreme Court judgement dated 28.04.2023, they are not liable for penal action under section 114A of Customs Act, 1962 and requested to drop the proceedings initiated against their company.

Because of a change in adjudicating authority, opportunity of personal hearing was given afresh to the noticee in the subject case. Shri Dhruvan Mehta, Associate Manager and Shri Kartik Ojha, Manager Accounts of M/s Adani Wilmar Limited, appeared for the personal hearing on 05.01.2024. They submitted the written submission vide letter dated 05.01.2024 and reiterated their earlier submission dated 06.07.2023 & 20.10.2023 and intimated that they had already paid the IGST amount alongwith applicable interest as per the directions dated 28.04.2023 by the Hon'ble Supreme Court of India in the matter of Civil Appeal No. 290 of 2023 relating to "Pre Import Condition" and Circular No. 16/2023- Cus. dated 07.06.2023 issued by CBIC. Further all the procedures and formalities were also complied by them. They submitted that they are not liable for penalty under Section 114A of the Customs Act, 1962 on the following grounds:- (i) In absence of charging section for the imposition of penalty under Section 3 of the Customs Tariff Act, 1975, penalty under the provisions of the Customs Act, 1962 cannot be imposed. (ii) In a case

which is pertaining to the interpretation of law, penalty cannot be imposed and (iii) penalty not leviable when there is mass unawareness.

Further, noticee submitted their additional written submission on 16.02.2024 and intimated that they have already made payment of interest amounting to Rs. 29,96,298/- (Rs. Twenty Nine Lacs Ninety Six Thousand Two Hundred Ninety Eight) but they are not liable to pay the interest in absence of any charging section for the imposition of interest under Section 3 of the Customs Tariff Act, 1975.

14. DISCUSSON & FINDING

14.1 I have carefully gone through the facts of the case, Show Cause Notice dated 19.06.2023, the noticees' submissions both, in written submitted vide letter dated 06.07.2023, 20.10.2023, 05.01.2024 and 16.02.2024 and in person during personal hearing held on 05.01.2024. I proceed to decide the case.

14.2 The main issues involved in the case which are required to be decided in the present adjudication are as below:

i. Whether the importer is liable to pay IGST @5% amounting to Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) along with interest under Section 28AA of the Act, 1962 saved in course of imports of the goods under the Advance Authorizations and the corresponding Bills of Entry as mentioned in above Table-A.
ii. Whether the said Importer is liable to penalty under Section 114A of the Customs Act, 1962.
iii. Whether interest should be demanded and recovered from importer under section 28AA of the Customs Act, 1962 or not.

15. I find that M/s. Adani Wilmar Ltd., Survey No.169/P-1, 2 & 3, Village Dhrub, Taluka – Mundra, Dist. Kutch, Gujarat- 370421 (IEC No.0899000363) is engaged in the import of goods availing the benefit of Exemption under Notification No.18/2015-Cus dated 01.04.2015 (as amended by Notification No.79/2017-Cus dated 13.10.2017) under the Advance Authorization Scheme. They had presented Bills of Entry bearing Nos. 6981363 dated 27.06.2018 and 9302647 dated 18.12.2018 through their Customs Broker M/s. Narendra Forwarders, at Custom House, Mundra, for clearance of goods i.e. RBD Palm Stearin classified under CTH No. 15119030 of First Schedule of the Customs Tariff Act, 1975.

15.1 I find that during the course of Performance audit, Ahmedabad (Para-3.1.4.1 of Report No.10 of 2021 dated 24.05.2023), it was observed from the data analysis of Bills of Entry that the said importer had availed the benefit of exemption under Notification No.18/2015-Cus dated 01.04.2015 (as amended by Notification No.79/2017-Cus date 13.10.2017) under the Advance Authorization Scheme, but while going through the process of such imports and corresponding exports towards discharge of export obligation, they failed to comply with the pre-import condition, as demanded under the said Notification No.79/2017-Cus dated 13.10.2017, that extended such conditional exemption. **Pre-import condition simply means that the goods should be imported prior to commencement of export** to enable the exporter to manufacture finished goods, which could be consequently exported under the same Advance Authorization for discharge of Export Obligation. They had imported "RBD Palm Stearin" classified under Chapter Heading 15119030 on Advance Authorization Scheme (Indirect Tax-Customs) and cleared the goods without payment of IGST @5%. However, these goods are levied @5% IGST and the pre-import conditions imposed vide Notification No. 79/2017-Cus. Dated 13.10.2017 is not fulfilled. Further, the exports were done first before import under Licenses issued under Advance Authorization Scheme, that quite naturally, they did not manufacture the goods which were exported under the mentioned Advance Authorizations and that the materials which were exported against the shipping bills, were not manufactured entirely out of the Duty free materials imported under the Advance Authorization in question; that resulted in non-compliance of the pre-import condition. The details are as shown below:-

BE No.& Dt	**Importer Name**	**Item Description**	**Ass.Value (in Rs.)**	**Total amount IGST (in Rs.)**
6981363 dtd.27.06.18	M/s. Adani Wilmar Ltd.	RBD Palm Stearin	6491816	5,17,398/-
9302647 dtd.18.12.18	M/s. Adani Wilmar Ltd.	RBD Palm Stearin	50687909	40,39,826/-
			Total	**45,57,224/-**

15.2.1 I find that Advance Authorizations are issued by the Directorate General of Foreign Trade (DGFT to importers for import of various raw

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

15.2.2 With the introduction of GST w.e.f. 01.07.2017, Additional Customs Duties (CVD & SAD) were subsumed into the newly introduced Integrated Goods and Service Tax (IGST). Therefore, at the time of imports, in addition to Basic Customs Duty, IGST was made payable instead of such Additional Duties of Customs. Accordingly, Notification No. 26/2017-Customs dated 29 June 2017, was issued to give effect to the changes introduced in the GST regime in respect of imports under Advance Authorization. It was a conscious decision to impose IGST at the time of import, however, at the same time, importers were allowed to either take credit of such IGST for payments of Duty during supply to DTA, or to take refund of such IGST amount within a specified period. The corresponding changes in the Policy were brought through Trade Notice No.11/2018 dated 30-06-2017. It is pertinent to note here that while in pre-GST regime blanket exemption was allowed in respect of all Duties leviable when goods were being imported under Advance Authorizations, contrary to that, in post-GST regime, for imports under Advance Authorization, the importers were required to pay such IGST at the time of imports and then they could get the credit of the same.

15.2.3 I find that 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 dated 13-10-2017, was issued with the intent of incorporating certain changes / amendment in the principal Customs Notifications, which were issued for extending benefit of exemption to the goods when imported under Advance Authorizations. The said Notification stated that the Central Government, on being satisfied that it is necessary

in the public interest so to do, made the following further amendments in each of the Notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the Table below, in the manner as specified in the corresponding entry in column (3) of the said Table. Only the relevant portion pertaining to the Customs Notification No. 18/2015 dated 01-04-2015 is reproduced in Para 3 above.

15.2.4 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.

15.2.5 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).

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

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

2. 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;

15.2.7 The Union Government vide Notification No. 01/2019 dated 10.01.2019 amended the parent Notification No. 18/2015-Cus dated 01.04.2015 and omitted the “pre-import” condition inserted vide 79/2017-Cus dated 13.10.2017. Therefore, for the intervening period between 13-10-2017 to 09-01-2019, all importers were duty bound to comply with the said "pre-import and physical export" conditions for availing benefit of exemption of IGST.

15.2.8 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 fulfillment of 'pre-import condition', during October, 2017 to January 9, 2019, incorporated in the Foreign Trade Policy of 2015-2020 ("FTP") and Handbook of Procedures 2015-2020 ("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.

15.2.9 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 Supreme Court vide order dated 28.04.2023 passed in the case of Union of India & Ors vs Cosmos Films & othrs has over-ruled judgement of the Gujarat High Court and has held that pre-import condition during October-13, 2017 to January 9, 2019, in Advance Authorization scheme was valid. The order portion provides as under:-

“*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.
76. The Revenue's appeals are allowed, subject to the above terms"

I find that this issue is no longer res-integra in as much Hon'ble Supreme Court in the case of Union of India & Ors vs Cosmo Films has over-ruled Judgment of the Hon'ble Gujarat High Court and has held that pre-import condition, during October 13, 2017 to January 9, 2019, in Advance Authorization Scheme was valid.

16.1 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 Authorizations. 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 instant 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.

16.1.1 I find that the importer have willfully suppressed the facts that they had not used Duty free imported materials in manufacturing of exported goods. It was the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorizations under which imports were being made availing benefit of IGST exemption. The above acts of omission and commission on the part of the importer have rendered the imported goods cleared under two Bills of Entry as listed in Table-A of para 1 above. The IGST amounting to Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) not paid by the importer, is liable to be recovered under Section 28(4) of the Customs Act, 1962.

16.1.2 I find that the importer failed to comply with the conditions laid down under the relevant Customs Notification as well as the DGFT Notification and the provisions of the Foreign Trade Policy (2015-20), as discussed in the foregoing paras. Therefore, the amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with applicable interest at appropriate rate under Section 28AA of the Customs Act, 1962.

16.1.3 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 along with appropriate interest under Section 28AA of the Customs Act, 1962.

16.1.4 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.

17. Liability of interest under section 28AA of the Customs Act, 1962 and Penalty on the importer under Section 114A of the Customs Act, 1962.

17.1 Ongoing through the submission made by the importer vide letter dated 06.07.2023, 20.10.2023, 05.01.2024 and 16.02.2024 , I find that the importer has paid the differential duty amount of Rs. 45,57,224/- and interest amount of Rs. 29,96,398/- by way of re-call and re-assessment

before the concern Appraising Group-1, CH, Mundra. The payment particulars submitted by the importers are as follows:

(Amount in Rs.)

Sl. No.	Bill of Entry No. & BE Date	IGST Amount	Interest Amount	Challan No. & Date
1	9302647/18.12.2018	40,39,826/-	26,09,838/-	2044766808/04.07.2023
2	6981363/27.06.2018	5,17,398/-	3,86,560/-	2044766815/04.07.2023
	Total	**45,57,224/-**	**29,96,398/-**	

17.2 I find that the importer vide their written submission made vide letter dated 06.07.2023, 20.10.2023 05.01.2024 and 16.02.2024 and during the personal haring submitted that they had already paid the IGST amount as per the directions dated 28.04.2023 by the Hon'ble Supreme Court of India in the matter of Civil Appeal No. 290 of 2023 relating to "Pre Import Condition" and Circular No. 16/2023- Cus dated 07.06.2023 issued by CBIC. He further added that as per the findings of Hon'ble Supreme Court judgement dated 28.04.2023, they are not liable for payment of interest under section 28AA and penal action under section 114A of Customs Act, 1962 and requested to drop the proceedings initiated vide Show Cause Notice dated 19.06.2023 against their company.

Ongoing through the judgment dated 28.04.2023 passed in Civil Appeal No(s). 290 of 2023 by Hon'ble Supreme Court, I find that in the said case, Hon'ble Supreme Court had directed that *the importers shall approach the jurisdictional Commissioner of Customs to make the payment of IGST 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.*

In compliance of Hon'ble Supreme Court judgment dated 28.04.2023, CBIC vide Circular No. 16/2023-Cus. Dated 07.06.2023 has issued following procedure to be adopted at the port of import.

(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.

17.3 I find that importer has not approached this office for the payment of IGST in respect of Bill of Entry as mentioned in Table-A above. The importer have made payment of IGST along with interest on 04.07.2023 by way of Re-call and Re-assessment at the port of import only after issuance of Show Cause Notice Dated 19.06.2023 in the subject case. I, therefore find that importer has not followed the procedure prescribed in Circular No. 16/2023-Cus. dated 07.06.2023.

17.4 The noticee have vehemently contended that they have paid the differential duty amount of Rs. 45,57,224/- and interest amount of Rs. 29,96,398/- by way of re-call and re-assessment before the concerned Appraising Group-1, CH, Mundra. However, they are not liable for payment of interest under section 28AA and penalty under Section 114A of the Customs Act, 1962.

17.4.1 In this regard, I find that the Show Cause Notice was issued on 19.06.2023 in the instant case. The noticee had made the payment of

differential duty along with interest on 04.07.2023 by way re-call and re-assessment. The impugned Show Cause Notice dated 19.06.2023 was issued under Section 28(4) of the Customs Act, 1962. The noticee had the option to avail the facility under the provisions of Section 28(5) of the Customs Act, 1962, which reads "where any duty has not been levied or has been short-levied or the interest has not been charged 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 by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under Section 28AA and the penalty equal to fifteen per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing" and get the proceedings initiated by this Notice concluded under the provisions of Section 28(6)(i), ibid.

17.4.2 I find that the noticee had paid differential IGST along with interest by way of re-call and re-assessment in respect of Bills of Entry as detailed in Table-A above, but they did not made the payment of penalty equal to fifteen percent of the duty specified in the notice which is the essential condition of the provisions of Section 28(5) of the Customs Act, 1962 for conclusion of proceedings initiated by this Notice under the provisions of Section 28(6)(i), ibid. Thus, I find that the instant case does not fit for conclusion of proceedings initiated by this Notice under the provisions of Section 28(6)(i), ibid as the noticee did not comply with condition of the provisions of Section 28(5) of the Customs Act, 1962. further, noticee contention that they are not liable for payment of interest is not true as it is a after thought as section 28(4) specifically stipulates that where any duty has not been paid or short paid or interest payable has not been paid/ short paid by reason of collusion, wilful mis statement or suppression of facts, 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 paid/ short paid. Further, in compliance of Hon'ble Supreme Court judgment dated 28.04.2023, CBIC vide Circular No. 16/2023-Cus. Dated 07.06.2023 has issued following procedure to be adopted at the port of import wherein it has been mentioned that payment of tax and cess, along with applicable interest, shall be made aginst the electronic challan generated in the Customs EDI system. Hence, I do not

find any force in noticee contention.

17.4.3 In view of above, I find that interest is compensatory in nature, which is imposed on the importer who has withheld the payment of any tax or duty and such liability arises automatically by operation of law. Under the Customs Act, 1962, the liability for payment of interest arises in view of the provisions of Section 28AA of the Customs Act, 1962. Interest is always accessory to the demand of duty as held in case of Pratibha Processors Vs. UOI-1996 (88) ELT 12(SC). Hence, I hold that the amount of Custom duty demanded and confirmed in this order are recoverable from the importer together with interest at appropriate in terms of Section 28AA of the Act, ibid.

17.5 The noticee have strongly contended that Section 28(4) is not invokable in this case since there was no suppression or collusion or misclassification. The Noticee has neither challenged the classification of the imported goods nor has suppressed any facts to the department's detriment. In respect of In respect of proposal of penalty under Section 114A of the Customs Act, 1962, the noticee submitted that they are not liable for penalty under Section 114A of the Customs Act, 1962 on the following grounds:- (i) In absence of charging section for the imposition of penalty under Section 3 of the Customs Tariff Act, 1975, penalty under the provisions of the Customs Act, 1962 cannot be imposed. (ii) In a case which is pertaining to the interpretation of law, penalty cannot be imposed and (iii) penalty not leviable when there is mass unawareness.

17.5.1 In this regard, I find that with the introduction of self-assessment and consequent upon amendments to Section 17 of the Customs Act, 1962, since 8th April, 2011, it is the responsibility of the importer to declare the correct description, value, notification etc. and to correctly classify, determine and pay the duty applicable in respect of the imported goods. I find that, the importer failed to discharge the legal and statutory obligation entrusted upon them by Section 17 read with Section 46 of the Customs Act, 1962 for levy and payment of IGST for the imported goods.

17.5.2 I further find that the noticee have self-assessed the said Bill of Entry in terms of Section 17 of the Customs Act, 1962, however, I also find that the importer has contravened the provisions of Section 46(4) of the Customs Act, 1962 in as much as they had intentionally availed the

exemption from the payment of IGST on the imported goods under Notification No. 79/2017-Cus dated 13-10-2017.

17.5.3 I find that 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 along with appropriate interest under Section 28AA of the Customs Act, 1962. 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. Therefore, the ingredients of mis-statement or suppression of facts with intent to evade duty is vividly present in the instant case for invocation of extended period under Section 28(4) of the Customs Act, 1962 for demand and recovery of duty short levied or short paid.

17.6 Further, Had the Audit Unit, Ahmedabad during the course of performance audit on Advance Authorisation Scheme; (Indirect Tax-Customs) not observed the said observation against the Importer, the evasion of Duty would not have come to the knowledge of the department. Further, the Importer only after issuance of Show Cause Notice dated 19.06.2023 deposited differential duty along with interest for the import of goods in respect of Bills of Entry as mentioned in Table-A above and tried to colour the same as if the amount was paid voluntarily.

17.7 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 misstatement 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. I find that the importer has deliberately suppressed the fact of their failure to comply with the conditions of pre-import 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. As discussed above, since ingredients of suppression of facts with intent to evade duty is present in the instant case, the differential duty is liable to be demanded and recovered under Section 28(4) of the Customs Act, 1962. The penalty under Section 114A ibid is mandatory in nature and since in this case it has been found that duty is liable to be demanded and recovered under Section 28(4) ibid, I find that penalty under Section 114A is imposable in this case on the noticee.

18. In view of the above, I pass the following order:

ORDER

(i) I order to confirm and recover the differential duty of Rs. 45,57,224/- (Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) on reassessment of the impugned Bills of Entry under Section 28(4) of the Customs Act, 1962 and order to appropriate an amount of Rs.45,57,224/-(Rupees Forty Five Lakhs Fifty Seven Thousand Two Hundred Twenty Four Only) already paid by them vide e-challan no. 2044766808 & 2044766815 both dated 04.07.2023 against their duty liability;

(ii) I order to confirm and recover interest as per the provisions of Section 28AA of the Customs Act, 1962 and order to appropriate an amount of Rs. 29,96,398/- (Rupees Twenty Nine Lakhs Ninety Six Thousand Three Hundred Ninety Eight Only) already paid by them vide e-challan no. 2044766808 & 2044766815 both dated 04.07.2023 against their liability;

(iii) I impose a penalty of Rs. 45,57,224/-(Rs. Forty Five lakh Fifty Seven Thousand and Two Hundred Twenty Four Only) upon importer, M/s Adani Wilmar Ltd., (IEC No.0899000363) under Section 114A of the Customs Act, 1962 for his act of omission and commission.

19. This order is issued without prejudice to any other action which may be contemplated against the importer or any other person under 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.

20. The show Cause Notice bearing No. GEN/ADJ/ADC/1122/2023-ADJN. dated 19.06.2023 stands disposed in above terms.

Signed by
Arun Kumar
Date: 16-04-2024 15:48:18

Additional Commissioner
CH Mundra.

F.No. GEN/ADJ/ADC/1122/2023-Adjn. Date:
By Speed post/ By Hand/by E-mail

To,

M/s. Adani Wilmar Ltd.
(IEC No.0899000363)
Survey No.169/P-1, 2 & 3, Village Dhrub,
Taluka – Mundra, Dist. Kutch, Gujarat- 370421.

Copy to;

1. The Deputy/Assistant Commissioner of Customs (RRA), CH, Mundra
2. The Deputy/Assistant Commissioner of Customs (TRC), CH, Mundra
3. The Deputy/Assistant Commissioner of Customs (EDI), CH, Mundra
4. The Deputy/Assistant Commissioner of Customs (Gr.1), CH, Mundra
5. The Deputy/Assistant Commissioner of Customs (Audit), CH, Mundra
6. Guard File.