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निबन्धितपावतीडाकद्वारा / By SPEED POST A.D.

फा. सं./**VIII/10-12/DRI-KZU/Commr/O&A/2021-22**

DIN-20240471MN0000107986

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

द्वारापारित :- **शिव कुमार शर्मा, प्रधान आयुक्त**
Passed by :- Shiv Kumar Sharma, Principal Commissioner

मूलआदेशसंख्या :

Order-In-Original No: AHM-CUSTM-000-PR.COMMR-2&3-24-25 dated 10.04.2024
in the case of M/s Singhal Industries Pvt. Ltd., Block No. 1547, Behind Mukat Pipes, Khatraj--Kalol Road, Moti Bhoyan, Gandhinagar, Gujarat- 382721

1 जिसव्यक्ति(यों) कोयहप्रतिभेजीजातीहै, उसेव्यक्तिगतप्रयोगकेलिएनिःशुल्कप्रदानकीजातीहै।

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

2. इसआदेशसेअसंतुष्टकोईभीव्यक्तिइसआदेशकीप्राप्तिसेतीनमाहकेभीतरसीमाशुल्क, उत्पादशुल्क एवं सेवाकर अपीलीयन्यायाधिकरण, अहमदाबादपीठकोइसआदेशकेविरुद्धअपीलकरसकताहै।अपीलसहायकरजिस्ट्रार, सीमाशुल्क, उत्पादशुल्क एवं सेवाकर अपीलीयन्यायाधिकरण, दुसरीमंज़िल, बहुमालीभवन , गिरिधरनगर पुलके बाजुमे, गिरिधरनगर, असारवा, अह्मदाबाद-380 004 को सम्बोधित होनी चाहिए।

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

3. उक्त अपीलप्रारुपसं. सी.ए.3 मेंदाखिल कीजानी चाहिए। उसपर सीमाशुल्क (अपील) नियमावली, 1982 केनियम 3 केउपनियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्तअपीलको चारप्रतियोंमें दाखिल किया जाए तथा जिस आदेशके विरुद्ध अपीलकी गईहो, उसकी भी उतनीही प्रतियाँ संलग्न कीजाएँ (उनमेंसे कमसेकम एक प्रतिप्रमाणित होनी चाहिए)। अपीलसे सम्बंधित सभी दस्तावेज भी चार प्रतियोंमें अग्रेषित किए जाने चाहिए।

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

4. अपील जिसमें तथ्यों का विवरण एवं अपीलके आधार शामिल हैं, चार प्रतियोंमें दाखिल कीजाएगीतथाउसकेसाथजिसआदेशकेविरुद्धअपीलकीगईहो, उसकीभीउतनीहीप्रतियाँसंलगनकीजाएंगी (उनमेंसेकमसेकमएकप्रमाणितप्रतिहोगी)।

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

5. अपीलकाप्रपत्रअंग्रेजीअथवाहिन्दीमेंहोगाएवंइससेसंक्षिप्तएवंकिसीतर्कअथवाविवरणकेबिनाअपीलकेकारणोंकेस्पष्टशीर्षोंकेअंतर्गततैयारकरनाचाहिएएवंऐसेकारणोंकोक्रमानुसारक्रमांकितकरनाचाहिए।

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

6. केंद्रियसीमाशुल्कअधिनियम,1962 कीधारा 129 ऐकेउपबन्धोंकेअंतर्गतनिर्धारितफीसजिसस्थानपरपीठस्थितहै, वहांकेकिसीभीराष्ट्रीयकृतबैंककीशाखासेन्यायाधिकरणकीपीठकेसहायकरजिस्ट्रारकेनामपररेखांकितमाँगड्राफ्टकेजरिएअदाकीजाएगीतथायहमाँगड्राफ्टअपीलकेप्रपत्रकेसाथसंलग्नकियाजाएगा।

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

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

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

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

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

Sub: Show Cause Notice Nos. (i) VIII/10-12/DRI-KZU/Commr./O&A/2022-23 dated 16.08.2022 issued by Commissioner of Customs, Ahmedabad and (ii) Gen/Adj/ADC/477/2022-Adjn dated 31.05.2022 issued by Additional Commissioner of Customs, Mundra (made answerable to Pr. Commissioner/Commissioner, Customs, House vide Corrigendum Dtd.06.12.2022 issued from F.No. Gen/ADJ/ADC/477/2022-Adjn) to **M/s Singhal Industries Pvt. Ltd.,** Block No. 1547, Behind Mukat Pipes, Khatraj--Kalol Road, Moti Bhoyan, Gandhinagar, Gujarat- 382721.

Brief facts of the case:

M/s Singhal Industries Pvt. Ltd., having their registered office at Block No. 1547, Behind Mukat Pipes, Khatraj--Kalol Road, Moti Bhoyan, Gandhinagar, Gujarat-382721(hereinafter referred to at the Noticee) are engaged in the import of various input materials and are holding IEC No. 0807016519 for the same.

2. Whereas intelligence was developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter referred to as DRI) to the effect that the Noticee had imported various input materials without payment of duty of Customs under cover of a number of Advance Authorizations issued by the Regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the Noticee 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 the Integrated Goods & Service Tax (IGST) component of Customs Duty levied under Sub-section (7) of Section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended subject to condition that the person willing to avail such benefit should comply with pre-import condition and the finished goods should be subjected to physical exports only.

2.1 Intelligence developed by DRI, Kolkata, clearly indicated that though the Noticee availed such exemption in respect of 09 (Nine) Advance Authorizations, but while going through the process of such imports and corresponding exports towards discharge of export obligation, they failed to comply with the pre-import condition, as stipulated under the said Notification No. 79/2017-Cus dated 13-10-2017, that extended such conditional exemption. Pre-import condition means that the goods should be imported prior to commencement of export to enable the exporter to manufacture finished goods, which could be subsequently exported under the said Advance Authorization for discharge of Export Obligation.

2.2 Accordingly, a case was booked by DRI and investigation was initiated by way of issuance of Summons under section 108 of the Customs Act, 1962. The Noticee was summoned for production of documents in connection with such imports and also for giving evidence. The first letter F.No. DRI/KZU/CF/(INT-09)/2018/4191 dated 23-07-2018, was written to the Noticee drawing their attention to the fact that they had violated the pre-import condition while causing imports under various Advance Authorizations. In response to the said letter the Noticee, vide their letter dated Nil, simply forwarded some data in the prescribed format without any supporting evidence and **denied having violated the pre-import condition as alleged in the aforementioned letter.** Summons dated 05-09-2018 was issued to the Noticee directing them to appear before the investigating authority for giving evidence and also to submit required records and documents. However, **the Noticee did not appear on the scheduled date and instead sent a letter dated 24-10-2018, clearly stating that they would not appear** in view of the fact that many importers have approached various High Courts challenging the said notification.

2.3 For the purpose of determination of the actual liability of the Noticee, it was extremely necessary to have the copies of the Advance Authorizations under which such imports were made, copies of the Bills of Entry against which such exemption was availed and in particular the copies of the first Bill of Entry and first Shipping Bill under respective Advance Authorization and particulars of Goods Receipt Notes (GRN), for ascertainment of violation or otherwise of the respective Authorizations. **However, without showing any valid reason the Noticee did not submit such records and documents even after lapse of more than two years and three months from the date on which the matter was brought to their notice.**

2.4 It appears that the Noticee did not submit any documents/data, whatsoever, in their **attempt to stall the investigation**. These documents were absolutely necessary to conclusively determine whether or not there had been violation of the pre-import/physical export condition in respect of a particular Advance Authorization. **Such deliberate withholding of records/documents exposes mens-rea of the Noticeeand suggestive of their non-cooperative attitude.**

2.5 In the meantime, another writ petition was filed by M/s. Vedanta Ltd. before the High Court of Madras (Madurai Bench) on the same issue and challenging the said conditions imposed vide Customs Notification No.79/2017 dated 13-10-2017. The Hon'ble Court vide its order dated 29-10-2018 dismissed the said WP and held that-

> ***"A careful reading of the Foreign Trade policy indicates that the actual user condition or physical export is imposed with an intention not to allow diversion of imported raw materials to the local market apparently on the prudence that allowing the same is fraught with revenue risks. Post export AA can act as a conduit for substituting local raw materials into manufacturing export goods and for diverting the imported inputs in the local market and that is sought to be negated by the flurry of the notifications issued consequent to the implementation of GST. It is clearly the policy of the government and it is the same to all the tax paying assesses/exporters of the same class and not discriminatory."***

It further held that-

> *"11.* ***Even by not allowing exemption of IGST at the time of import, no benefit in the AA scheme is altered by the Government, though collateral costs get fastened on the petitioner and the likes by way of blockages in cash flow and attendant interest liabilities. And clearly, it is a matter of public policy. And rightly, the choice of policy is for the decision maker, in this case the Government, to make and not for the Court. Nor has been established before this court that the decision suffers from perversity, irrationality or arbitrariness."***

2.6 Therefore, the matter was put to rest and dispute, if any, about the authority of the Government of India to issue such notification extending exemption subject to compliance of certain conditions which was again given stamp of approval by the judiciary. However, the Noticee did not submit any documents whatsoever, despite the fact that they continued to avail such incorrect exemption, even after it was brought to their attention and they had clear knowledge about the fact that **such exemption was being availed in violation of the condition of the subject notification**. What is pertinent to note is that even after such violations were brought to the notice of the Noticee, instead of rectifying the same, they went on to avail such irregular benefit in total disregard to the law of the land.

2.7 The Hon'ble High Court of Gujarat on 04-02-2019, passed an order in the WP filed by various importers other than the Noticee and held that the pre-import and physical export conditions are ultra-vires as the Foreign Trade Policy (2015-20), allows export in anticipation of Authorization under Para 4.27 of the Policy. Another order was passed by the Hon'ble High Court of Gujarat on 19-06-2019, in relation to the **SCA No. 16190 of 2018 filed by M/s Singhal Industries Pvt Ltd.** In the said order, appeal was allowed in favour of the Noticee for being similar to the other WPs disposed of earlier vide order dated 04-02-2019. However, Surprisingly the Hon'ble High Court while passing the said orders, conclusively and emphatically contended that the Government did not bring any change in Para 4.27 of the Hand Book of Procedures. While the fact of the matter is that specific provision under the said Para 4.27 was incorporated in the form of inclusion of Para 4.27(d), which states that –

(d) Exports/supplies made in anticipation of authorisation 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).

2.8 In view of the foregoing, the revenue decided to file an appeal against the said order of the Hon'ble High Court of Gujarat dated 04-02-2019 before the Hon'ble Apex Court of India. Hon'ble Supreme Court vide its order dated 23-09-2019, stayed the said order of the High Court **from operation and implementation.** Therefore, the said order of the High Court of Gujarat is no more operational and cannot be implemented. Special Leave Petition (SLP) was also filed in assailing the order dated 19-06-2019, before the Supreme Court and the **Hon'ble Supreme Court vide order dated 12-03-2021, stayed the said order dated 19-06-2019**, too and tagged all such matters for hearing.

2.9 In the meantime, the Government of India vide notification No. 1/2019-Cus dated 11-01-2019, removed "pre-import and physical export" conditions from the parent notification No. 18/2015-Cus dated 01-04-2015 prospectively. **Therefore, for the intervening period between 13-10-2017 to 10-01-2019** [hereinafter referred to as material period], **all importers were duty bound to comply with the said "pre-import and physical export" conditions for availing benefit of exemption of IGST.**

3. Whereas, as the original order of the Hon'ble Gujarat High Court dated 04-02-2019 was stayed by the Apex Court from operation and implementation, fresh Summons dated 07-10-2020, was issued to the Noticee for submitting information and records pertaining to their imports made during the material period. In response to the said Summons, the Noticee vide e-mail dated 13-10-2020, sought further time for 45 more days, even though more than two years and three months was over from the date of first communication from DRI, Kolkata, seeking records and documents. As no documents were submitted, another letter dated 16-10-2020, was issued to the Noticee directing them to immediately submit soft copies of the required documents through e-mails, and excusing them from physical appearance. **It was specifically pointed out that such non-submission of documents would be viewed as withholding information with intent to disrupt the ongoing investigation.** Thereafter, the Noticee started forwarding the desired documents in soft, through e-mails in phased manner.

3.1 Upon examination of the fresh data submitted by the Noticee and the supporting documents as a whole, it was found that they imported various input materials during the material period under cover of **09 (Nine)** Advance Authorizations, and failed to comply with the pre-import condition in respect of all 09 (Nine) Advance Authorizations, still availing the benefit of exemption of IGST. Therefore, after taking into account particulars of imports submitted by the Noticee previously and also details of further imports, **which were not disclosed earlier**, it appears that the Noticee had contravened the provision of pre-import condition in respect of total **09 (Nine) Advance Authorizations**, involving 14 (Fourteen) Bills of Entry, and incorrectly availed exemption benefit for an amount of **Rs 3, 23, 57, 152/-**. In case of all such 09 (Nine) Advance Authorizations, as evident from **Table-1** below, export commenced much before the commencement of import and/or they continued to import input materials long after the export obligation was over which indicates that the Noticee used domestically procured materials for manufacture of the export goods instead of duty-free imported raw materials in outright infringement of the pre-import condition laid down in the subject Customs Notification.

3.2 From the **Table-1** below, which shows Advance Authorization No. & date of the respective first Bill of Entry and first Shipping Bill, the data submitted by the Authorized Representative of the Company, and the corresponding documents like original Bills of Entry under which goods were imported, first Bill of Entry in respect of every Advance Authorization and corresponding first Shipping Bill, it is seen that in respect of **08 (Eight)[Sr No. 1 to 8]** Advance Authorizations, the goods were exported before the commencement of imports. Therefore, it appears that for the manufacture of the export goods under the subject Advance Authorizations, they used domestically procured materials, thereby contravened the provision of pre-import condition and went on to avail benefit of exemption. Therefore, in terms of explanation given at Para 9.2(i) below, the Noticee failed to comply with the pre-import condition and therefore, was not eligible for IGST exemption benefit.

Table-1

Advance Authorization specific No. & Date of the First Bill of Entry and First Shipping Bill

Sr No	AA No	AA Date	First BE No	BE Date	First SB No	SB date	Gap
1	810139020	10-11-2016	6255290	05-05-2018	3308181	07-01-2017	-483
2	810138452	09-08-2016	4864636	19-01-2018	3287335	06-01-2017	-378
3	810138566	30-08-2016	4379129	13-12-2017	2604339	03-12-2016	-375
4	810138565	30-08-2016	4864636	19-01-2018	4984478	25-03-2017	-300
5	810140367	25-05-2017	6255290	05-05-2018	8631946	13-09-2017	-234
6	810140454	08-06-2017	3666208	18-10-2017	6609166	08-06-2017	-132
7	810141447	01-12-2017	5678400	22-03-2018	1841699	28-12-2017	-84
8	810140346	24-05-2017	6890077	21-06-2018	4634874	04-05-2018	-48
9	810138591	01-09-2016	7637919	29-11-2016	3738423	28-01-2017	60

3.3 It appears that in respect of the aforementioned **08 (Eight)** Advance Authorizations, the Noticee failed to use duty-free materials imported under the respective Advance Authorizations for the purpose of manufacture of the finished goods, which were exported towards discharge of export obligation. It is also implied that the duty-free goods subsequently imported could not have been used for the specified purpose. Therefore, the Noticee failed to comply with the pre-import condition in respect of all these Advance Authorizations.

3.4 In case of the Advance Authorization mentioned at **Sr. No. 9 of Table-1**, examination of the pattern of imports reveals that out of the two basic raw materials, Polypropylene & Polyethylene required for manufacture of the export goods, one item was imported before the first export, whereas, other input material, which is a major input, was subsequently imported. In respect of Advance Authorization No. 810138591, while Low Density Polyethylene [LDPE] was first imported vide Bill of Entry No. 7637919, dated 29-11-2016, the other input material, i.e Polypropylene was imported vide Bills of Entry Nos. 4864636 dated 19-01-2018, and 5321449 dated 22-02-2018 respectively, long after the commencement of export and even after completion of entire export obligation. **Table-2** below, which shows complete imports as well as exports made against the subject Advance Authorization, reveals that the Noticee imported LDPE first and once such import is over, they imported Polypropylene. From the details of export, it can be seen that before the commencement of the import of Polypropylene, entire export was completed. Therefore, it is implied that in case of the subject Advance Authorizations, they could not utilize the duty-free materials imported subsequently, for the purpose of manufacture of export goods and rather used domestically or otherwise procured materials for production of export goods. Therefore, in terms of explanation given at Para 9.2(iii) below, the Noticee failed to comply with the pre-import condition and therefore, was not eligible for IGST exemption benefit. Therefore, the

Noticee grossly failed to follow the pre-import condition in respect of 09 (Nine) [Sr Nos. 1 to 9 of Table-1], and the demand is being raised in respect of the said 09 (Nine) Advance Authorizations mentioned at table-1 and only for the period between 13-10-2017 to 10-01-2019.

Table-2

Export vis-à-vis imports in respect of AA No. 810138591 dated 01-09-2016				
Export				
Sr No	**SB no**	**SB date**	**Qty**	**FOB Value (Rs)**
1	3738423	28-01-2017	21261	₹ 29,86,288
2	3832916	01-02-2017	20148	₹ 28,14,625
3	4156469	16-02-2017	4460	₹ 4,58,562
4	4221977	18-02-2017	20555	₹ 26,86,687
5	4335802	24-02-2017	21158	₹ 29,22,643
6	1700124	21-12-2017	21162	₹ 26,53,741
Total			**108744**	**₹ 1,45,22,547**
Import				
Sr No	**BE No**	**BE Date**	**IGST Saved (Rs)**	**Value (Rs)**
1	7637919	29-11-2016	₹ 0	₹ 1,01,10,755
2	4864636	19-01-2018	₹ 7,55,801	₹ 38,97,790
3	5321449	22-02-2018	₹ 5,93,861	₹ 30,47,793
Total			**₹ 13,49,662**	**₹ 1,70,56,337**

3.5 Apart from the violations discussed above, it is also seen that in respect of at least 06 (Six) Advance Authorizations **[serial Number 1 to 5 & 9]**out of the defaulted 09 (Nine) Authorizations under dispute, the Noticee imported most of the input materials after completion of the entire exports. The following **Table-3A to Table-3F**, depicts details of exports vis-à-vis imports made by the Noticee in respect of individual Advance Authorization as mentioned in the respective Table. It can be seen that even after the last export was made, the Noticee continued to import materials under the same Authorization. It is but natural, that such imported duty-free goods could not have been used for the specified purpose of manufacturing export goods to be exported towards discharge of export obligation of the subject Advance Authorization. **This led to contravention of pre-import condition too.** In the following Tables, gist of exports are given which would give us a picture of the commencement of first and last exports. At the same time, it also shows the portion of imports made after the last export was made.

Table-3A

AA No. 810139020 dated 10-11-2016 imports vis-à-vis export				
Export				
Sr No	**SB No**	**SB Date**	**Qty (Kgs)**	**Cumulative Qty (Kgs)**
1	3308181	07-01-2017	15039	15039
2	3307210	07-01-2017	15039	30078
>>>>>>>>>>>>>>>>>>>>>>>>>				
19	9045556	03-10-2017	7007	147321
20	3180069	28-02-2018	7370	154691

Import				
Sr No	BE No	BE Date	IGST Saved (Rs)	IGST AV (Rs)
1	6255290	05-05-2018	3714231	19062000

Table-3B

AA No. 810138452 dated 09-08-2016 imports vis-à-vis export				
Export				
Sr No	SB No	SB Date	Qty (Kgs)	Cumulative Qty (Kgs)
1	3287335	06-01-2017	17359	17359
2	3750910	29-01-2017	18029	35388
3	3864759	03-02-2017	8925	44313
Import				
Sr No	BE No	BE Date	IGST Saved (Rs)	IGST AV (Rs)
1	4864636	19-01-2018	773578	3989468

Table-3C

AA No. 810138566 dated 30-08-2016 imports vis-à-vis export				
Export				
Sr No	SB No	SB Date	Qty (Kgs)	Cumulative Qty (Kgs)
1	2604339	03-12-2016	10253	10253
2	3908671	06-02-2017	12811	23064
>>>>>>>>>>>>>>>>>>>>>>>>>>				
57	8459684	31-08-2017	9182	983637
58	8498669	07-09-2017	19849	1003486
Import				
Sr No	BE No	BE Date	IGST Saved (Rs)	IGST AV (Rs)
1	4379129	13-12-2017	2903585	14974267
2	4507211	21-12-2017	3680035	18978548
3	4665593	03-01-2018	725980	3744000
4	4665594	03-01-2018	725980	3744000
5	5321449	22-02-2018	4756552	24411353

Table-3D

AA No. 810138565 dated 30-08-2016 imports vis-à-vis export				
Export				
Sr No	SB No	SB Date	Qty (Kgs)	Cumulative Qty (Kgs)
1	4984478	25-03-2017	20450	20450
2	5297902	08-04-2017	20773	41223
>>>>>>>>>>>>>>>>>>>>>>>>>>				

9	7211035	07-07-2017	20852	184399
10	8226065	24-08-2017	9508	193907

Import				
Sr No	**BE No**	**BE Date**	**IGST Saved (Rs)**	**IGST AV (Rs)**
1	4864636	19-01-2018	2266390	11688148

Table-3E

AA No. 810138591 dated 01-09-2016 imports vis-à-vis export				
Export				
Sr No	**SB No**	**SB Date**	**Qty (Kgs)**	**Cumulative Qty (Kgs)**
1	3738423	28-01-2017	21261	21261
2	3832916	01-02-2017	20148	41409
>>>>>>>>>>>>>>>>>>>>>>>>>				
5	4335802	24-02-2017	21158	87582
6	1700124	21-12-2017	21162	108744
Import				
Sr No	**BE No**	**BE Date**	**IGST Saved (Rs)**	**IGST AV (Rs)**
1	4864636	19-01-2018	755801	3897790
2	5321449	22-02-2018	593861	3047793

Table-3F

AA No. 810140367 dated 25-05-2017 imports vis-à-vis export				
Export				
Sr No	**SB No**	**SB Date**	**Qty (Kgs)**	**Cumulative Qty (Kgs)**
1	8631946	13-09-2017	8582	8582
2	8703039	16-09-2017	20781	29363
>>>>>>>>>>>>>>>>>>>>>>>>>				
34	3490761	14-03-2018	131240	951238
35	3724668	24-03-2018	49000	1000238
Import				
Sr No	**BE No**	**BE Date**	**IGST Saved (Rs)**	**IGST AV (Rs)**
1	6255290	05-05-2018	541659	2779875
2	6901239	21-06-2018	5742683	29472327
3	8412644	11-10-2018	888804	4561480
4	8412039	11-10-2018	888804	4561480

3.6 Therefore, the Noticee has violated the pre-import condition for the reasons discussed at length in **Para 3.1 to 3.6** above in respect of 09 (Nine) Advance Authorizations. Collective amount of incorrectly availed IGST exemption by the Noticee stands at **Rs.3,23,57,152/-.** Port specific, Advance Authorization specific and Bills of Entry specific details of imports made in violation of these Advance Authorizations are shown below involving IGST amount of **Rs.3,23,57,152/- which is recoverable from**

the Noticee as a whole. However, the present Notice is being issued demanding Duty in respect of Ports mentioned at Sr Nos. 1 & 2 of Table-4 below involving 11 Bills of Entry mentioned against the said ports in Table-6 [Sr No. 1 to 11] below and collective amount of Duty demanded for the purpose of the present Notice stands at Rs 2, 97, 38, 003/-.

Table-4

Port specific IGST Value and IGST saved amount			
Sr No	**Port**	**IGST AV (Rs)**	**IGST Amount Saved (Rs)**
Imports made through the ports within jurisdiction of Commissioner of Customs Ahmedabad			
1	Hazira	₹ 16,03,81,859	₹ 2,88,68,735
2	ICD Sabarmati	₹ 48,29,270	₹ 8,69,268
Total		**₹ 16,52,11,129**	**₹ 2,97,38,003**
Imports made through the ports within jurisdiction of Commissioner of Customs, Mundra			
3	Mundra	₹ 1,45,50,828	₹ 26,19,149
Grand Total		**₹ 17,97,61,957**	**₹ 3,23,57,152**

Table-5

Port specific Advance Authorization specific Value and IGST Amount Saved

Sr No	Port	AA No	AA Date	IGST Value (Rs)	IGST Amount Saved (Rs)
1	Hazira	810138452	09-08-2016	₹ 42,97,654	₹ 7,73,578
2		810138565	30-08-2016	₹ 1,25,91,058	₹ 22,66,390
3		810138566	30-08-2016	₹ 7,10,67,408	₹ 1,27,92,133
4		810138591	01-09-2016	₹ 74,98,119	₹ 13,49,662
5		810139020	10-11-2016	₹ 2,06,34,615	₹ 37,14,231
6		810140346	24-05-2017	₹ 93,79,996	₹ 16,88,399
7		810140367	25-05-2017	₹ 3,49,13,008	₹ 62,84,342
8		**Total**		**₹ 16,03,81,859**	**₹ 2,88,68,735**
	ICD Sabarmati	810141447	01-12-2017	₹ 24,82,863	₹ 4,46,915
1		810140454	08-06-2017	₹ 23,46,407	₹ 4,22,353
		Total		**₹ 48,29,270**	**₹ 8,69,268**
1	Mundra	810140367	25-05-2017	₹ 98,75,603	₹ 17,77,609
2		810141447	01-12-2017	₹ 46,75,225	₹ 8,41,541
		Total		**₹ 1,45,50,828**	**₹ 26,19,149**
Grand Total				**₹ 17,97,61,957**	**₹ 3,23,57,152**

Table-6

Advance Authorization specific Value and IGST Amount Saved				
Sr No	**AA No**	**AA date**	**IGST Assessable Value (Rs)**	**IGST Saved Amount (Rs)**

1	810138452	09-08-2016	₹ 42,97,654	₹ 7,73,578
2	810138565	30-08-2016	₹ 1,25,91,058	₹ 22,66,390
3	810138566	30-08-2016	₹ 7,10,67,408	₹ 1,27,92,133
4	810138591	01-09-2016	₹ 74,98,119	₹ 13,49,662
5	810139020	10-11-2016	₹ 2,06,34,615	₹ 37,14,231
6	810140346	24-05-2017	₹ 93,79,996	₹ 16,88,399
7	810140367	25-05-2017	₹ 4,47,88,612	₹ 80,61,950
8	810140454	08-06-2017	₹ 23,46,407	₹ 4,22,353
9	810141447	01-12-2017	₹ 71,58,088	₹ 12,88,456
Grand Total			**₹ 17,97,61,957**	**₹ 3,23,57,152**

Table-7

Bills of Entry specific Value and IGST Amount Saved

Sr No.	Port	BE no.	BE date	Value (Rs)	IGST Amount Saved (Rs)
1	Hazira	4379129	13-12-2017	₹ 1,61,31,029	₹ 29,03,585
2		4507211	21-12-2017	₹ 2,04,44,641	₹ 36,80,035
3		4665593	03-01-2018	₹ 40,33,224	₹ 7,25,980
4		4665594	03-01-2018	₹ 40,33,224	₹ 7,25,980
5		4864636	19-01-2018	₹ 2,10,87,606	₹ 37,95,769
6		5321449	22-02-2018	₹ 2,97,24,516	₹ 53,50,413
7		6255290	05-05-2018	₹ 2,36,43,829	₹ 42,55,889
8		6890077	21-06-2018	₹ 93,79,996	₹ 16,88,399
9		6901239	21-06-2018	₹ 3,19,03,794	₹ 57,42,683
		Total		**₹ 16,03,81,859**	**₹ 2,88,68,735**
10	ICD Sabarmati	8610200	25-10-2018	₹ 24,82,863	₹ 4,46,915
11		3666208	18-10-2017	₹ 23,46,407	₹ 4,22,353
		Total		**₹ 48,29,270**	**₹ 8,69,269**
12		5678400	22-03-2018	₹ 46,75,225	₹ 8,41,541
13		8412039	11-10-2018	₹ 49,37,802	₹ 8,88,804
14		8412644	11-10-2018	₹ 49,37,802	₹ 8,88,804
		Total		**₹ 1,45,50,828**	**₹ 26,19,149**
Grand Total				**₹ 17,97,61,957**	**₹ 3,23,57,152**

3.7 From the records and documents submitted by the Noticee, it appears that they have grossly failed to comply with the pre-import condition laid down in the amended Policy as well as the amended Customs Notification. It is also an admitted fact that the Noticee while importing such goods availing the benefit of exemption from payment of IGST, had the knowledge that considerable quantity of export was already made, by manufacturing export goods out of input materials procured from the domestic market or otherwise. **They knew it well that it was not practicable and possible for them to follow pre-import condition in respect of the said Advance Authorizations, as export already commenced and in the manufacture of the export goods, they could not use the duty-free materials imported under the subject Advance Authorization**. It was also in their knowledge that Para 4.03 of the Foreign Trade Policy (2015-20), demands physical incorporation of duty-free imported materials in the export goods, when such materials are subjected to pre-import condition. Yet they went

on to import such goods availing full benefit of exemption. **This was a deliberate act on the part of the Noticee.**

3.8 It is also a fact on record that the Noticee did not inform the Customs Authority about the fact of not following such pre-import condition in respect of the impugned Advance Authorizations, against which they were claiming exemption. In the regime of self-assessment, it was their duty to claim such exemption only if they were entitled to the same. However, the Noticee **did not hesitate to suppress the fact of not following pre-import condition** from the Customs Authority and by taking advantage of the prevalent law of self-assessment in force, which was introduced as a part of trade facilitation, went on to avail the inadmissible benefit of such exemption.

3.9 From the discussions, it appears that the Noticee, despite being asked to submit details of imports and corresponding exports with valid documents in support of such import/export, did not submit anything and left no stone unturned to thwart the process of investigation. They made every attempt to withhold the information, so that their actual liability could not be ascertained. They kept on delaying the process of submission of documents before the investigating authority with the mala-fide intent of evading Customs duty in the form of IGST. They deliberately refrained from appearing before the investigating authority and refused to give evidence. Such omission and/or commission on the part of the Noticee are clearly indicative of their non-cooperative attitude and their deliberate attempt to suppress the fact and records from the investigation.

3.10 Thus, from the facts of the case and the statement recorded by the Authorized Representative of the Noticee it appears that –

a. In case of 08 (Eight) Authorization **[Serial No. 1 to 8 of Table-1],** they started exporting finished goods even before the imports were commenced. Therefore, such input materials despite being covered by the respective Advance Authorization and absolutely necessary for the purpose of manufacture of the export goods, have not been used for the specified purpose.

b. In case of 01 (One) Advance Authorization, only one input material required for the purpose of manufacture of the finished goods, was imported prior to the commencement of export while the other input was imported subsequent to commencement of export contravening the condition of pre-import.

c. In addition to the violations as above, in respect of 06 (Six) Advance Authorizations **[serial Number 1 to 5 & 9]** the Noticee continued to import Duty-free materials even after completion of export obligation period of the respective Advance Authorization. Such input materials could not have gone into the production of the goods to be exported for discharge of EO of the said Advance Authorizations.

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

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

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

g. The Noticee did not co-operate with the investigation, in as much as despite being asked to furnish details of all the imports and exports corresponding to all the Advance Authorizations issued to them, they failed to furnish documents in respect of the subject Advance Authorizations. This further indicates their intent to suppress the materials facts hindering in completion of the investigation.

(Copies of 09 Advance Authorizations are attached as RUD-1;
Copies of the first Bills of Entry in respect of 09 Advance Authorizations are attached as RUD-2;
Copies of the first SB in respect of all AAs are annexed as RUD-3;
Copies of 11 Nos. Bills of Entry are annexed as RUD-4)

LEGAL PROVISIONS

4. Following provisions of law, which are relevant, have been reproduced under for ease of reference:

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

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

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

4.05 Eligible Applicant / Export / Supply
(a) Advance Authorisation can be issued either to a manufacturer exporter or merchant exporter tied to supporting manufacturer.
(b) Advance Authorisation for pharmaceutical products manufactured through Non-Infringing (NI) process (as indicated in paragraph 4.18 of Handbook of Procedures) shall be issued to manufacturer exporter only.
(c) Advance Authorisation shall be issued for:

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

c) Para 4.13 Foreign Trade Policy (2015-20):-

4.13 Pre-import condition in certain cases-

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

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

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

d) Para 4.14 Foreign Trade Policy (2015-20):-

4.14 Details of Duties exempted-

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

e) Para 9.20 Foreign Trade Policy (2015-20):-

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

f) Para 4.27 of Foreign Trade Policy:

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

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

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

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

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

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

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

h) Notification No.33/2015-2020 New Delhi, Dated: 13 October, 2017

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

S.O. (E): In exercise of powers conferred by Section 5 of FT (D&R) Act, 1992, read with paragraph 1.02 of the Foreign Trade Policy, 2015-2020, as amended from time to time, the Central Government hereby makes following amendments in Foreign Trade Policy 2015-20. 1. Para 4.14 is amended to read as under: "4.14: Details of Duties exempted Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) that the said authorisation bears,-

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

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

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

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

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

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

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

(vi) that in respect of imports made after the discharge of export obligation in full, and if facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of rule 19 of the Central Excise Rules, 2002 or of

CENVAT credit under CENVAT Credit Rules, 2004 has not been availed and the importer furnishes proof to this effect to the satisfaction of the Deputy Commissioner of Customs or the Assistant Commissioner of Customs as the case may be, then the imported materials may be cleared without furnishing a bond specified in condition (v);

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

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

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

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

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

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

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

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

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

Central Government, on being satisfied that it is necessary in the public interest so to do, made the following further amendments in each of the notifications of the Government of India in the Ministry of Finance (Department of Revenue), specified in column (2) of the

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

-: Table:-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

q) ***Section 114A of the Customs Act provides that:-***

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.

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

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

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

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

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

DISCUSSION OF PROVISIONS OF LAW

D-1 Imposition of two conditions for availing the IGST exemption in terms of Notification No. 79/2017-Cus dated 13-10-2017:-

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

5.1 With the introduction of GST w.e.f. 01.01.2017, 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 29.6.2017, was issued to give effect to the changes introducedintheGSTregimeinrespectofimportsunderAdvanceAuthorization. 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.

5.2 However, 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. 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 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 4(j) above, which may be referred to.

5.3 Therefore, by issuing the subject Notification No.79/2017-Cus dated 13.10.2017, the Government of India amended 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 conditional and one of the condition was that such exemption can only be extended so long as exports made under the Advance Authorization are physical exports in nature and the other being the condition that to avail such benefit one has to follow the pre-import condition.

5.4 The Director General of Foreign Trade, issued 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-Cuswas amended by the Notification No. 79/2017-Cus dated 13.10.2017, in tandem with the changed Policy by integrating the same provisions for proper implementation of the provisions of the Foreign Trade Policy (2015-20).

5.5 Therefore, conscious legislative intent is apparent by 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 be required to comply with the following two conditions: -

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

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

D-2 Physical Export condition in relation to the Foreign Trade Policy (2015-20) and the Notification No. 79/2017-Cus dated 13-10-2017, and whether it was followed by the Noticee

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

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

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

(c) Advance Authorization shall be issued for:

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

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

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

D-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, and whether it was followed by the Noticee

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

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

7.3 Advance Authorization are issued for import of duty-free materials first, which would be used for the purpose of manufacture of export goods, which would be exported out of India or be supplied under deemed export, if allowed by the Policy or the Customs Notification. The very name Advance Authorization was coined with prefix 'Advance', which illustrates and indicates the basic purpose as aforesaid. Spirit of the scheme is further understood, from the bare fact that while time allowed for import is 12 months (conditionally extendable by another six months) from the date of issue of the Authorization, 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.6 Thus, insertion of such conditions in the Notification is indicative of legislative intent of keeping check on possible misuse of the scheme. However, ensuring compliance of these two conditions is not easy, on the other hand, such conditions are vulnerable to be mis-used and have the inherent danger to pave way for 'rent-seeking'.

Therefore, to **plug the loop-hole, and to facilitate & streamline the implementation of the export incentive scheme, in the post-GST scenario the concept of "Pre-Import" and "Physical Export" was introduced in the subject Notification**. This is also in keeping with the philosophy of GST legislation to remove as many conditional exemptions as possible and instead provide for zero-rating of exports through the option of taking credit of the IGST duties paid on the imported inputs, at the time of processing of the said inputs.

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

9.1 IGST benefit is available against Advance Authorizations subject to observance of pre-import condition in terms of the condition of the Para 4.14 of the Foreign Trade Policy (2015-20) & also the conditions of the newly inserted 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 the provisions of Para 4.03 of the Foreign Trade Policy (2015-20), physical incorporation of the imported materials in the export goods is obligatory, and the same is feasible only when the imports precedes export.

9.2 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. This implies that in the production of the export goods, except for the item already imported, the importer had to utilize materials other than the duty-free materials imported under the subject

Advance Authorization. The other input materials are imported subsequently, **which do not and could not have gone into productionof the finished goods exported under the said Advance Authorization**. Therefore, pre-import condition is violated.

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

D-4 Whether the Advance Authorizations issued prior to 13-10-2017 should come under purview of investigation.

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

10.2 While issuing the subject Notification, the Government of India instead of imposing a condition that such benefit would be made available for Advance Authorizations issued on and after the date of issuance of the Notification, kept the doors wide open for those, who obtained such Advance Authorization in the past too, subject to conditions that such Authorizations are valid for import, and pre-import and physical export conditions have also been followed in respect of those Advance Authorizations. Therefore, instead of narrowing down the benefit to the importers, in reality, it extended benefit to many Advance Authorizations, which could have been out of ambit of the Notification, had the date of issue been made the basic criterion for determination of availment of benefit. Further, the Notification did not bring into existence any new additional restriction, rather it introduced new set of exemption, which was not available prior to issue of the said Notification. **However, as always, such exemptions were made conditional. Even the parent Notification, did not offer carte blanche to the importers to enjoy benefit of exemption,** as it also had set of conditions, which were required to be fulfilled to avail such exemption. As such, an act of the Government is in the interest of the public at large and instead of confining such benefits for the Advance Authorizations issued after 13-10-2017, the option was left open, even for the Authorizations, which were issued prior to the issuance of the said Notification. **The Notification never demanded that the previously issued Authorizations have to be pre-import compliant, but definitely, it made it compulsory that benefit of exemption from IGST can be extended to the old Advance Authorizations too, so long, the same are pre-import compliant.The importers did have the option to pay IGST and avail other benefit, as they were doing prior to introduction of the said Notification without following pre-import condition.** The moment they opted for IGST exemption, despite being an Advance Authorization issued prior to 13-10-2017, it was necessary for the importer to

ensure that pre-import/physical export conditions have been fully satisfied in respect of the Advance Authorization under which they intended to import availing exemption.

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

D-5 Whether the Advance Authorizations can be compartmentalized to make it partly compliant to pre-import/ physical export and partly otherwise.

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

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

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

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

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

11.6 Contrary to the 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.

D-6 Violations in respect of the Foreign Trade Policy (2015-20) and the condition of the Notification No. 79/2017-Cus dated 13-10-2017 in respect of the imports made by the importer: -

12.1 Customs Notification No.79/2017 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.**

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

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

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

12.3 For the purpose of availing the benefit of exemption from payment of IGST in terms of Para 4.14 of the Foreign Trade Policy (2015-20) and the corresponding Customs Notification No.79/2017-Cus dated 13-10-2017, it is obligatory to comply with the Pre-import as well as physical export conditions. Therefore, if for reasons as elaborated in section D-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.

12.4 Conjoint provisions of the Foreign Trade Policy and the subject Customs Notifications, clearly mandate that only imports under pre-import condition would be allowed 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.

D-7 Whether pre-import condition is applicable only in respect of goods/items mentioned in Appendix-4J of the Foreign Trade Policy (2015-20);

13.1 Para 4.13 (i) of the Foreign Trade Policy stipulates that:-

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

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

13.2 Para 4.13 of the Foreign Trade Policy stipulates that to impose pre-import condition, the Directorate General of Foreign Trade is required to issue Notification for that purpose. The DGFT has followed the said principle and accordingly issued Notification No. 33/2015-20 dated 13-10-2017. The said notification is general in nature and does not exclude any goods from the purview of the same. Only condition that is imposed that for one and all goods is that pre-import condition has to be followed in case the importer wants to avail the benefit of IGST exemption. In absence of any specific negative list containing specific mention of set of goods, which may not be covered by the said provision, it has been ensured that all goods are covered by the said Notification, provided that the importer intends to avail exemption of IGST. **It is a common practice and understanding that in case of general provision, the same is applicable to one and all except those covered by a specific clause in the form of negative list. It is neither practicable nor possible to specify each and every single item on earth for the purpose. In absence of any such negative list offered by the said notification, such pre-import condition becomes applicable for all goods to be imported.**

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

dated 13-10-2017, which without any shadow of doubt covers all goods including the one being imported by the Noticee. The importer has mis-interpreted the scope of Para 4.13 of the Foreign Trade Policy, and made an attempt to confine the scope of the said Para to infer that the goods imported by them are not covered by the said Para. However, such an inference is not in consonance with the Policy in vogue.

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

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

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

D-8 Violations of the provisions of the Customs Act, 1962:-

14.1 In terms of Section 46 of the Customs Act, 1962, while presenting the Bills of Entry before the Customs Authority for clearance of the imported goods, it was the duty of the Noticee 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 Noticee. It was the duty of the Noticee to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorization. As the Noticee 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 Noticee to place correct facts and figures before the Assessing Authority. In the present case, the Noticee had full knowledge of the fact that they did not follow the pre-import condition in respect of the impugned Advance Authorizations but they preferred suppressing the fact from the Customs Authority for claiming benefit of exemption of IGST. Instead of disclosing such facts of not having complied with pre-import/physical export condition, they decided to file Bills of Entry under cover of such Advance Authorizations availing benefit of exemption from IGST despite having failed to comply with the requirements of law and went on to incorrectly avail the 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, and therefore, attracts the provision of demand of Duty in terms of Section 28(4) of the Act ibid.

14.2 The Noticee failed to comply with the conditions laid down under the relevant Customs Notification as well as the DGFT Notification and the provisions of the Foreign Trade Policy (2015-20), as would be evident from the discussions above and availed benefit of exemption by suppressing the materials facts from the Customs Authority. The Noticee did not co-operate with the investigations, in as much as despite being asked to furnish details of all the imports and exports corresponding to all the Advance Authorizations issued to them, they failed to furnish such documents. Despite being summoned and issued with letters for submission of records and documents, the Noticee left no stone unturned to thwart the investigation. They declined outright to appear and also to provide with documents on one plea or other. Even after the judgment of the High Court of Gujarat was stayed by the Hon'ble Supreme Court, **the Noticee was still in complete denial and did not co-operate with the investigating agency by withholding all records and documents.** This further **indicates an intent to suppress the materials facts hindering in completion of the investigation**. Therefore, **the amount of IGST not paid, is recoverable under Section 28(4) of the Customs Act, 1962 along with interest**.

14.3 With the introduction of self-assessment under the Customs Act, more faith is bestowed on the importer, as the practice of routine assessment, concurrent audit and examination has been dispensed with and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the Noticee, it was duty of the Noticee 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. **Despite having known that they did not follow the pre-import condition in respect of the impugned Advance Authorizations, the Noticee deliberately availed the benefit of exemption and suppressed the fact of not complying with such condition from the Customs Authority for pecuniary benefit.** Amount of Customs Duty attributable to such benefit availed in the form of exemption of IGST, is therefore, recoverable from them under Section 28(4) of the Customs Act, 1962.

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

14.5 Section 114A of the Customs Act, 1962, stipulates that where the Duty has not been levied or has been short-levied by reason of collusion or any willful mis-statement

or suppression of facts, the person who is liable to pay the Duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the Duty or interest so determined. It appears that the Noticee has deliberately suppressed the fact of their failure to comply with the conditions of pre-import/physical export in respect of the impugned Advance Authorizations, which they were well aware of at the time of commencement of import itself, from the Customs Authority. Such an act of deliberation appears to have rendered them liable to penalty under Section 114A of the Customs Act, 1962.

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

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

14.7 Therefore, while Section 28 gives authority to recover Customs Duty, short paid or not-paid, and Section 111(o) of the Act, hold goods liable for confiscation in case such goods are imported by availing benefit of an exemption Notification and the importer fails to comply with and/or observe conditions laid down in the Notification. Section 124 & Section 28 of the Customs Act, 1962, authorize the proper Officer to issue Show Cause Notice for confiscation of the goods, recovery of Customs Duty and imposition of penalty in terms of Section 114A & 112(a) of the Customs Act, 1962.

15. In view of the above, Show Cause Notice No.VIII/10-12/DRI-KZU/Commr./O&A/2021-22 dated 16.08.2022**, was issued to M/s Singhal Industries Pvt. Ltd.,** having their registered office at Block No. 1547, Behind Mukat Pipes, Khatraj--Kalol Road, Moti Bhoyan, Gandhinagar, Gujarat- calling upon them to Show Cause in writing to the Commissioner of Customs, Ahmedabad having his Office at 1st Floor, Customs House, Nr. Akashwani Bhavan, Navrangpura, Ahmedabad -380009within 30 days of receipt of the Notice as to why:-

a) Duty of Customs amounting to **Rs 2,97,38,003/- (Rupees Two Crore, Ninety Seven Lakh, Thirty Eight Thousand and Three only)** in the form of IGST saved in course of imports of the goods through Hazira Port and ICD Sabarmati under the subject Advance Authorizations and the corresponding Bills of Entry as detailed above, in respect of which benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import condition as stipulated in the said Notification, and also for contravening provisions of Para 4.14 of the Foreign Trade Policy (2015-20), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, **should not be demanded and recovered under Section 28(4) of the Customs Act, 1962 read with the provisions of Section 143(3) of the Customs Act, 1962** which provides for recovery of the Customs Duty and interest there upon by way of enforcement of the Bonds executed by them at the time of import;

b) Subject goods, having assessable value of **Rs 16,52,11,129/- (Sixteen Crore, Fifty Two Lakh, Eleven Thousand, One Hundred and Twenty Nine only)** imported through Hazira Port & ICD Sabarmati under the subject Advance Authorizations should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in

terms of the Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said Notification;

c) Interest should not be demanded and recovered under Section 28AA of the Customs Act, 1962, on such Duty of Customs in the form of IGST, benefit of exemption of which was incorrectly availed;

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

e) Penalty should not be imposed under Section 112(a) of the Customs Act, 1962, for improper importation of goods availing exemption under Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without observance of the pre-import and/or physical export conditions set out in the Notification, resulting in non-payment of Customs Duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962;

16. Additional Commissioner of Customs, Custom House, Mundra has also issued Show Cause Notice No. GEN/ADJ/ADC/477/2022-Adjn Dated 31.05.2022, to the importer M/s. Singhal Industries Pvt. Ltd in respect of import effect from Mundra Port on the similar ground as mentioned in foregoing paras. Further, Corrigendum Dtd.06.12.2022 is issued from F.No. Gen/ADJ/ADC/477/2022-Adjn, by Additional Commissioner of Customs, Custom House, Mundra, making the said Show Cause Notice answerable to Principal Commissioner/Commissioner of Customs, Ahmedabad.

16.1 Show Cause Notice No. GEN/ADJ/ADC/477/2022-Adjn Dated 31.05.2022 (Corrigendum Dtd.06.12.2022) issued to M/s Singhal Industries Pvt. Ltd., calling upon them to Show Cause in writing to the Pr. Commissioner/Commissioner of Customs, Ahmedabad having his Office at 1st Floor, Customs House, Nr. Akashwani Bhavan, Navrangpura, Ahmedabad -380009within 30 days of receipt of the Notice as to why:-

(a) Duty of Customs amounting to **Rs 26,19,149/- (Rupees Twenty Six Lakh, Nineteen Thousand, One Hundred & Forty Nine only)** in the form of IGST saved in course of imports of the goods through Mundra Port under the Advance Authorizations and the corresponding Bills of Entry as mentioned at Sr. No. 12 to 14 in Table No. 7 in SCN, in respect of which benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import condition as stipulated in the said Notification, and also for contravening provisions of Para 4.14 of the Foreign Trade Policy (2015-20), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, **should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 read with the provisions of Section 143(3) of the Customs Act, 1962** which provides for recovery of the Customs Duty and interest there upon by way of enforcement of the Bonds executed by them at the time of import;

(b) Subject goods, having assessable value of **Rs 1,45,50,828/- (One Crore, Forty Five Lakh, Fifty Thousand, Eight Hundred & Twenty Eight only)** imported through Mundra Port under the Advance Authorizations and the corresponding Bills of Entry as mentioned at Sr. No. 12 to 14 in Table No. 7 in SCN should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated

13-10-2017, without complying with obligatory pre-import condition laid down under the said Notification;

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

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

(e) Penalty should not be imposed under Section 112(a) of the Customs Act, 1962, for improper importation of goods availing exemption under Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without observance of the pre-import and/or physical export conditions set out in the Notification, resulting in non-payment of Customs Duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962;

17. Defense Submission: The importer, vide letter dated 01.09.2022 submitted their common submission for Show Cause Notice dated 16.08.2022 and 31.05.2022 wherein they interalia stated as under:

- That the this issue has been a constant debate and litigation before various High Court where the impugned notification and the amendments to the Foreign Trade Policy (2015-20) were subject matter of challenge including before the Hon'ble Gujarat High Court which had clearly found such notification and amendment to be violative of basic and fundamental rights of importers like the present noticee, and therefore struck down the same as ultra vires. The said orders have thereafter been challenged before the Hon'ble Supreme Court therefore, there is not suppression of facts and or any mens rea whatsoever on the part of the importer;
- That the Government has now vide notification no 1/2019-Cus dated 11-1-2019 itself finding the hardships and difficulties faced by all importers across India and the challenges to the same, entirely removed the pre-import and physical export conditions from Notification 18/2015-Cus dated 1-4-2015 and merely it is removed w.e.f. 11-1-2019 would not mean or confer any right yet upon your office or the DRI to demand duty for the intervening period immediately till the Hon'ble Supreme Court decides the issue entirely in favour of the revenue or vice versa.
- That Hon.ble Delhi High Court in Narendra Plastic Private Limited vs. Union of India &Ors TS 203 HC 2017 (DEL) NT where the Hon'ble Court immediately issued interim orders, allowing imports in these cases without payment of IGST. That the necessary benefits under Advance Authorization scheme, was to assist exporters in carrying out their business efficiently.
- That the pre-import condition introduced has effectively nullified the benefit of the IGST exemption on the goods imported under the Advance Authorization Licenses issued to the noticee and the imposition of "pre-import" condition on Advance Authorization Licenses issued prior to 13 October 2017 places the noticee in the same position as of any other importer, who does not hold any license; that the noticee had imported the goods after corresponding Export Obligation was fulfilled and it was impossible for them to fulfill the pre-import condition as mandated for old Advance Authorization Licenses, through such a retrospective application of an amendment in Impugned Notification.

- That the impugned Notifications and the Impugned Notices, to the extent they prevent them from availing benefit of up-front exemption of Integrated Goods and Services Tax ("IGST"), violate their right to carry on trade, or business freely, on wholly illegal and irrational grounds and without authority of law, as well as being discriminatory, arbitrary, and unreasonable which require now require pre-imports of their raw materials i.e. LDPE/LLDPE & HDPE, as used in the manufacture of woven sacks, prior to their exports;
- That as a manufacturer and exporter of woven sacks, they face stiff competition and duty-free benefits granted through Advance Authorization Licenses under the original FTP incentive there was quality export and enabled hassle-free trade, which encouraged businesses that enabled in-flow of foreign exchange; that they had entered into export contracts, based on pricing determined on various factors and additional cost of business, to compensate for lost exemption benefits under Advance Authorization Licenses, which now in this new regime, will be very detrimental to them;
- That the pre-import condition inserted vide the Impugned Notifications, is therefore violative of Articles 14 & 19 of the Constitution and is ultra vires the established principles of law well propounded and announced from time to time in this regards including the various judicial precedents on the subject; that impugned Notifications are arbitrary in nature and are not based on a proper interpretation and to serve the intended and basic purpose of the statutory provisions; that the 'pre-import condition' inserted vide the Impugned Notifications as issued were devoid of any logic, reasoning or rational and against the tenets of law;
- That Article 14 of the Constitution permits reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends; that in this case, such a restriction of pre import condition is absolutely unreasonable and hence requires to be set aside accordingly;
- That imposition of the "pre-import condition" leads to class legislation; that by introduction of the pre-import condition, it has sought to resort to class legislation and have attempted to make a differential treatment to the same class of license holders by enabling only certain class of license holders to avail the IGST benefit without providing any conceivable rationale for the same. This is because by insertion of the pre-import condition in the Customs notification, by way of the Amending Customs Notification, persons who fulfil the export obligation before importing the goods are denied the opportunity to avail the benefit of IGST exemption; that "Pre-import condition" is not in consonance with the objective of the AA License Scheme and takes away the benefit of IGST exemption on imports; that they submitted that the pre-import condition that was sought to be imposed in case of availment of IGST exemption was arbitrary and without any basis;
- That "Pre-import Condition" is an unworkable restriction. That we had already discharged its export obligation before making imports under the Advance Authorization Licenses. Hence, it is impossible for us to comply with the pre-import conditions at this stage. Since the law cannot compel us to do something that is impossible, this unworkable restriction in the form of pre-import conditions should be set aside;
- That as per this proviso the levy of IGST is co-extensive with the levy of BCD in all respects. Accordingly, whatever provisions and conditions apply to the levy of BCD shall also apply to the levy of IGST. Therefore, the Impugned Amending Customs Notification by imposing 'pre-import condition' only in respect of IGST exemption, is in conflict with the clear provision laid out under Proviso to Section 5 (1) of the IGST Act. Even the other general exemptions as laid out under Notification Number 50 / 2017 - Cus, dated 30 June 2017 which specifies conditions for the concessional rate of tariff for BCD and IGST, clearly lays down uniform conditions for both BCD and IGST exemptions. Accordingly,

it is submitted that Para 1(xii) of the Impugned Customs Notification is ultra vires the proviso to Section 5(1) of the IGST Act;

- That Denial of IGST benefit on imports is contrary to objectives of the Advance Authorisation scheme. That the denial of IGST benefit on imports taking place after the fulfilment of export obligation is contrary to the stated objectives of duty remission schemes such as the Advance Authorisation License scheme laid down in Chapter 4 of the FTP;
- That benefits of an exemption cannot be taken away by way of imposition of a retrospective restriction That an exemption available to a person in the erstwhile regime cannot be watered down by placing unreasonable restrictions vide the imposition of an arbitrary conditions through subsequent notification that applies retrospectively;
- That the restrictions are in violation of the principle of promissory estoppels; that the essence of the precedential formulations on promissory estoppel and legitimate expectation in generic terms, as well as in the perspective of executive policy can be gleaned from the authorities cited at the Bar;
- That Pre-import condition is an exemption and not the rule and therefore, it is not mandatory for every license-holder to follow pre-import condition; that Import items subject to pre-import condition are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION);

18. Personal Hearing: Personal Hearing in respect of both the Show Cause Notices: (i) VIII/10-12/DRI-KZU/Commr./O&A/2022-23 dated 16.08.2022 and ii) Gen/Adj/ADC/477/2022-Adjn dated 31.05.2022 was fixed on 23.01.2024.However, noticee did not appear on the said date. Therefore, another Personal Hearing was fixed on 28.03.2024. The advocate of the importer requested for virtual hearing. Accordingly, virtual hearing was conducted on 04.04.2024 wherein the Advocate of the importer reiterated the submission as detailed in their written submission dated 01.09.2022.

19. I have also taken up the Show Cause Notice No. Gen/Adj/ADC/477/2022-Adjn dated 31.05.2022 issued by the Additional Commissioner of Customs, Mundra for adjudication following Para 11.5 of the Circular No. 1053/2/2017-CX dated 10.03.2017 issued by the Central Board of Excise and Customs, New Delhi as the Principal Commissioner is the competent authority to decide the case involving the highest amount of Duty in the above matter.

20. Findings: I have carefully gone through both the Show Cause Notices(i) VIII/10-12/DRI-KZU/Commr./O&A/2022-23 dated 16.08.2022 issued by Commissioner of Customs, Ahmedabad and ii) Gen/Adj/ADC/477/2022-Adjn dated 31.05.2022 issued by Additional Commissioner of Customs, Custom House,Mundra and relevant documents. I have also given due consideration to the oral submissions made by the Noticee's Counsel during the course of Personal Hearing as well as the written submissions dtd.01.09.2022 of the noticee.

21. I find from the records that the Show Cause Notices dated 16.08.2022 & 31.05.2022 were transferred to Call Book on 15.09.2022 & 09.12.2022 respectively as in the identical issue, the Department had filed SLP No. 25771/2019 against the order of Hon'ble Gujarat High Court in case of M/s. Maxim Tubes Company P. Ltd., and it was informed to the Importer vide letter dated 12.09.2022 & 12.12.2022 respectively. Now both the said Show Cause Notice have been retrieved from Call Book in view of Hon'ble Supreme Court decision dated 28.04.2023 in case of M/s. Cosmo Films Ltd. and same have been taken up for adjudication. Accordingly, the time limit specified in Section 28 (9) ibid shall apply from the date when the reason specified under Section 28 (9A) has ceased to exist i.e. w.e.f 28.04.2023.

22. Issues for consideration before me in these proceedings for both the Show Cause Notices are asunder:-

a) Duty of Customs amounting to **Rs 2,97,38,003/- (Rupees Two Crore, Ninety Seven Lakh, Thirty Eight Thousand and Three only)** in the form of IGST saved in course of imports of the goods through Hazira Port and ICD Sabarmati under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Show Cause Notice issued by Commissioner of Customs, Ahmedabad and Duty of Customs amounting to **Rs 26,19,149/- (Rupees Twenty Six Lakh, Nineteen Thousand, One Hundred & Forty Nine only)** in the form of IGST saved in course of imports of the goods through Mundra Port under the subject Advance Authorizations and the corresponding Bills of Entry as mentioned at Sr. No. 12 to 14 in Table No. 7 in the Show Cause Notice issued by Additional Commissioner, Customs, Mundra, in respect of which benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import condition as stipulated in the said Notification, and also for contravening provisions of Para 4.14 of the Foreign Trade Policy (2015-20), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, **should not be demanded and recovered from them under Section 28(4) of the Customs Act, 1962 read with the provisions of Section 143(3) of the Customs Act, 1962** which provides for recovery of the Customs Duty and interest there upon by way of enforcement of the Bonds executed by them at the time of import;

b) Subject goods, having assessable value of **Rs 16,52,11,129/- (Sixteen Crore, Fifty Two Lakh,, Eleven Thousand, One Hundred and Twenty Nine only)**imported through Hazira Port & ICD Sabarmati under the subject Advance Authorizations as detailed in the Show Cause Notice issued by Commissioner of Customs, Ahmedabad and subject goods, having assessable value of **Rs 1,45,50,828/- (One Crore, Forty Five Lakh, Fifty Thousand, Eight Hundred & Twenty Eight only)** as mentioned at Sr. No. 12 to 14 in Table No. 7 in Show Cause Notice issued by Additional Commissioner, Customs, Mundra should not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said Notification;

c) Interest should not be demanded and recovered under Section 28AA of the Customs Act, 1962, on such Duty of Customs in the form of IGST, benefit of exemption of which was incorrectly availed;

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

e) Penalty should not be imposed under Section 112(a) of the Customs Act, 1962, for improper importation of goods availing exemption under Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without observance of the pre-import and/or physical export conditions set out in the Notification, resulting in non-payment of Customs Duty, which rendered the goods liable to confiscation under Section 111(o) of the Customs Act, 1962;

I find that the question of Duty liability with interest and penal liabilities on the Importer would be relevant only if the bone of the contention as to whether the Importer has violated the obligatory pre-import condition as stipulated in Notification No.79/2017-Cus, dated 13-10-2017 is answered in the affirmative. Thus, the main point is being taken up firstly for examination.

23. Genesis of Pre Import Condition:

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

23.1.1Relevant Para 4.03 of the Foreign Trade Policy (2015-20) inter-alia states that :-

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

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

4.13 Pre-import condition in certain cases-

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

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

23.1.3Relevant Para 4.14 of the Foreign Trade Policy (2015-20) inter-alia states that :-

4.14 Details of Duties exempted-

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

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

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

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

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

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

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

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

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

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

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

Para 4.14 is amended to read as under:

"4.14: Details of Duties exempted

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

provided in the notification issued by Department of Revenue, and **such imports shall be subject to pre-import condition.**"

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

-: Table:-

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

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

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

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

23.5 I find that 'Pre-Import Condition' is unambiguous word/phrase. Further, I find that the definition of pre-import directly flows from Para 4.03 of the Foreign Trade Policy (2015-20)[erstwhile Para 4.1.3 of the Policy (2009-14)] wherein it is said that Advance Authorizations are issued for import of inputs, which are physically incorporated in the export goods allowing legitimate wastage. Thus, this Para specifically demands for such physical incorporation of imported materials in the export goods. And the same is only possible, when imports are made prior to export. Therefore, such Authorizations principally do have the pre-import condition in-built, which is required to be followed. In the instant case, it is undisputed fact that the Importer has not complied with the Pre-Import Condition as laid down vide Exemption Notification

No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017.

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

> **69.** The object behind imposing the 'pre-import condition' is discernible from Paragraph 4.03 of FTP and Annexure-4J of the HBP; that only few articles were enumerated when the FTP was published, is no ground for the exporters to complain that other articles could not be included for the purpose of 'pre-import condition'; as held earlier, that is the import of Paragraph 4.03(i). The numerous schemes in the FTP are to maintain an equilibrium between exporters' claims, on the one hand and on the other hand, to preserve the Revenue's interests. Here, what is involved is exemption and postponement of exemption of IGST, a new levy altogether, whose mechanism was being worked out and evolved, for the first time. The plea of impossibility to fulfil 'pre-import conditions' under old AAs was made, suggesting that the notifications retrospectively mandated new conditions. The exporter respondents' argument that there is no *rationale* for differential treatment of BCD and IGST under AA scheme is without merit. BCD is a customs levy at the point of import. At that stage, there is no question of credit. On the other hand, IGST is levied at multiple points (including at the stage of import) and input credit gets into the stream, till the point of end user. As a result, there is justification for a separate treatment of the two levies. IGST is levied under the IGST Act, 2017 and is collected, for convenience, at the customs point through the machinery under the Customs Act, 1962. The impugned notifications, therefore, cannot be faulted for arbitrariness or under classification.
>
> **70.** The High Court was persuaded to hold that the subsequent notification of 10.01.2019 withdrew the 'pre-import condition' meant that the Union itself recognized its unworkable and unfeasible nature, and consequently the condition should not be insisted upon for the period it existed, *i.e.*, after 13.10.2017. This Court is of the opinion that the reasoning is faulty. It is now settled that the FTPRA contains no power to frame retrospective regulations. Construing the later notification of 10-1-2019 as being effective from 13-10-2017 would be giving effect to it from a date prior to the date of its existence; in other words the Court would impart retrospectivity. In *Director General of Foreign Trade &Ors.* v *Kanak Exports &Ors.* [2015 (15) SCR 287 = 2015 (326) E.L.T. 26 (S.C.)] this Court held that :
>
> "Section 5 of the Act does not give any such power specifically to the Central Government to make rules retrospective. No doubt, this Section confer powers upon the Central Government to 'amend' the policy which has been framed under the aforesaid provisions. However, that by itself would not mean that such a provision empowers the Government to do so retrospective."
>
> **71.** To give retrospective effect, to the notification of 10-1-2019 through interpretation, would be to achieve what is impermissible in law. Therefore, the impugned judgment cannot be sustained on this score as well.
>
> ***75.*** *For the foregoing reasons, this court holds that the Revenue has to succeed. The impugned judgment and orders of the Gujarat High Court are hereby set aside. However, since the respondents were enjoying interim orders, till the impugned judgments were delivered, the Revenue is directed to permit them to claim refund or input credit (whichever applicable and/or wherever*

customs duty was paid). For doing so, the respondents shall approach the jurisdictional Commissioner, and apply with documentary evidence within six weeks from the date of this judgment. The claim for refund/credit, shall be examined on their merits, on a case-by-case basis. For the sake of convenience, the revenue shall direct the appropriate procedure to be followed, conveniently, through a circular, in this regard."

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

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

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

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

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Indirect Taxes & Customs, New Delhi

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

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

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

3. Hon'ble Supreme Court has allowed the appeal of Revenue directed against a judgment and order of Hon'ble Gujarat High Court [2019 (368) E.L.T. 337 (Guj.)] which had set aside the said mandatory fulfilment of pre-import condition. As such, this implies that the relevant imports that do not meet the said pre-import condition requirements are to pay IGST and Compensation Cess to that extent.

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

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

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

(b) Under GST law, the BE for the assessment of integrated tax/ compensation cess on imports is one of the documents based on which the input tax credit may be availed by a registered person. A TR-6 challan is not a prescribed document for the purpose.
(c) The nature of facility in Circular No. 11/2015-Cus. (for *suomotu* payment of customs duty in case of *bona fide* default in export obligation) [2015 (318) E.L.T. (T11)] is not adequate to ensure a convenient transfer of relevant details between Customs and GSTN so that ITC may be taken by the importer.
(d) The Section 143AA of the Customs Act, 1962 provides that the Board may, for the purposes of facilitation of trade, take such measures for a class of importers-exporters or categories of goods in order to, *inter alia*, maintain transparency in the import documentation.

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

(a) **for the relevant imports that could not meet the said pre-import condition and are hence required to pay IGST and Compensation Cess to that extent, the importer (not limited to the respondents) may approach the concerned assessment group at the POI with relevant details for purposes of payment of the tax and cess along with applicable interest.**
(b) the assessment group at POI shall cancel the OOC and indicate the reason in remarks. The BE shall be assessed again so as to charge the tax and cess, in accordance with the above judgment.
(c) the payment of tax and cess, along with applicable interest, shall be made against the electronic challan generated in the Customs EDI System.
(d) on completion of above payment, the port of import shall make a notional OOC for the BE on the Customs EDI System [so as to enable transmission to GSTN portal of, *inter alia*, the IGST and Compensation Cess amounts with their date of payment (relevant date) for eligibility as per GST provisions].
(e) the procedure specified at (a) to (d) above can be applied once to a BE.

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

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

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

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

23.9 I find that the said importer has reiterated their contention that the Pre Import condition laid down vide amendment Notification No. 79/2017-Cus, dated 13-10-2017

in exemption Notification No. No.18/2015 dated 01-04-2015, is arbitrary and further contended that "Pre-import Condition" is an unworkable restriction. I find that aforesaid issues were contended before the Hon'ble Gujarat High Court in case of Maxim Tubes Company Pvt. Ltd. v. Union of India —reported as 2019 (368) E.L.T. 337 (Guj.). I find that discussing all the aforesaid issue, Hon'ble Supreme Court has turned down this decision of Maxim Tubes Company Pvt. Ltd. v. Union of India in case of Union of India Vs. Cosmo Film Ltd. Thus, I find that Importer have utter disregard towards the decision of Hon'ble Supreme Court as they are contesting the same issue which has already been settled by the Hon'ble Supreme Court.

23.10 Thus, from the findings and discussion in Para 23 to 23.9 above, I find that there is no dispute that the said importer has failed to comply with the mandatory conditions of 'Pre-Import' while claiming the benefit of Exemption from IGST and Compensation Cess under Exemption Notification No. 18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 during the period from October13, 2017 to January 9,2019, in Advance Authorization Scheme.

24. Whether duty of Customs amounting to **Rs 2,97,38,003/- (Rupees Two Crore, Ninety Seven Lakh, Thirty Eight Thousand and Three only)** in the form of IGST saved in course of imports of the goods through Hazira Port and ICD Sabarmati under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Show Cause Notice dated 16.08.2022 issued by Commissioner of Customs, Ahmedabad and Duty of Customs amounting to **Rs 26,19,149/- (Rupees Twenty Six Lakh, Nineteen Thousand, One Hundred & Forty Nine only)** in the form of IGST saved in course of imports of the goods through Mundra Port under the subject Advance Authorizations and the corresponding Bills of Entry as detailed in the Show Cause Notice dated 31.05.2022 issued by Additional Commissioner, Customs, Mundra, in respect of which benefit of exemption under Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017, was incorrectly availed, without complying with the obligatory pre-import condition as stipulated in the said Notification, and also for contravening provisions of Para 4.14 of the Foreign Trade Policy (2015-20), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, **should be demanded and recovered under Section 28(4) of the Customs Act, 1962 read with the provisions of Section 143(3) of the Customs Act, 1962** which provides for recovery of the Customs Duty and interest there upon by way of enforcement of the Bonds executed by them at the time of import;

24.1 I find that it would be worth to reiterate that the Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd has overruled judgement of Hon'ble Gujarat High Court and has held that pre-import conditions, during October13, 2017 to January 9, 2019, in Advance Authorization Scheme was valid. Thus, I find that the Hon'ble Supreme Court has settled that IGST and Compensation Cess involved in the Bills of Entry filed during October13, 2017 to January 9,2019 is required to be paid on failure to compliance of 'Pre Import Condition as stipulated under Exemption Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017. I find that it is undisputed fact that said Importer has failed to fulfill and comply with 'Pre Import condition' incorporated in the Foreign Trade Policy of 2015-2020 and Handbook of Procedures 2015-2020 by DGFT Notification No. 33/2015-20 and Customs Notification No.18/2015 dated 01-04-2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017. Further, I find that Importer is well aware of the rules and regulation of Customs as well as Exim Policy as they are regularly importing the goods under Advance Authorisation and they were fully aware that the goods being cleared from Customs was not fulfilling pre import condition as they have already filed the Shipping Bill to this effect and goods have already been exported. Thus, it proves beyond doubt that goods imported under subject Bills of Entry were never used in the goods already exported. Thus, I find that the Importer with clear intent to evade the payment of IGST and Compensation Cess, have suppressed the facts of export without

compliance of Pre- Import condition from the Department while filing Bills of Entry under Advance Authorisation. Therefore, extended period is rightly invoked and therefore differential Customs Duty totally amounting to **Rs.3,23,57,152/ (Rs.2,97,38,003/- + Rs.26,19,149/-)** is required to be recovered under Section 28 (4) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act,1962.

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

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

NOW THE CONDITIONS OF THE ABOVE BOND ARE THAT:-

1. I/We, the obligor(s) fulfill all the conditions of the said notification and shall observe and comply with its terms and condition.

2.We the obligor shall observe all the terms and conditions specified in the license.

3....

4...

5.We, the obligor, shall comply with the conditions stipulated in the said Import & Export Policy as amended from time to time.

6....

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

1. The above written Bond is given for the performance of an act in which the public are interest.

2.The Government through the commissioner of customs or any other officer of the Customs recover the same due from the Obligor(s) in the manner laid sub-section (1)of the section 142 of the customs act,1962.

24.3 I find that no time limit is prescribed for recovery of any liability in case of Bond filed under Section 143 (1) of the Customs Act,1962 as it is continuous liability on the part of the importer to follow the conditions prescribed in the Bond. I find that the said importer is obliged to follow the conditions of the Bond. Therefore, I find that by filing the Bond under Section 143, said Importer is obliged to pay the consequent duty

liabilities along with interest on noncompliance/failure to fulfill the conditions of the Notification. Therefore, I find that without prejudice to the extended time limit envisaged under Section 28 (4) of the Customs Act, 1962, said Importer is liable to pay differential duty alongwith interest without any time limit. Therefore, I find that without prejudice to the Provisions of Section 28 (4) of the Customs Act,1962, the Bond is required to be enforced under Section 143 (3) of the Customs Act, 1962 for the recovery of differential Customs Duty of **Rs.3,23,57,152/-(Rs.2,97,38,003/- + Rs.26,19,149/-)** alongwith interest.

24.4 Further, Section 28AA ibid provides that when a person is liable to pay Duty in accordance with the provisions of Section 28 ibid, in addition to such Duty, such person is also liable to pay interest at applicable rate as well. Thus the said Section provides for payment of interest automatically along with the Duty confirmed/determined under Section 28 ibid. I have already held that Customs Duty amounting to **Rs.3,23,57,152/-(Rs.2,97,38,003/- + Rs.26,19,149/-)**is liable to be recovered under Section 28(4) of the Customs Act, 1962. Therefore, I find that differential Customs Duty of **Rs.3,23,57,152/-(Rs.2,97,38,003/- + Rs.26,19,149/-)**is required to be demanded and recovered as determined under Section 28 (8) of the Customs Act, 1962 alongwith Interest under Section 28AA of the Customs Act, 1962.

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

25. Whether the (i) Subject goods, having assessable value of Rs 16,52,11,129/- (Sixteen Crore, Fifty Two Lakh, Eleven Thousand, One Hundred and Twenty Nine only) imported through Hazira Port & ICD Sabarmati under the subject Advance Authorizations as detailed in the Show Cause Notice dated 16.08.2022 issued by Commissioner of Customs, Ahmedabad and (ii) Subject goods, having assessable value of Rs 1,45,50,828/- (One Crore, Forty Five Lakh, Fifty Thousand, Eight Hundred & Twenty Eight only) as detailed in the Show Cause Notice dated 31.05.2022 issued by Additional Commissioner, Customs, Mundra should be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said Notification?

25.1 Show Cause Notice proposes confiscation of the impugned imported goods under Section 111(o) of the Customs Act, 1962. Any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer, would come under the purview of Section 111(o) of Customs Act, 1962. As discussed above and relying on the decision of Hon'ble Supreme Court in case of Union of India Vs. Cosmo Films Ltd reported as 2023 (72) GSTL 147 (SC) wherein Hon'ble Supreme Court has held that pre-import condition, during October,2017 to January,2019, in Advance Authorization Scheme was valid, I find that the Importer has failed to comply with the pre-import conditions as stipulated under Notification No. No.18/2015 dated 01-04-

2015, as amended by Notification No. 79/2017-Cus, dated 13-10-2017 and therefore, imported goods under Advance Authorization claiming the benefit of exemption Notification No. No.18/2015 dated 01-04-2015, as amended by Notification No 79/2017-Cus, dated 13-10-2017 are liable for confiscation under Section 111(o) of the Customs Act,1962.

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

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

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

25.3 I find that the importer has wrongly availed the benefit of Notification No.18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017 and further imported goods have been cleared after the execution of Bond for the clearance of the imported goods under Advance Authorization. I rely on the decision in the matter of Weston Components Ltd. v. Collector reported as 2000 (115) E.L.T. 278 (S.C.) wherein Hon'ble Supreme Court has held that:

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

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

" 23.*The penalty directed against the importer under Section 112 and the fine payable under Section 125 operate in two different fields. The fine under Section 125 is in lieu of confiscation of the goods. The payment of fine followed up by payment of duty and other charges leviable, as per sub-section (2) of Section 125, fetches relief for the goods from getting confiscated. By subjecting the goods to payment of duty and other charges, the improper and irregular importation is sought to be regularised, whereas, by subjecting the goods to payment of fine under sub-section (1) of Section 125, the goods are saved from getting confiscated. Hence, the availability of the goods is not necessary for imposing the redemption fine. The opening words of Section 125, "Whenever confiscation of any goods is authorised by this Act ....", brings out the point clearly. The power to impose redemption fine springs from the authorisation of confiscation of goods provided for under Section 111 of the Act. When once power of authorisation for confiscation of goods gets traced to the said Section 111 of the Act, we are of the opinion that the physical availability of goods is not so much relevant.*

The redemption fine is in fact to avoid such consequences flowing from Section 111 only. Hence, the payment of redemption fine saves the goods from getting confiscated. Hence, their physical availability does not have any significance for imposition of redemption fine under Section 125 of the Act. We accordingly answer question No. (iii)."

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

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

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

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

25.6 I find that the ratio of decision rendered by Hon'ble Tribunal Mumbai in case of *Apco Infratech Pvt. Ltd.* v. *Commissioner* reported as 2019 (368) E.L.T. 157 (Tri.-Mumbai) affirmed by the Hon'ble Supreme Court reported as *2019 (368) E.L.T. A49 (S.C.)] is squarely applicable to the present case as in the said decision it has been held as under :*

> ***7.*** *Heard both the sides and perused the records of the case. We find that the appellant M/s. Apco had imported the "Hot mix plant" under Notification No. 21/2002-Cus. Sr. No. 230. It is apparent from the facts of the case that the plant was never utilized as provided under the conditions of the notification. The contention of the appellant that they were eligible for multiple road constrsites does not mean that the condition of the notification has been followed. In fact the plant was never used for such contracts as canvassed by the appellant during the importation of goods and claiming exemption. The appellant has not adduced single evidence that they have followed the conditions of the notification. They declared that they had contracts awarded by the State of U.P wherein the imported plant would be used. However they never used the said imported equipments in*

State of U.P. for construction of road. Instead they used the plant as a sub-contractor in State of Rajasthan and Tamil Nadu, but even in these cases also they were not named as sub-contractor in the contract awarded for construction of road. As per the conditions of the exemption notification, an importer can claim the benefit of exemption provided they are named as sub-contractor for construction of road. Even this condition was not satisfied. ***It clearly shows that the appellant never complied with the conditions of the exemption notification and has knowingly violated the conditions. We also find that since the conditions of the notification were not complied with and from the facts of the case it is very clear that the same were never intended to be complied with, we hold that the impugned order confirming demand, penalties and confiscation of goods has been rightly passed.*** *We also find that the officers had handed over the plant for safe custody after seizure and the same could not have been used without permission from the department. Having violated the conditions of Section 110 safe keeping by using the plant even after seizure makes the appellant liable for penalty under Section 117 of C.A. 1962. Further we find that Shri Anil Singh, Managing Director was fully aware about the benefits likely to accrue by availing ineligible notification and use of machine and therefore in such case his complicity in deliberate violation of the condition of notification is apparent. However in case of Shri V.S. Rao, Chief Manager (F & A), we find that he was only concerned with the taxation matter to the extent of availing benefit of exemption notification and was not concerned/connected with the decision to use machine and his role in violation of condition is also not visible. We are therefore of the view that he cannot be burdened with penalty. Resultantly, in view of our above findings, we uphold the impugned order inasmuch as it has confirmed demand, confiscation of goods and penalties against M/s. Apco and Shri Anil Singh. However the penalty imposed upon Shri V.S. Rao is set aside. The impugned order is modified to the above extent. The appeals filed by M/s. ApcoInfratech and Shri Anil Kumar Singh is rejected and the appeal filed by Shri S.V. Rao is allowed.*

In the present case, it is clearly apparent that the importer/noticee never complied with the conditions of the exemption notification and has knowingly violated the conditions. The importer has knowingly cleared the imported goods without observing obligatory condition of 'Pre Import' as envisaged under Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017. In view of the above, the impugned goods imported without observing obligatory condition of "Pre-import" as envisaged in the aforementioned notification are rightly liable for confiscation.

25.7 In view of the above, I find that redemption fine under Section 125 (1) is liable to be imposed in lieu of confiscation of (i) impugned goods having assessable value of Rs 16,52,11,129/- (Sixteen Crore, Fifty Two Lakh, Eleven Thousand, One Hundred and Twenty Nine only) imported through Hazira Port & ICD Sabarmati under the Advance Authorizations as detailed in the Show Cause Notice dated 16.08.2022 issued by Commissioner of Customs, Ahmedabad and impugned goods, having assessable value of Rs 1,45,50,828/- (One Crore, Forty Five Lakh, Fifty Thousand, Eight Hundred & Twenty Eight only) as detailed in the Show Cause Notice dated 31.05.2022 issued by Additional Commissioner, Customs, Mundra.

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

26.1. I find that demand of differential Custom Duty totally amounting to Rs.3,23,57,152/- (Rs.2,97,38,003/- + Rs.26,19,149/-) has been made under Section 28(4) of the Customs Act, 1962, which provides for demand of Duty not levied or short levied by reason of collusion or wilful mis-statement or suppression of facts. Hence as a naturally corollary, penalty is imposable on the Importer under Section 114A of the Customs Act, which provides for penalty equal to Duty plus interest in cases where the Duty has not been levied or has been short levied or the interest has not been charged or paid or has been part paid or the Duty or interest has been erroneously refunded by reason of collusion or any wilful mis statement or suppression of facts. In the instant case, the ingredient of wilful mis-statement and suppression of facts by the importer has been clearly established as discussed in foregoing paras and hence, I find that this is a fit case for imposition of penalty equal to the amount of Duty plus interest in terms of Section 114A ibid.

26.2 Further, I rely on the ratio of the decision of Honble Tribunal Delhi in case of Commissioner of Customs Vs. Ashwini Kumar Alia Amanullah reported as 2021 (376) E.L.T. 321 (Tri. - Del.)wherein it is held as under :

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

I find that in present case, importer has with clear intent to evade the payment of IGST have wrongly availed the benefit of exemption Notification No. 18/2015 dated 01.04.2015, as amended by Notification No. 79/2017-Cus, dated 13.10.2017 for the clearance of imported goods under Advance Authorization and did not fulfill the 'Pre-Import' condition as stipulated in Notification No.18/2015 dated 01.04.2015, as amended by Notification No.79/2017-Cus, dated 13.10.2017 and thereby short paid the duty. Therefore, Importer is liable for penalty under Section 114A of the Customs Act, 1962 as proposed in Show Cause Notice dated 16.08.2022 issued by the Commissioner of Customs, Ahmedabad and Show Cause Notice dated 31.05.2022 issued by the Additional Commissioner of Customs, Mundra.

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

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

28. I find that Importer has submitted that the restrictions by way of 'Pre Import condition' imposed is in violation of the principle of promissory estoppels. I find that the plea is not tenable as various judicial forum has time and again has held that 'Promissory estoppels' is not available against the exercise of legislative power and nor any vested right accrues to in the matter of grant of any tax concession. Ratio of decision of Hon'ble Supreme Court rendered in the case of Union of India Vs. A.B.P. Pvt. Ltd. reported in 2023 (386) ELT 33 (SC) is squarely applicable in present case, wherein it has been interalia stated as under:

26. *So far as the question of promissory estoppel is concerned, a recent decision of this Court, in Prashanti Medical Services & Research Foundation v. Union of India,*

(2019) 9 SCR 828/[2019] 107 taxmann.com 382 (S.C.)/[2019] 265 Taxman 504 (SC) placed the matter in correct perspective, when it observed that :

"26. ..... a plea of promissory estoppel is not available to an assessee against the exercise of legislative power and nor any vested right accrues to an assessee in the matter of grant of any tax concession to him. In other words, neither the appellant nor the assessee has any right to set up a plea of promissory estoppel against the exercise of legislative power such as the one exercised while inserting sub-section (7) in Section 35AC of the Act (see Motilal Padampat Sugar Mills Co. Ltd. [Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409] and other cases relied on by the Learned Counsel for the respondent Revenue). It is more so when we find that this sub-section was made applicable uniformly to all alike the appellant prospectively."

***27.** In the present case, the principal, or rather the sole ground which persuaded the High Court, to set aside the Amended Notification is that withdrawal of the concession could not be said to facilitate indigenous manufacturers. It was also held that "Indigenous angle therefore was not germane to withdrawal of exemption" and therefore, "public interest which must govern in the case of grant or withdrawal of the grant is lost." The third ground was that there was no "distinction between the two types of machines as both were having the same technology."*

***28.** Once it is recognized that it is the executive's exclusive domain, in fiscal and economic matters to determine the nature of classification, the extent of levy to be imposed, and the factors relevant for either granting, refusing or amending exemptions, the role of the Court is confined to decide if its decision is backed by reasons, germane, and not irrelevant to the matter. Judicial scrutiny can also extend to consideration of legality, and bona fides of the decision. The wisdom or unwisdom, and the soundness of reasons, or their sufficiency, cannot be proper subject matters of judicial review. In the present case, the impugned judgment has virtually conducted a merits review of the concerned economic measure [Vivek Narayan Sharma (Demonetisation Case-5 J.) v. Union of India, 2023 (1) SCR 1/[2023] 146 taxmann.com 36 (SC)*

"13.4. .....That the court may not undertake a foray into the merits, demerits, sufficiency or lack thereof, success in realising the objectives, etc. of an economic policy, as such an analysis is the prerogative of the Government in consultation with experts in the field."

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

::ORDER::

(A) In respect of Show Cause Notice No. VIII/11-12/DRI-KZU/Commr./O&A/2021-22 dated 16.08.2022:

(a) I confirm the Duty of Customs amounting to Rs 2,97,38,003/- (Rupees Two Crore, Ninety Seven Lakh, Thirty Eight Thousand and Three only) in the form of IGST saved in course of imports of the goods through Hazira Port and ICD Sabarmati under Advance Authorizations and the corresponding Bills of Entry as detailed in the Show Cause Notice and order recovery of the same from M/s. Singhal Industries Pvt. Ltd in terms of the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962;

(b) I hold the subject goods having assessable value of Rs 16,52,11,129/- (Rupees Sixteen Crore, Fifty Two Lakh, Eleven Thousand, One Hundred and Twenty Nine only) imported through Hazira Port & ICD Sabarmati under Advance

Authorizations as detailed in the Show Cause Notice liable for confiscation under Section 111(o) of the Customs Act, 1962.However, I give them the option to redeem the goods on payment of Fine of Rs.50,00,000/- (Rupees Fifty Lakh only) under Section 125 of the Customs Act, 1962;

(c) I impose a penalty of Rs 2,97,38,003/- (Rupees Two Crore, Ninety Seven Lakh, Thirty Eight Thousand and Three only)) plus interest on M/s. Singhal Industries Pvt. Ltd. under Section 114A of the Customs Act, 1962 in respect of Advance Authorizations and the corresponding Bills of Entry as detailed in Show Cause Notice. However, I give an option under proviso to Section 114A of the Customs Act, 1962, to the importer, If the duty and interest as confirmed above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per the first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within said period of 30 days.

(d) I refrain from imposing penalty on M/s. Singhal Industries Pvt. Ltd under Section 112 (a) of the Customs Act, 1962 for the reasons discussed in para 26 supra:

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

(B) In respect of Show Cause Notice No.GEN/ADJ/ADC/477/2022-Adjn dated 31.05.2022 issued by the Additional Commissioner of Customs, Custom House, Mundra Port:

(a) I confirm duty of Customs amounting to **Rs 26,19,149/- (Rupees Twenty Six Lakh, Nineteen Thousand, One Hundred & Forty Nine only)** in the form of IGST saved in course of imports of the goods through Mundra Port under Advance Authorizations and the corresponding Bills of Entry as mentioned at Sr. No. 12 to 14 in Table No. 7 in Show Cause Notice dated 31.05.2022 and order recovery of the same from M/s. Singhal Industries Pvt. Ltd in terms of the provisions of Section 28(4) of the Customs Act, 1962 along with applicable interest under Section 28 AA of the Customs Act, 1962;

(b) I hold the subject goods, having assessable value of Rs 1,45,50,828/- (One Crore, Forty Five Lakh, Fifty Thousand, Eight Hundred & Twenty Eight only) as detailed in the Show Cause Notice issued by Additional Commissioner, Customs, Mundra liable for confiscation under Section 111(o) of the Customs Act, 1962. However, I give them the option to redeem the goods on payment of Fine of Rs.4,50,000/- (Rupees Four Lakh Fifty Thousand only) under Section 125 of the Customs Act, 1962;

(c) I impose a penalty of Rs 26,19,149/- (Rupees Twenty Six Lakh, Nineteen Thousand, One Hundred & Forty Nine only) plus interest on M/s. Singhal Industries Pvt. Ltd. under Section 114A of the Customs Act, 1962 in respect of Advance Authorizations and the corresponding Bills of Entry as detailed in Show Cause Notice. However, I give an option under proviso to Section 114A of the Customs Act, 1962, to the importer, If the duty and interest as confirmed above is paid within 30 days of communication of this order, the amount of penalty imposed would be 25% of the duty and interest as per the first proviso to Section 114A ibid subject to the condition that the amount of penalty so determined is also paid within said period of 30 days.

(d) I refrain from imposing penalty on M/s. Singhal Industries Pvt. Ltd Pvt. Ltd. under Section 112 (a) of the Customs Act, 1962 for the reasons discussed in para 26 supra:

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

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

31. The Show Cause Notice VIII/11-12/DRI-KZU/Commr./O&A/2021-22 dated 16.08.2022 & GEN/ADJ/ADC/477/2022-Adjn dated 31.05.2022 are disposed off in above terms.

10.04.2024

(Shiv Kumar Sharma)
Principal Commissioner

DIN-20240471MN0000107986
F.No. VIII/10-12/DRI-KZU/Commr./O&A/2021-22 Date:10.04.2024.

M/s Singhal Industries Pvt. Ltd,
Block No.1547, Behind Mukat Pipes,
Khatraj-Kalol Road, Moti Bhoyan,
Gandhinagar, Gujarat - 382721

Copy to:-

1. The Chief Commissioner of Customs, Ahmedabad Zone, Ahmedabad for information please.
2. The Additional Commissioner of Customs, Mundra for information please.
3. The Additional Commissioner of Customs (TRC), Ahmedabad for information please.
4. The Deputy Commissioner of Customs, ICD Khodiyar/Hazira, Customs, Ahmedabad for information please.
5. The Superintendent of Customs(Systems), Ahmedabad in PDF format for uploading on the website of Customs Commissionerate, Ahmedabad.
6. Guard File.