OFFICE OF THE COMMISSIONER

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A	File No.	GEN/ADJ/ADC/1238/2024-Adjn-O/o-Commr-Cus-Kandla
B	Order-in-Original No.	KDL/ADC/VS/37/2024-2025
C	Passed by	Vishwajeet Singh, Additional Commissioner of Customs, Custom House, Kandla
D	Date of Order	25.03.2025
E	Date of Issue	29.03.2025
F	SCN No. & Date	S/43-01/SIIB/Pre-Import/2020-21/Flexituff dated 21.08.2023
G	Noticee / Party / Importer / Exporter	M/s Flexituff Ventures International Limited (Earlier known as M/s Flexituff International Limited), C 41-50, Sector-3, SEZ Industrial Area, Pithampur Dhar, Madhya Pradesh-454775

1. यह मूल आदेश संबंधित को निःशुल्क प्रदान किया जाता है।

   This Order - in - Original is granted to the concerned free of charge.

2. यदि कोई व्यक्ति इस मूल आदेश से असंतुष्ट है तो वह सीमाशुल्क अपील नियमावली 1982 के नियम 3 के साथ पठित सीमाशुल्क अधिनियम 1962 की धारा 128 A के अंतर्गत प्रपत्र सीए- 1 में चार प्रतियों में नीचे बताए गए पते पर अपील कर सकता है।

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

सीमा शुल्क आयुक्त (अपील)

7वीं मंजिल, मृदुल टावर, टाइम्स ऑफ इंडिया के पीछे, आश्रम रोड, अहमदाबाद 380 009"

"THE COMMISSIONER OF CUSTOMS (APPEALS),

Having his office at 7th Floor, Mridul Tower, Behind Times of India,

Ashram Road, Ahmedabad-380009."

3. उक्त अपील यह आदेश भेजने की दिनांक से 60 दिन के भीतर दाखिल की जानी चाहिए।

   Appeal shall be filed within sixty days from the date of communication of this order.

4. उक्त अपील के पर न्यायालय शुल्क अधिनियम के तहत 5/- रुपए का टिकट लगा होना चाहिए और इसके साथ निम्नलिखित अवश्य संलग्न किया जाए।

   Appeal should be accompanied by a fee of Rs. 5/- under Court Fee Act it must be accompanied by –

BRIEF FACTS OF THE CASE

Specific Intelligence developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter referred to as DRI) indicated that **M/s. Flexituff Ventures International Limited** (formerly known as M/s Flexituff International Ltd.), hereinafter also referred to as *"the said importer or M/s Flexituff for the sake of brevity"* having IEC No. 1194001645, located at C-41-50, Sector-3, SEZ Industrial Area, Pithampur Dhar, Madhya Pradesh-454775 appeared to have contravened the provisions of Section 17, 46 of the Customs Act, 1962 and also the provisions of Customs Notification No. 18/2015-Cus dated 01.04.2015 as amended by the Customs Notification No. 79/2017 dated 13.10.2017 read with the provisions of Para 4.03, 4.13 and 4.14 of the Foreign Trade Policy (2015-20), as they had imported various input materials through several ports without payment of duty of Customs under the cover of 04 (Four) Advance Authorization, on the strength of the subject Notification and they had accordingly availed the benefit of exemption from payment of IGST on the goods so imported, leviable in terms of sub-section (7) of section 3 of the Customs Tariff Act, 1975, by deliberately suppressing the fact of non-compliance of the **pre-import condition** laid down in the subject notification. Their deliberate act of omission and/or commission by suppression of material facts from the Customs Authorities, appeared to have resulted into non-payment of duty of Customs in the form of Integrated Goods and Services Tax (IGST) to the extent of Rs. 4,43,873.50/- which appeared to be recoverable under Section 28(4) of the Customs Act, 1962, along with applicable interest and also appeared to attract provision of section111(o) of the Customs Act, 1962 making the goods liable for confiscation and the company liable to penalty under section 114A & section 112(a) of the Act *ibid*.

2. A reference F. No: DRI/KZU/MISC-09/IGST/2019 dated 02.06.2020 was received from the Additional Director General, Directorate of Revenue Intelligence, Kolkata Zonal Unit which had indicated that a large number of importers across the country had imported various input materials without payment of duty of Customs under the cover of Advance Authorizations issued by the Regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importers had 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 such importers had not paid any Customs duty to the extent of Integrated

Goods & Service Tax (IGST) levied under sub-section (7) of section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended to the importers 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. Further, a list of the importers was also passed on to Kandla Customs Commissionerate for verification of compliance with the conditions of physical export and pre-import condition for availment of exemption of IGST in terms of Customs Notification No. 79/2017 dated 13-10-2017.

3. Acting on the said intelligence, summons was issued to all the importers including M/s. Flexituff Ventures International Limited, C41-50, Sector-3, SEZ Industrial Area, Pithampur Dhar, Madhya Pradesh-454775 (IEC-1194001645) who appeared to have imported goods under Advance Authorizations at **Kandla Port**. The pre-import condition and all Bills of Entry under cover of which goods have been imported by availing benefit of exemption from payment of IGST were taken into consideration in totality for determination of their liability.

4. Whereas, for the purpose of availing the benefit of exemption from payment of IGST, the importer was mandatorily required to comply with the pre-import condition. It was admitted that the pre-import condition demands that the **entire materials** imported under Advance Authorization should be utilized exclusively for the purpose of manufacture of finished goods, which would be then exported out of India. It was also admitted that the said Notification further stipulated that such benefit was available only for physical exports. **It had emerged that the export goods were exported before commencement of import by way of manufacturing such export goods from raw materials which were not imported under the respective Advance Authorizations or the raw materials procured from the domestic market which resulted into violation of pre-import condition imposed under the said Notification.**

B. FACTS ON RECORD

5.1 Intelligence developed by the Directorate of Revenue Intelligence, Kolkata, (hereinafter also referred to as DRI) had indicated that M/s. Flexituff Ventures International Limited had imported various input materials without payment of duty of Customs under the cover of a number of Advance Authorizations issued by Regional Directorate General of Foreign Trade (hereinafter referred to as DGFT). While executing such imports, the importer had 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 accordingly they had not paid any Customs duty in the form of Integrated Goods & Service Tax (IGST) levied under sub-section (7) of section 3 of the Customs Tariff Act, 1975, on such input materials at the time of import. However, such exemption was extended subject to condition that the person/importer willing to avail such benefit should comply with pre-import conditions and the finished goods should be subjected to physical exports only.

5.2 Whereas, the investigation conducted by Kandla Customs Commissionerate in respect of wrong availment of exemption of IGST benefit clearly indicated that although M/s. Flexituff had availed such exemption in respect of one **Bill of Entry bearing no. 2009566 dated 23.08.2018**, however, while going through the process of such imports and corresponding exports towards discharge of export obligation, it appeared that they had **failed to comply with the pre-import condition** as mandated under the aforesaid Notification No. 18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No. 79/2017 dated 13-10-2017. The pre-import condition simply implies that the goods should be imported prior to commencement of export of finished goods which could be subsequently exported under the same Advance Authorization for discharge of Export Obligation.

5.3 As it appeared that the benefit of exemption from payment of IGST was availed by M/s Flexituff in violation of the pre-import condition mandated under the aforesaid Notifications, accordingly, a case was booked by this Office and further investigation was initiated by way of issuance of summons under Section 108 of the Customs Act, 1962 to M/s. Flexituff who had imported goods under Advance Authorizations at Kandla port. In response to the summons dated 05.03.2021 issued to M/s Flexituff, **Shri Amit Nagar, Assistant Manager of M/s. Flexituff** had appeared on 25.03.2021 for recording of his voluntary statement u/s 108 of the Customs Act, 1962. Thereafter, another summons dated 22.03.2023 was issued to M/s Flexituff and another statement of Shri Amit Nagar was recorded on 05.04.2023. During the course of tendering statements, Amit Nagar, Assistant Manager of M/s. Flexituff Ventures International Limited ***inter-alia*** submitted that:

- *"He works as Assistant Manager in M/s. Flexituff International Ltd. (now M/s. Flexituff Ventures International Ltd.), C-41- 50, Sector-3, SEZ Industrial Area, Pithampur Dhar, Madhya Pradesh- 454775 (IEC No*

1194001645). The name of our company has changed from Flexituff International Ltd. to Flexituff Ventures International Ltd. from 28.09.2018. He further stated that being Assistant Manager in M/s. Flexituff International Ltd. (now M/s. Flexituff Ventures International Ltd.), he looks after day to day Customs work related to Import & Export. He had further stated that his email ID was excise1@flexituff.com.

- He stated that M/s. Flexituff Ventures International Limited is engaged in manufacturing of various types of PPE woven bags and FIBC bags out of the raw materials namely PP Granules, LDPE, LLDPE, HDPE, UV Stabilizers etc. for their above mentioned manufacturing activity and they have 2 manufacturing premises located at Pithampur, Dhar, MP & Udhamsingh Nagar, Uttarakhand.

- The company is importing goods under Advance Authorization from the countries like USA, China and from SEZs like KASEZ Kandla, Reliance SEZ Jamnagar etc. and taking exemption benefits of the notifications issued by CBIC in this regard.

- Post perusal of the Notification No. 79/2017 Customs dated 13th October, 2017 he inter-alia stated that this notification was issued to exempt IGST after introduction of GST along with other exemption provided under Notification No. 18/2015 - Customs dated 1st April, 2015 for the goods imported under Advance Authorisation; as, IGST was newly introduced under GST and was not exempted earlier. He further stated that at the time of issuance of Notification **the importer was not aware about two major conditions** prescribed for the availment of exemption of IGST for goods imported and further exported under Advance Authorisation **i.e. Pre-import condition** in respect of export and **export must be physical exported** means deemed export will not be considered for fulfilment of conditions of Advance Authorisation. He further stated that before issuance of Notification No. 01/2019-Cus. dated 10.01.2019 they were not aware about two major conditions prescribed under Notification No.79/2017 Customs dated 13th October, 2017 for availment of exemption of IGST for goods imported and further exported under Advance Authorisation under Notification.

➢ *He further stated that their company M/s. Flexituff Ventures International Limited (earlier known as M/s. Flexituff International Limited) had imported goods during the period 13.10.2017 to 10.01.2019 under Advance Authorisation at Kandla SEZ and availed exemption of IGST along with other exemptions in accordance with the Notification No. 79/2017 - Customs dated 13th October, 2017 under one* ***Bill of Entry imported at KASEZ Kandla imported vide Bill of Entry No. 2009566 dated 23.08.2018 under Advance License No. 5610005144 dated 22.05.2017 and due to non-awareness of two conditions laid down under Notification No. 79/2017 - Customs dated 13th October, 2017 i.e. pre-import and physical export for availing of IGST exemption, they were not fulfilling these two conditions".***

5.4 The details of the bill of entry under which import was made at the Kandla Special Economic Zone and benefit of IGST Exemption was availed but the two conditions as stipulated under Notification No 79/2017 dated 13.10.2017 were not fulfilled has been shown in **Table-1** below:

TABLE-1

S. No.	KASEZ BE No.	BE Date	Assessable Value (in Rs.)	IGST Amount (in Rs.)	Advance License No.	Date of License
1	2009566	23.08.2018	22,77,000	4,43,873.50	5610005144	22.05.2017

5.4.1 The pre-import condition and all Bills of Entry under cover of which goods have been imported by availing benefit of IGST have been taken into consideration in totality for determination of their liability, following table shows details of Advance Authorization with No. & date of the first Bill of Entry and first Shipping bill:

TABLE -2

Sr No	Advance License No.	Date of License	First B/E/ TRA No	BE/TRA date	First SB	SB Date
1.	5610005144	22.05.2017	5037001	25.07.2017	9805175	09.11.2017

5.5 On the basis of the details given in **Table-2** above, prima facie it appeared that the importer had followed the two conditions i. e. pre-import condition and physical export condition as stipulated under Notification No 79/2017 dated 13th October 2017. However, upon scrutiny of documents submitted by the importer while recording of their voluntary statement as discussed at **Para 5.3** above, it is observed that the said importer had admitted that they had not followed the two conditions as mentioned supra of the aforesaid notification. The said importer had submitted the documents i.e. **statement of import** made based on debit entry made on the license (Advance Authorisation No. 5610005144 dated 22.05.2017) and **statement of export** made under Advance Authorisation No. 5610005144 dated 22.05.2017).

5.6 While scrutinizing the statement of import submitted by M/s Flexituff, it was observed that the value of the first import which was made under the **BE/TRA No. 5037001 dated 25.07.2017** consisted of **PP Granules** having CIF Value of **Rs.8,20,59,250.25**/- for a total quantity of **1078 MT**.

5.7 Further, from the statement of export submitted by the importer, it is observed that M/s Flexituff had made total exports involving FOB Value of Rs.25,48,08,661/- for a total quantity of **1500 M.T.** The said exports were made during the period from **09.11.2017 to 09.07.2018** which included **PP Granules of 980 M.T.**, UVS (UV stabilizer) of 20 M.T., LDPE of 100 M.T. & LLDPE of 400 M.T. The details of export done before the 2nd import was made by M/s Flexituff and after the 2nd import have been shown in Table-3 below:

TABLE-3

	Export made before 2nd import (before 09.07.2018)			**Export made after 2nd Import (on /after 09.07.2018)**	
Sr. No	Cargo description	Quantity (in MT.)	Value in Rupees	Quantity (in MT)	Total FOB Value in Rupees
1	PP Granules	975.256	25,47,86,427.78	4.744	22,233.22/-
2	UV Stabilizer	19.903		0.097	
3	LDPE	99.516		0.484	
4	LLDPE	398.064		1.936	
	Total Quantity	**1492.739**		**7.261**	

Further, it was also observed that total import before 09.07.2018 was 1078 MT of PP Granules and the import of UV Stabilizer, LDPE, LLDPE of total quantity of 545 MTs was done on or after 07.07.2018.

6.8 On the basis of the import and export details as mentioned supra, it is found that as against the import of PP Granules of 1078 MT of the total assessable value of Rs. 8,20,59,250.25/-, export was made of PP Granules, UV Stabilizer, LDPE, LLDPE of total quantity of 1492.739 MT. having total combined FOB value of Rs.25,47,86,427.78 as shown in **Table-3** above. Therefore, it was clearly visible that the export of UV Stabilizer, LDPE, LLDPE was made earlier through domestically procurement of goods and the import of the same was done after the export of the same. Therefore, the pre-import condition as envisaged under notification No 79/2017 dated 13.10.2017 was not followed in true sense and thus they appeared to have violated the conditions mentioned in the aforesaid notification and availed wrongfully the benefit of the IGST Exemption.

7. LEGAL PROVISIONS

7.1 Following provisions of law, which are relevant, have been quoted in the Show Cause Notice issued to M/s Flexituff:

a. Para 4.03 of the Foreign Trade Policy (2015-20);
b. Para 4.05 of the Foreign Trade Policy (2015-20);
c. Para 4.13 of the Foreign Trade Policy (2015-20);
d. Para 4.14 of the Foreign Trade Policy (2015-20);
e. 9.20 of the Foreign Trade Policy (2015-20);
f. Para 4.27 of the Hand Book of Procedures (2015-20);
g. Section 2(e) of the Foreign Trade (DR) Act, 1992;
h. DGFT Notification No. 33/2015-20 dated 13-10-2017;
i. DGFT Notification No. 31/2013 (RE-2013) dated: 01-08-2013;
j. DGFT Circular No. 3/2013 (RE-2013) dated. 02-08-2013;
k. Notification No 18/2015-Customs dated 01-04-2015;
l. Notification No 79/2017-Customs dated 13-10-2017;
m. Section 17 of the Customs Act, 1962;
n. Section 46 (4) of the Customs Act, 1962;
o. Section 111(o) of the Customs Act, 1962
p. Section 112(a) of the Customs Act;
q. Section 124 of the Customs Act, 1962

7.2 Further, a detailed discussion on the above legal provisions has been made in the Show Cause Notice dated 21.08.2023 also incorporating the various judicial pronouncements governing the matter under dispute at Para D-1 to D-8.

8. **ISSUANCE OF SHOW CAUSE NOTICE**

In view of the above, M/s. Flexituff were issued Show Cause Notice bearing no. **F.No.CUS/43-01/SIIB/Pre-Import/2020-21/Flexituff dated 21.08.2023** issued by the Additional Commissioner of Customs Kandla as to why:

a) **Duty of Customs** amounting **to Rs.4,43,873.50/- (Table-1)** in the form of IGST saved in course of imports of the goods through Kandla SEZ under the subject Advance Authorization 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 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 provide for recovery of the Customs duty and interest thereupon by way of enforcement of the Bonds executed by them at the time of import;

b) Subject goods having assessable value of **Rs.22,77,000/- (Table-1)** imported through Kandla SEZ under the subject Advance Authorization shall not be held liable for confiscation under Section 111(o) of the Customs Act, 1962, for being imported availing incorrect exemption of IGST in terms of the Notification No. 18/2015 dated 01-04-2015, as amended by Notification No.79/2017-Cus, dated 13-10-2017, without complying with obligatory pre-import condition laid down under the said notification;

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

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

9. DEFENCE REPLY AND WRITTEN SUBMISSION: -

9.1 I find that the importer vide their letter dated 05.09.2023 has submitted their defense reply wherein, *interalia*, apart from mentioning the facts of the case as already discussed above, they appear to have submitted that the above show cause notice dated 21.08.2023 proceeds on an incorrect factual as well as legal basis. They have denied and countered each and every allegation contained in the said show cause notice dated. Relevant portion of their reply has been discussed as under: -

The term 'pre-import condition' has not been defined, absence of which makes such condition vague and cryptic: -

The noticee has submitted *that the SCN alleges that the noticee has not complied with the pre-import condition as inserted vide the Notification No.79/2017-Cus and Notification No.33/2015-20 dated 13.10.2017. The noticee submits that the said notification has not defined the term "pre-import condition" and absence of a clear definition deems such condition vague and cryptic and, in such situation, the noticee cannot be faulted for alleged violation of such condition.*

9.2 M/s Flexituff have also referred to Para 4.03 of the FTP and they have further relied on their judgment in KDL Biotech Ltd vs. CC - 2015 (327) ELT 305, wherein the tribunal has held at para 15, that-

"In our view, term "physically incorporated" only implies that such items are required for the manufacture and have been used so. It is not necessary that only imported exempt material is incorporated."

9.3 They have also referred to Para 4.1.3 of the Foreign Trade Policy 2004-2009 (similar to Para 4.03 of the FTP 2015-20), wherein the tribunal held that "physically incorporated" only implies that such items are required for the manufacture and have been used so. It is not necessary that only imported exempt material is incorporated. This further justifies the fact that the definition of pre-import condition does not flow from Para 4.03 of the FTP.

9.4 The noticee has submitted that since pre-import condition has not been defined under FTP, there is an ambiguity in the manner in which such pre-import condition has to be fulfilled. It is unclear whether "pre-import" signifies that all imports under the licence should be made before any export of the finished goods. Owing to the absence of a clear definition of "pre-import", the assessees are unsure whether they have met "pre-import" obligation when one batch is imported under a particular Advance Authorisation licence before exports whereas the other batch is imported after meeting export obligation. It is also unclear whether this qualifies as a violation of "pre-import condition" for all transactions made under the licence. That further begs the question whether the fulfilment of the conditions should be looked at qua the transaction or qua the Advance Authorisation.

Pre-import condition is against the whole scheme of Advance Authorisation

9.5 The Foreign Trade (Development and Regulation) Act, 1992 has been enacted to provide for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for matters connected therewith or incidental thereto. The Foreign Trade Policy, 2015-2020 has been notified in exercise of powers conferred under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The objective of the Foreign Trade Policy, 2015-2020, is to provide a framework for increasing exports of goods and services as well as generation of employment and increasing value addition in the country. Paragraph 1.06 of the Foreign Trade Policy provides thus:

> ***"1.06 Objective:***
> *Trade facilitation is a priority of the Government for cutting down the transaction cost and time, thereby rendering Indian exports more competitive. The various provisions of FTP and measures taken by the Government in the direction of trade facilitation are consolidated under this chapter for the benefit of stakeholders of import and export trade."*

9.6 The object of the scheme is (a) boosting of exports, (b) employment generation, and (c) making the exporter and exports competitive in the international market; and therefore, the condition of pre-import has no nexus with the object sought to be achieved and it on the contrary sets the Advance Authorisation Scheme at naught and hence, the show cause notice is liable to be dropped.

9.7 The subsequent notification dated 10.01.2019 amending Notification No. 79/2017-Cus dated 13.10.2017 is clarificatory in nature and hence, applicable retrospectively. Therefore, the demand is bad and the show cause notice is liable to be dropped

9.8 By Notification No. 53/2015-20 dated 10.01.2019, the Government has found deletion of condition (xii) in Notification No. 79/2017-Cus dated 13.10.2017 to be in public interest, and, therefore, now the controversy involved in the present case is limited to a period of about thirteen months only, between 13.10.2017 and 9.01.2019. The said amendment is only curative / clarificatory.

9.9 In the case of ***Shree Renuka Sugars Ltd vs. Union of India - 2018 (360) ELT 483 (Guj)***, wherein the Court referred to the decision of the Supreme Court in the case of ***W.P.I.L. Ltd vs. CCE - 2005 (181) ELT 359 (SC)***, wherein the Court considered a case where exemption notification was withdrawn and a fresh notification was issued shortly thereafter exempting duty of excise on parts used in manufacturing of power driven pumps. The Hon'ble Court noted that there was a consistent policy of the Government of India to grant such exemption. The later notification did not grant exemption for the first time. It was held that such notification was merely clarificatory and hence, would apply with retrospective effect. The Court also placed reliance upon the decision of this Court in the case of ***Gujarat Paraffins Pvt Ltd vs. Union of India - 2012 (282) ELT 33 (Guj)***, where the Court has considered a case where the Government of India had taken corrective measure of reintroducing the exemption after a gap of about sixteen months, and held that such exemption would have retrospective effect.

9.10 In the facts of the present case, there was no condition of pre-import insofar as the Advance Authorisation Scheme is concerned and subsequently, by the above notification dated 10.01.2019, the condition for pre-import had been deleted, and, therefore, such amendment should be considered to be a curative amendment and be applied retrospectively.

9.11 They have submitted that it is well settled legal position that the amendment which is clarificatory in nature is to be applied retrospectively and they have referred the following judgments:

(i) **GOI vs. Indian Tobacco Association – 2005 (187) ELT 162 (SC)**

(ii) **Zile Singh vs. State of Haryana – 2004 (8) SCC**

9.12 The current FTP permits exports in anticipation of authorization

(i) In exercise of powers conferred under paragraph 1.03 of the Foreign Trade Policy 2015-2020, the DGFT has notified the Handbook of Procedures by a Public Notice dated 01.04.2015. Paragraph 4.27 thereof provides for "Exports in Anticipation of Authorisation" and to the extent the same is relevant for the present purpose, reads thus:

> ***"4.27 Exports in Anticipation of Authorization***
>
> *(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."*

(ii) Thus, this paragraph permits exports in anticipation of authorisation and permits exports towards discharge of export obligation on the basis of the file number even prior to Advance Authorisation being granted. This condition has not been modified and export in anticipation of authorisation is permitted. This policy still exists.

(iii) In view of the above, the present show cause notice, invoking pre-import condition as brought vide Notification No. 79/2017-Cus dated 13.10.2017 is liable to be dropped in as much as the import – export of the noticee is governed under the above Para.

9.13 The second part of Paragraph 4.14 of the FTP is inconsistent with the first part thereof and hence, renders the first part redundant. On this count alone, the show cause notice must be dropped.

(i) Paragraphs 4.13 and 4.14 of the FTP before and after the amendment of paragraph 4.14 vide Notification No. 33/2015-2020, dated 13th October, 2017, read thus:

> ***"4.13 "pre-import condition" in certain cases***
>
> *(i) DGFT may, by notification, impose "pre-import condition" for inputs under this Chapter.*

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

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

"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."

(ii) Thus, paragraph 4.13 is a provision which is specifically made for "pre-import" condition and provides for the categories of cases to which such condition has to be applied. "Para 4.13 (Foreign Trade Policy-2015-20) has been in existence (under different Paras in different Policy periods) for years. Since, 2003, all drug companies have been importing their raw materials sourced from unregistered sources, under pre-import condition. Silk in any form, Raw Sugars, Natural Rubbers, Tea Spices and precious metals etc. are allowed to be imported under pre-import condition only. As already stated, pre-import condition is in-built within the Advance Authorization Scheme itself, and in terms of Para 4.04 of the Policy, which is integral part of the Policy since its inception, it has been [continuously] hammered upon the potential exporters, that they are allowed to import those inputs under Advance Authorisation scheme, which would be physically incorporated in the export goods.". Therefore, if a condition of pre-import has to be put in respect of any input, ideally such input should find place in paragraph 4.13 of the Foreign Trade Policy, which is not so in the present case. Due to the condition of pre-import contained in paragraph 4.14 and condition (xii) of the notification, though the inputs imported by the noticee do not fall within the categories enumerated in paragraph 4.13 of the Foreign Trade Policy and are as such not subject to the pre-import condition, the same become subject to the condition of pre-import *qua* specific levies viz. integrated tax and GST compensation cess, which creates an anomalous situation, inasmuch as the import of the inputs against an Advance Authorisation is subject to several levies under Section 3 of the Customs Tariff Act and in respect of the levies under sub-sections (1), (3) and (5) thereof, there is no pre-import condition; however, insofar as Integrated Tax and GST compensation cess leviable under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act, 1975 are concerned, for the purpose of exemption from such levies, such imports would be subject to "pre-import condition", as a result of which if the importer wants the benefit of exemption from the levy of integrated tax and GST compensation cess, the fact that the other levies are not subject to "pre-import condition" becomes immaterial inasmuch as the same input would be subject to the pre-import condition qua integrated tax and GST compensation cess which would, therefore, result in the input being subject to pre-import condition in respect of all the levies.

(iii) Thus, compliance is required of the authorisation as a whole and in case the condition of pre-import is violated, the entire Advance Authorisation gets vitiated. Consequently, even paragraph 4.27 of the Handbook, which is specifically applicable to Advance Authorisation, just remains in the Handbook and has no relevance whatsoever. Firstly, for the reason that if the importer wants the benefit of exemption from integrated tax and GST compensation cess in respect of such imports, he has to comply with the "pre-import condition"; and secondly, because in terms of the interpretation put forth by the Directorate of Revenue Intelligence violation of condition of pre-import would vitiate the entire authorisation, which may mean that in case of breach of condition of pre-import, the importer may be denied all the benefits available under such Advance Authorisation, including exemption in respect of levies other than integrated tax and GST compensation cess, in respect of which there is no "pre-import condition". Therefore, export in anticipation of Advance Authorisation as contemplated in paragraph 4.27 of the Handbook and the "pre-import condition" contained in paragraph 4.14 of the Foreign Trade Policy and condition (xii) of the exemption notification, cannot stand together.

(iv) Thus, by virtue of the amended paragraph 4.14 of the Foreign Trade Policy, even in case of inputs not falling within the ambit of paragraph 4.13, if such inputs have been imported against an Advance Authorisation, the same are subject to "pre-import condition" insofar as claim for exemption from the levy of integrated tax and GST compensation cess under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act is concerned. In other words, all the raw materials imported against an advance licence are subject to the "pre-import condition". Thus, while under the Foreign Trade Policy, vide paragraph 4.13 specific inputs have been subjected to the condition of pre-import considering the nature of such inputs, under paragraph 4.14 which merely provides for the details of duties exempted, all the raw materials imported under an Advance Authorisation, whatever be their nature, have been made subject to "pre-import condition" for the purpose of availing the benefit of exemption from Integrated Tax and GST compensation cess.

(v) Moreover, a piquant situation has been created whereby the very same inputs which are not subject to "pre-import condition" insofar as payment of basic customs duty, additional customs duty, education cess, anti-dumping duty, safeguard duty and transition product specific safeguard duty are concerned, are subject to condition of pre-import insofar as Integrated Tax and GST compensation cess are concerned, thereby setting at naught the first part of paragraph 4.14, inasmuch as if the very same inputs are subject to the condition of pre-import *qua* some levies, it would amount to importing the inputs subject to the condition of pre-import even *qua* the other levies. Thus, an anomalous situation has arisen, whereby the second part of paragraph 4.14 is inconsistent with the first part thereof and renders the first part redundant.

(vi) It is well settled that any interpretation that renders specific provision of law redundant or otiose or nugatory or inconsistent needs to be avoided. The legislature is a perfect legislative body. It is presumed to know all the laws when it enacts any particular legislation.

(vii) In **Union of India V/s Hansoli Devi (2002) 7 SCC 273,** the Hon'ble Supreme Court has observed that the legislature never waste's it words or say anything in vain and a construction which attributes redundancy to legislation will not be accepted except for compelling reasons.

(viii) In **Sultana Begum V/s Prem Chand Jain (1997) 1 SCC 373, at page 381**, the Hon'ble Apex Court has held that: (1) It is the duty of the courts to avoid a head-on clash between two sections of the Act; (2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them; (3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction"; (4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction; (5) To harmonise is not to destroy any statutory provision or to render it otiose.

(ix) Similarly, in **CIT V/s Hindustan Bulk Carriers (2003) 3 SCC 57, at page 73,** the Hon'ble Supreme Court has held that the courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.

(x) From the above settled legal position, it clearly emerges that a bare mechanical interpretation of words and application of a legislative intent is devoid of concept and purpose will reduce the most of the remedial and beneficent legislation to futility. To be literal in meaning is to see the skin and miss the soul. Words, phrases and rules occurring in a statute are to be read together and not in an isolated manner. The legislation never intends to give one from one hand and take away from other hand.

9.14 The Issue Is Revenue Neutral

(i) The manufacturer-exporters like the noticee who cannot comply with "pre-import condition", then, the imports shall have to be made on payment of integrated tax as well as GST compensation cess and such other levies; and thereafter, the noticee would have to avail ITC (Input Tax Credit) under the GST laws for utilizing such ITC for payment of GST and such levies for domestic transactions; and refund shall have to be claimed for such ITC, if it could not be utilized for other transactions. Thus, in the ultimate analysis, the Union Government shall not earn any revenue; whereas manufacturer- exporters shall have to undergo the rigors of paying such levies at the time of import of the goods and then availing its credit or refund. Thus, "pre-import condition" does not result in any revenue accrual for the Union Government. On this count as well, the show cause notice must be dropped. In a number of cases the courts have taken a view that where the situation is revenue neutral, the demand cannot survive. The noticee referred below mentioned case laws in support of their defense-

(a) C.C.E. v. Chloride Industries Ltd., 1997 (22) RLT 586

(b) P.T.C. Industries Ltd. v. Commissioner, 2003 (159) E.L.T. 1046

(c) Hindustan Zinc Ltd. v. C.C.E. - 2008 (232) E.L.T. 687

(d) Similar view has been taken in the following cases as well:

(i) India Piston Ltd. v. C.C.E. - 2008 (221) ELT 295

(ii) Savita Polymers Ltd. v. C.C.E. - 2009 (240) ELT 616

(iii) Aurobindo Pharma Ltd. v. C.C.E. - 2007 (216) ELT 389

(iv) Tennco India Pvt. Ltd. v. C.C.E. - 2009 (235) ELT 105

(v) SRF Ltd. v. C.C.E. - 2007 (220) ELT 201

(e) CCE vs. Textile Corporation of Marathawada 2008 (231) ELT 195 (SC)

Further the noticee submitted that Hon'ble Supreme Court has consistently held that where demand raised against by Revenue is equal to the credit available to the assessee, then the demand is not maintainable.

(i) CCE vs. Narayan Polyplast 2005 (179) ELT 20 (SC)

(ii) CCE vs. Narmada Chematur 2005 (179) ELT 276 (SC)

(iii) CCE vs. Coca-Cola India 2007 (213) ELT 490 (SC)

9.15 No reliance can be placed on the statements recorded by the department

(i) The noticee submits that reliance placed by the department in the show cause notice on the statements is wholly misplaced, out of context and erroneous.

(ii) *First*, the present case is a matter involving interpretation of condition newly inserted in the customs notification affecting the industry at large. In such a case, reliance on statements of the officials of the noticee company to hold that the noticees are liable to pay duty is incorrect.

(iii) *Second*, without prejudice to the above, the statements in no manner lead to a conclusion that the noticees are liable to pay duty.

(iv) *Third*, vide his statement Shri. Kripashankar Tiwari, Manager of the noticee company explained the factual position only. There was never any admission that the noticee has evaded duty.

(v) *Fourth*, the noticees submit that the above statements, in no manner, established the fact that the noticee has intention to evade duty.

(vi) It is pertinent to note that the entire statement should be read as a whole. It is well settled that a statement has to be accepted in full or rejected in full and cannot be relied upon in parts to suit the allegations contained in the show cause notice. This is precisely what is being sought to be done by the department in the present case.

(vii) Sixth, without prejudice to the above submissions, as a matter of fact, the noticees state and submit that in a matter of interpretation of law such as the one involved in the present case i.e. what is pre-import conditions, reliance cannot be placed upon the aforesaid statement. The noticees submit that in cases of the present type, it has to be determined as to whether the activity sought to be taxed would fall within the four corners of the pre-import condition or not. To place reliance upon statement of the authorized personnel of the notice company would be of no assistance to the case of the Revenue.

(viii) Seventh, in any case, in the absence of cross examination, the above statements cannot be relied upon to allege against the noticee.

9.16 There should not be any confiscation under section 111(o) of the Customs Act, 1962

(i) The Show Cause Notice proposes confiscation of goods under section 111 (o) of the Customs Act, 1962.

(ii) *First,* the goods imported by the noticees are not liable for confiscation, in as much as noticee has not violated the condition of exemption notification for the reasons stated supra.

(iii) *Second,* the goods are not liable for confiscation under Section 111(o) of the Customs Act, 1962 as they have already been used by the noticees in the manufacture of the final product. As the goods are not available for confiscation, the question of levying penalty under Section 111(o) of the Customs Act, 1962 dies not arise at all. Hence, the show cause notice is liable to be dropped.

9.17 No Penalty under Section 114A of the Customs Act can be imposed.

(i) The show cause notice proposes to impose penalty under Section 114A of the Customs Act, 1962.

(ii) The noticee submits that no penalty can be imposed on the noticee for the reasons *infra.*

(iii) *First,* the noticee has not violated any condition of the exemption notification for the reasons stated supra and therefore, no penalty can be imposed.

(iv) *Second*, the noticee was under bonafide belief that the 'pre-import' condition is illegal, in as much as the Hon'ble Gujarat High Court in ***Maxim Tubes Company Pvt Ltd vs. Union of India - 2019 (368) ELT 337(Guj)*** held that the said condition is illegal and invalid.

(v) *Third*, the issue involved under dispute is an interpretational issue, inasmuch as the dispute went up to Hon'ble Supreme Court and therefore, no penalty can be imposed on the noticee.

(vi) *Fourth*, if the importer failed to comply with the pre-import condition, due to the reason stated above, it cannot be said that the importer intended to evade payment of customs duty and avail improper benefit of the advance authorization scheme.

In support of their submission against penalty, the noticee relies on the below mentioned decision-

(a) *Krishna Knitwear Technologies Ltd vs. Commr. of C. Ex. & S.T., Vapi - 2016 (333) ELT 429 (Tri. - Ahmd.)*

(b) *Philips (India) Ltd vs. CC - 2001 (137) ELT 697; Meirs Pharma (India) Pvt Ltd vs. CC - 2004 (167) ELT 53* and in *Sun Knitwear Pvt Ltd vs. CC – 2007*

(c) *Hindustan Steel Ltd vs. The State of Orissa (1969 (2) SCC 627)*,

(d) *Continental Foundation vs. CCE 2007 (216) ELT 177 (SC)*,

(e) *Anand Nishikawa Co Ltd vs. CCE - 2005 (188) ELT 149 (SC)*.

(f) *Uniworth Textiles Ltd vs. CCR - 2013 (288) ELT 161 (SC)*;

(g) CCE vs. Swaroop Chemicals (P) Ltd. 2006 (204) ELT 492 (T)

(h) Haldia Petrochemicals Ltd vs. CCE 2006 (197) ELT 97 (T)

(i) CCE vs. TELCO LTD 2006 (196) ELT 308 (T)

(j) Siyaram Silk Mills Ltd vs. CCE 2006 (195) ELT 284 (T)

(k) CCE vs. Sikar Ex-Serviceman Welfare Coop. Society Ltd. 2006 (4) STR 213 (T)

(l) Hindustan Steel Ltd vs. State of Orissa 1978 (2) ELT (J 159) (SC)

(m) Fibre Foils Ltd vs. CCE 2005 (190) ELT 352 (T)

(n) ITEL Industries Pvt. Ltd vs. CCE 2004 (163) ELT 219 (T)

(o) Birla Corporation Ltd vs. CCE 2002 (148) ELT 1249 (T)

(p) *Mahindra & Mahindra Ltd v. Union of India - 2022-TIOL-1319-HC-MUM-CUS*,

In view of the above case laws, they submitted that the subject goods cannot be confiscated and penalty cannot be imposed on the applicant.

9.18 No interest

(i) The show cause notice proposes for interest on differential duty, the noticee submitted that once no tax is payable in view of the reasons mentioned above, no interest can be demanded from the noticees. Hence, the present show cause notice is liable to be set aside.

(ii) Second, no interest can be levied on delayed payment of IGST leviable under Section 3 of the Customs Tariff Act, 1975, inasmuch as interest under Section 28AA of the Customs Act can be levied only on delayed payment of basic customs duty and not additional customs duty.

(iii) The noticee relied upon case laws of *Mahindra & Mahindra Ltd v. Union of India - 2022-TIOL-1319-HC-MUM-CUS*, which was upheld by the Hon'ble Supreme Court reported at *2023 (8) TMI 135 – SC*.

9.19 The entire demand is time barred and extended period cannot be invoked

(i) The show cause notice has been issued on 21.08.2023 and received on 22.08.2023. The Bill of Entry is dated 23.08.2023. Hence, the entire demand is time barred, in as much as the normal time limit for issuance of show cause notice is 2 years in terms of Section 28(1) of the Customs Act, 1962.

(ii) The noticee submitted that provisions of section 28(4) of the Customs Act, 1962 would not be applicable in the facts of the present case.

(iii) It is submitted that Section 28(4) of the Customs Act, 1962 clearly deals with recovery of duty not levied, short levied or erroneously refunded to the importer or the exporter, where such non levy or short levy has occurred by reason of (a) collusion; or (b) wilful mis-statement; or (c) suppression of facts on part of the importer.

(iv) In the instant case, the noticee submits that there is no allegation that the noticee has not disclosed any material facts in the Bills of Entry with respect to any import made by the noticee, let alone any evidence to the said effect. No such evidence is available on record. Once this is the admitted factual position, the appellants submits that the extended period of limitation cannot be invoked in the facts of the present case.

(v) In support of the above submission, the noticee has placed reliance on decision of the Tribunal in the case of *DSM Anti Infectives India Limited V/s Commissioner of Customs reported at 2009 (246) ELT 648*. In that case, the Tribunal observed that in absence of any case of collusion or mis-statement on part of purchaser, extended period cannot be invoked against purchaser of the DEPB licenses.

(vi) In this context, the noticee relied upon decision of the Hon'ble Supreme Court in the case of **Continental Foundation V/s CCE 2007 (216) ELT 177 (SC)**

9.20 Further, the issue involved in the matter is interpretational in nature and therefore, extended period of limitation cannot be invoked. In any case, the department was aware about the disputed transaction since March, 2021 and ought to have issued show cause notice within 2 years from the date of knowledge. Hence, the present show cause notice is barred by limitation. Hence, the present show cause notice is liable to be dropped on this count alone.

9.21 The noticee has further submitted that without prejudice, the DGFT has not alleged violation of 'pre-import condition'. The exemption under Advance Authorization Licence is governed by FTP 2015-20. The proper authority to allege violation of FTP is DGFT. Hence, the allegation levelled in the present show cause notice are based on assumption and presumptions. Further, the present show cause notice is without jurisdiction.

Accordingly, M/s Flexituff have prayed that the proceedings initiated in the aforesaid show cause notice dated 21.08.2023 may be dropped in entirety.

10. PERSONAL HEARING

The Personal hearing was held in Virtual mode on 18.10.2024. The same was attended by Shri Ravi Patni, DGM, Customs SEZ and GST for the noticee namely M/s. Flexituff Ventures International Limited and interalia, he reiterated the ground submitted vide letter dated 05.09.2023 and additional submission dated 09.10.2024. He further, argued that, in case of M/s Chiripal Polypack, Hon'ble CESTAT, Ahmedabad, in the identical case, has held that suppression of fact is not there, so extended period will not be applicable and he requested to set aside the SCN and drop the demand.

DISCUSSION AND FINDINGS

11.1 I have carefully gone through the present Show Cause Notice bearing no. F.No. S/43-01/SIIB/Pre-Import/2020-21/Flexituff dated 21.08.2023, defense reply dated 05.09.2023, additional submission dated 09.10.2024 and submissions made during the course of personal hearing held in virtual mode on 18.10.2024. I have also gone through the case laws referred in the above referred defense reply submitted by M/s Flexituff and the case laws relied upon in the subject show cause notice.

11.2 I find that the present show cause notice dated 21.08.2023 has alleged that M/s Flexituff appear to have availed wrongfully the benefit of exemption from payment of IGST amounting to Rs. 22,77,000/- in respect of goods imported vide Bill of Entry bearing no. 2009566 dated 23.08.2018 having an assessable value of Rs.22,77,000/- against Advance Authorisation bearing license no. 5610005144 dated 22.05.2017 as available under notification No.18/2015-Cus dated 01-04-2015, as amended by the Customs Notification No.79/2017 dated 13-10-2017.

11.3 The show cause notice has alleged that on the basis of the "statement of import" and "statement of export" submitted by M/s Flexituff and the subsequent investigations undertaken by the Department, it is revealed that M/s Flexituff had not fulfilled the "pre-import" condition prescribed under the said notifications in as much as the export goods were exported prior to commencement of import under the above referred authorization and as such the imported goods were not utilized in manufacture of the export goods. Therefore, the SCN has alleged that the exemption from payment of IGST amounting to Rs.4,43,873.50/- on the goods imported vide Bill of Entry bearing no. 2009566 dated 23.08.2018 having an assessable value of Rs.22,77,000/- against Advance Authorisation bearing license no. 5610005144 dated 22.05.2017 appears to have been availed in contravention of the "pre-import condition"

11.4 I find that the **foundation of defense submitted by M/s Flexituff** is based on their notion that the terms "pre-import condition" has not been defined, absence of which makes such condition vague and cryptic. The noticee has submitted that since pre-import condition has not been defined under FTP, there is an ambiguity in the manner in which such pre-import condition has to be fulfilled. It is unclear whether "pre-import" signifies that all imports under the licence should be made before any export of the finished goods. Owing to the absence of a clear definition of "pre-import", the assessees are unsure whether they have met "pre-import" obligation when one batch is imported under a particular Advance Authorisation licence before exports whereas the other batch is imported after meeting export obligation. It is also unclear whether this qualifies as a violation of "pre-import condition" for all transactions made under the licence. That further begs the question whether the fulfilment of the conditions should be looked at qua the transaction or qua the Advance Authorisation.

11.5 M/s Flexituff, in continuation to the above, have also argued that the "pre-import condition" is against the whole scheme of Advance Authorisation and further that the subsequent Notification No. 01/2019-Customs dated 10.01.2019 (vide which the pre-import condition was omitted) amending Notification No. 79/2017-Cus dated 13.10.2017 is clarificatory in nature and hence applicable retrospectively. They have submitted that by Notification No. 53/2015-20 dated 10.01.2019, the Government has found deletion of condition (xii) in Notification No. 79/2017-Cus dated 13.10.2017 to be in public interest, and, therefore, now the controversy involved in the present case is limited to a period of about thirteen months only, between 13.10.2017 and 9.01.2019. The said amendment is only curative / clarificatory and it is a well settled principle that the amendment which is clarificatory in nature is to be applied retrospectively. In support of their contention, they have relied upon the following case laws: -

(i) GOI vs. Indian Tobacco Association – 2005 (187) ELT 162 (SC)

(ii) Zile Singh vs. State of Haryana – 2004 (8) SCC

11.6 I find that M/s Flexituff have argued that, if a condition of pre-import has to be put in respect of any input, ideally such input should find place in **paragraph 4.13 of the Foreign Trade Policy**, which is not so in their case. Due to the condition of pre-import contained in **paragraph 4.14 and condition (xii) of the Notification No. 79/2017-Cus dated 13.10.2017**, though the inputs imported by the noticee do not fall within the categories enumerated in paragraph 4.13 of the Foreign Trade Policy and are as such not subject to the pre-import condition, the same become subject to the condition of pre-import *qua* specific levies viz. integrated tax and GST compensation cess, which creates an anomalous situation, in as much as the import of the inputs against an Advance Authorisation is subject to several levies under Section 3 of the Customs Tariff Act and in respect of the levies under sub-sections (1), (3) and (5) thereof, there is no pre-import condition; however, insofar as Integrated Tax and GST compensation cess leviable under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act, 1975 are concerned, for the purpose of exemption from such levies, such imports would be subject to "pre-import condition", as a result of which if the importer wants the benefit of exemption from the levy of integrated tax and GST compensation cess, the fact that the other levies are not subject to "pre-import condition" becomes immaterial inasmuch as the same input would be subject to the pre-import condition *qua* integrated tax and GST compensation cess which would, therefore, result in the input being subject to pre-import condition in respect of all the levies. Therefore, export in anticipation of Advance Authorisation as contemplated in paragraph 4.27 of the Handbook and the "pre-import condition" contained in paragraph 4.14 of the Foreign Trade Policy and condition (xii) of the exemption notification, cannot stand together.

Thus, by virtue of the amended paragraph 4.14 of the Foreign Trade Policy, even in case of inputs not falling within the ambit of paragraph 4.13, if such inputs have been imported against an Advance Authorisation, the same are subject to "pre-import condition" insofar as claim for exemption from the levy of integrated tax and GST compensation cess under sub-section (7) and sub-section (9) of Section 3 of the Customs Tariff Act is concerned. In other words, all the raw materials imported against an advance licence are subject to the "pre-import condition". Thus, while under the Foreign Trade Policy, vide paragraph 4.13 specific inputs have been subjected to the condition of pre-import considering the nature of such inputs, under paragraph 4.14 which merely provides for the details of duties exempted, all the raw materials imported under an Advance Authorisation, whatever be their nature, have been made subject to "pre-import condition" for the purpose of availing the benefit of exemption from Integrated Tax and GST compensation cess.

It has also been argued that a piquant situation has been created whereby the very same inputs which are not subject to "pre-import condition" insofar as payment of basic customs duty, additional customs duty, education cess, anti-dumping duty, safeguard duty and transition product specific safeguard duty are concerned, are subject to condition of pre-import insofar as Integrated Tax and GST compensation cess are concerned, thereby setting at naught the first part of paragraph 4.14; inasmuch as if the very same inputs are subject to the condition of pre-import *qua* some levies, it would amount to importing the inputs subject to the condition of pre-import even quo the other levies. Thus, an anomalous situation has arisen, whereby the second part of paragraph 4.14 is inconsistent with the first part thereof and renders the first part redundant.

Finally, they have argued that it is a well settled law that any interpretation that renders specific provision of law redundant or otiose or nugatory or inconsistent needs to be avoided and they have relied upon the following case laws:

(a) **Union of India V/s Hansoli Devi (2002) 7 SCC 273.**
(b) **Sultana Begum V/s Prem Chand Jain (1997) 1 SCC 373.**
(c) **CIT V/s Hindustan Bulk Carriers (2003) 3 SCC 57.**

FINDINGS ON THE ISSUE OF PRE-IMPORT CONDITION

I have carefully gone through the contentions put forth by M/s Flexituff with regards to the "pre-import condition" envisaged under Notification No. 79/2017-Cus dated 13.10.2017. In the subsequent paragraphs, I shall record my findings on the above issue.

11.7. I find that by virtue of issuance of Notification No. 79/2017-Cus dated 13.10.2017, an amendment was incorporated in the original Notification No. 18/2015-Cus dated 01.04.2015, wherein, after condition no. (xi), the following condition no. (xii) was 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"

11.8 I also find that under the scheme of Advance Authorization, raw materials are imported without payment of Customs duty. The said export promotional scheme is governed by Chapter 4 of the Foreign Trade Policy (2015-20), applicable in the subject case and corresponding Chapter 4 of the Hand Book of Procedures (2015-20). The payment of IGST on imports under the Advance Authorisation Scheme was introduced vide Notification no. 79/2017 dated 13-10-2017. However, as discussed *supra*, such exemption from the payment of IGST was made conditional. Therefore, I find that by issuing the subject Notification No. 79/2017-Cus dated 13-10-2017, the Government of India has 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 Authorization. However, such exemption was not unconditional and certain conditions were incorporated in the subject notification. I find that one such 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.

11.9 I also find that a Notification bearing no. 33/2015-20 dated 13.10.2017 was also issued by the Directorate General of Foreign Trade amending 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. As discussed *supra*, the Customs Notification No. 18/2015-Cus was amended by the Notification No. 79/2017-Cus dated 13-10-2017, in line with the changed Foreign Trade Policy by incorporating the same provisions which included physical exports and pre-import condition.

11.10 In view of the above, I find that the contention of the noticee that the pre-import condition is cryptic and vague is not sustainable in as much as, there appears to be a conscious legislative intent which is apparent in the changes made in the Foreign Trade Policy (2015-20) and corresponding changes in the relevant Customs notifications, thereby stipulating that in order to avail the benefit of exemption in respect of payment of applicable Integrated Goods and Service Tax (IGST), the importer has to fulfill two conditions namely:-

(a) All exports under the Advance Authorisation should be physical exports.

(b) Pre-import condition has to be observed.

11.11 I also find that the pre-import condition has been part of the Foreign Trade 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. I further 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)]. As per the said condition, in case of Advance Authorizations issued for import of inputs, such inputs are required to be physically incorporated in the export goods. As such, I find that specific condition for physical incorporation of imported materials in the export goods has been made which can happen only when the imports are made prior to export of the goods.

11.12 Proceeding further, I find that vide Notification No. 31/2013 (RE-2013) dated: 01-08-2013 issued by the DGFT, a new Para No. 4.1.15 was incorporated in the Foreign Trade Policy. The said Para is an extension of the Para 4.1.3[Para 4.03 of the Policy (2015-2020)] and stipulated further condition which clarified the ambit of the aforesaid Para 4.1.3, inputs actually imported must be used in the export product. Further, a Circular No. 3/2013 (RE-2013) dated, 02-08-2013, was also issued by the Ministry of Commerce in line with the aforesaid notification. The Circular reiterates that duty-free import of inputs under Duty Exemption/Remission Schemes under Chapter-4 of FTP shall be guided by the Notification No. 31 issued on 1.8.2013.

11.13 Therefore, from a synchronous reading of Para 4.03 of the Foreign Trade Policy, in force at the time of issuance of the Authorization, and the notification aforesaid along with the Circular as mentioned above, it appears that the 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, it appears that the importers have not been placed at liberty to utilize such duty-free materials otherwise, nor do they have been allowed to export goods manufactured out of something, which was not actually imported.

11.14 I also find that for exemption from payment of IGST in case of goods imported under Advance Authorisation, the case for fulfillment of pre-import condition has been built by law which is required to be observed. I also find that the importer's argument regarding Para 4.27 of the Hand Book of Procedures which allows exports/supplies in anticipation of an authorization is also not sustainable in as much as the provision has been made as an exception for meeting requirement in case of exigencies. Further, Para 4.27 (d) has barred such benefit of export in anticipation of Authorization for the 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).

11.15 I will now proceed to examine the contention of the importer that the pre-import condition is applicable only in respect of certain goods as mentioned in Appendix-43 of the Foreign Trade Policy (2015-20). I find that Para 4.13(i) of the Foreign Trade Policy states as under: -

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

From the aforesaid provision, it is forthcoming that the scope for imposing the "pre-import condition" has been left open on any goods by way of issuance of Notification by the DGFT. In the present case, the DGFT has accordingly issued the notification No. 33/2015-20 dated 13.10.2017 wherein it has been stipulated that **the 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**." The relevant portion of the said Notification dated 13.10.2017 is reproduced as under: -

[To be published in the Gazette of India Extraordinary Part-II, Section - 2, Sub Section (ii)]

Government of India
Ministry of Commerce & Industry
Department of Commerce
Directorate General of Foreign Trade

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."

From the aforesaid notification, it can be safely inferred that in respect of all imports under Advance Authorisation, the conditions for physical export and pre-import condition has been imposed invariably and it therefore follows that the same is required to be observed in case the importer wants to avail the benefit of IGST exemption.

Thus, I find that the importer appears to have wrongly understood the scope of Para 4.13 of the Foreign Trade Policy, wherein the scope of the said Para has been limited to exclusive goods and that such inference is not in consonance with law.

11.16 At this juncture, I would like to place my reliance on the judgment pronounced by the **Hon'ble High Court of Allahabad in the case of Dharampur Sugar Mill reported in 2015 (321) ELT 0565 (A)** wherein the learned High Court has observed as under: -

> *"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 appear 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."*

11.16 Similarly, I would like to rely on the judgment pronounced by the Hon'ble Supreme Court of India in the case of **Pennar Industries as reported TIOL 2015-(162)-SC-CUS** wherein the 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 the manner mentioned, namely, for manufacture of specified products by the importer/assessee itself, this very material has to be utilised 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."*

12.1 I would now proceed to the contention of the importer on the issue of the SCN dated 21.08.2023 being hit by the limitation of time. I have carefully examined the contention of the noticee regarding limitation. The subject Bill of Entry 2009566 has been presented/filed on 23.08.2018 whereas the SCN has been issued on 21.08.2023 and as per the importer the same has been issued post expiry of the normal period of limitation i.e. within two years. I find that in terms of Section 46 of the Customs Act, 1962, while presenting the Bill of Entry before the Customs Authorities for clearance of the imported goods, it is the duty of the importer to declare whether or not they complied with the conditions of pre-import and/or physical export in respect of the Advance Authorisation under which imports were being made availing benefit of IGST exemption. The law demands true facts to be declared by the importer. It was duty of the importer to pronounce that the said pre-import and/or physical exports conditions could not be followed in respect of the subject Advance Authorization at the time of assessment of the Bill of Entry. As the importer has been working under the regime of self-assessment, where they have been given liberty to determine every aspect of an imported consignment from classification to declaration of value of the goods, it was sole responsibility of the importer to place correct facts and figures before the assessing authority. In the present case, the importer had full knowledge of the fact that they did not follow the pre-import condition in respect of the impugned Advance Authorization 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 Bill of Entry under cover of such Advance Authorization 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 in as much as that the facts regarding non-observance of the "pre-import condition" was suppressed by the importer.

12.2 I find that under the regime of self-assessment under the Customs Act, 1962 greater faith has been bestowed on the importer and the importers have been assigned with the responsibility of assessing their own goods under Section 17 of the Customs Act, 1962. As a part of self-assessment by the importer, it was duty of the importer to present correct facts and declare to the Customs authority about their inability to comply with the conditions laid down in the Customs notification, while seeking benefit of exemption under Notification No. 79/2017-Cus dated 13-10-2017. However, contrary to this, they had 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

Authorisation, the importer 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 or IGST, is therefore, recoverable from them under Section 28(4) of the Customs Act, 1962.

12.3 At this juncture, I also find that the vires of the pre-import condition for the period from 13.10.2017 to 09.01.2019 (Interim Period) were challenged before the Hon'ble Supreme Court ('SC') in the case of **Cosmo Films Limited (Civil Appeal No(s) 290 of 2023).** The Hon'ble Supreme Court has affirmed the demand raised by Revenue Authorities thereby, resulting in recovery of non-payment of IGST in cash at relevant time. Further, the Hon'ble Supreme Court has directed revenue to permit the petitioners to claim refund or Input Tax Credit and to provide the procedure to be followed by issuing a circular in this regard. Accordingly, Circular No.16/2023-Customs dated 07.06.2023 has been issued wherein the procedure to pay IGST was prescribed relating to such type of cases, and as per the same it was directed importers to pay IGST and Compensation Cess along with applicable interest as well.

12.4 Thus, I find that the situation in the matter is that the **Hon'ble Supreme Court of India in Civil Appeal No(s) 290/2023** has issued judgment vide their order dated 28.04.2023 and CBIC vide Circular No.16/2013 – Cus. dated 07.06.2023 has been issued subsequently prescribing the procedure to be followed for implementation of the decisions given by the Hon'ble Supreme Court in the matter. Para 5.2(c) of said Circular dated 07.06.2023 provides that payment of tax and cess along with applicable interest against the Electronic Challans generated in the Customs EDI systems upon re-assessment. Accordingly, I find that the goods under import covered under the Bill of Entry filed before KASEZ Dated 23.08.2018, is covered within the period which was decided by the Hon'ble Apex Court in their order discussed supra. Thus, I find that in view of the law laid down by the Hon'ble Supreme Court and the binding Circular No.16/2023-Cus dated 07.06.2023, the duty liability arising due to non-fulfilment of pre-import condition during the interim period remains payable.

13.1 I also find that the contention of the noticee that the entire issue is revenue neutral as IGST paid would have been available as Input Tax Credit or as refund is not the correct position of law in as much as the conditions of exemption from payment of IGST were not observed by the importer. Thus, failure to observe the condition for pre-import cannot be guised under the cover of revenue neutrality. I would once again like to rely on the judgment of the Hon'ble Supreme Court in Cosmo Films Ltd. wherein the scheme was examined and directions for payment of IGST along with applicable interest, while separately permitting availment of ITC/refund in accordance with law was passed. Thus, the liability to pay IGST at the time of import is independent of subsequent credit or refund mechanism. Revenue neutrality cannot override a specific condition prescribed in an exemption notification. Therefore, this contention is not acceptable. In view of the findings recorded above and the binding decision of the Hon'ble Supreme Court in Civil Appeal No. 290 of 2023, I hold that the noticee was required to pay IGST at the time of import for the Bill of Entry dated 23.08.2018, as the pre-import condition stipulated under Notification No.79/2017-Cus was not fulfilled. Accordingly, IGST amounting to Rs.4,43,873.50/- is liable to be recovered under Section 28 of the Customs Act, 1962.

13.2 The noticee has relied upon various judicial pronouncements in support of its contentions relating to interpretation of "pre-import condition", limitation and penalty. However, I find that the controversy regarding validity and applicability of the pre-import condition during the period 13.10.2017 to 09.01.2019 now stands conclusively settled by the Hon'ble Supreme Court in the case of Cosmo Films Ltd., wherein the levy of IGST for the interim period has been upheld. Therefore, to that extent, the earlier decisions cited by the noticee do not advance their case.

14. In view of the above, I hereby pass the following order: -

ORDER

(i) I hereby confirm the demand of duty of Customs amounting to **Rs.4,43,873.50/- (Table-1)** in the form of IGST not paid on the import of the goods through Kandla SEZ under Advance Authorization No. 5610005144 dated 22.05.2017 and the corresponding Bill of Entry No. 2009566 dated 23.08.2018 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 (2015-2020), by resorting to deliberate suppression of the fact of such non-compliance from the Customs Authority, as per the provisions of **Section 28(4)** of the Customs Act, 1962, as amended from the noticee i.e. M/s Flexituff Ventures International Ltd.

i. I hereby order to recover interest at the applicable rate on the Duty amount at Sr. No.1 above as per the provisions of **Section 28AA of the Customs Act, 1962**, as amended from time to time from the noticee i. e. M/s Flexituff Ventures International Ltd.,

ii. Since the Subject goods having assessable value of **Rs.22,77,000/- (Table-1)** imported through Kandla SEZ under the subject Advance Authorization, are being cleared and not in custody, I refrain from confiscating the same and imposing any redemption fine for the same.

iii. I impose the penalty **equal to the duty confirmed at S. No.1 above** of **Rs.4,43,873.50/-** upon the noticee i. e. M/s Flexituff Ventures International Ltd., under **Section 114A** of the Customs Act, 1962, as amended from time to time.

iv. I hereby order of enforcement of the Bonds executed by them at the time of import.

Vishwajeet Singh
29.03.2025

(VISHWAJEET SINGH)
Additional Commissioner,
Custom House, Kandla

F. No. GEN/ADJ/ADC/1238/2024-ADJN

Dated:~~25.03.2025~~ 29.03.2025

DIN:20250371ML000000DE05

To
M/s. Flexituff Ventures International Limited,
(IEC-1194001645)
C41-50, Sector-3, SEZ Industrial Area,
Pithampur, Dhar,
Madhya Pradesh-454775,

Copy to:

1. Deputy / Assistant Commissioner (RRA), Customs, Custom House, Kandla.
2. Deputy / Assistant Commissioner (TRC), Customs, Custom House, Kandla.
3. Deputy / Assistant Commissioner (SIIB), Customs, Custom House, Kandla.
4. Deputy /Assistant Commissioner (EDI), Customs, Custom House, Kandla for upload on Department's Website.
5. Guard File.