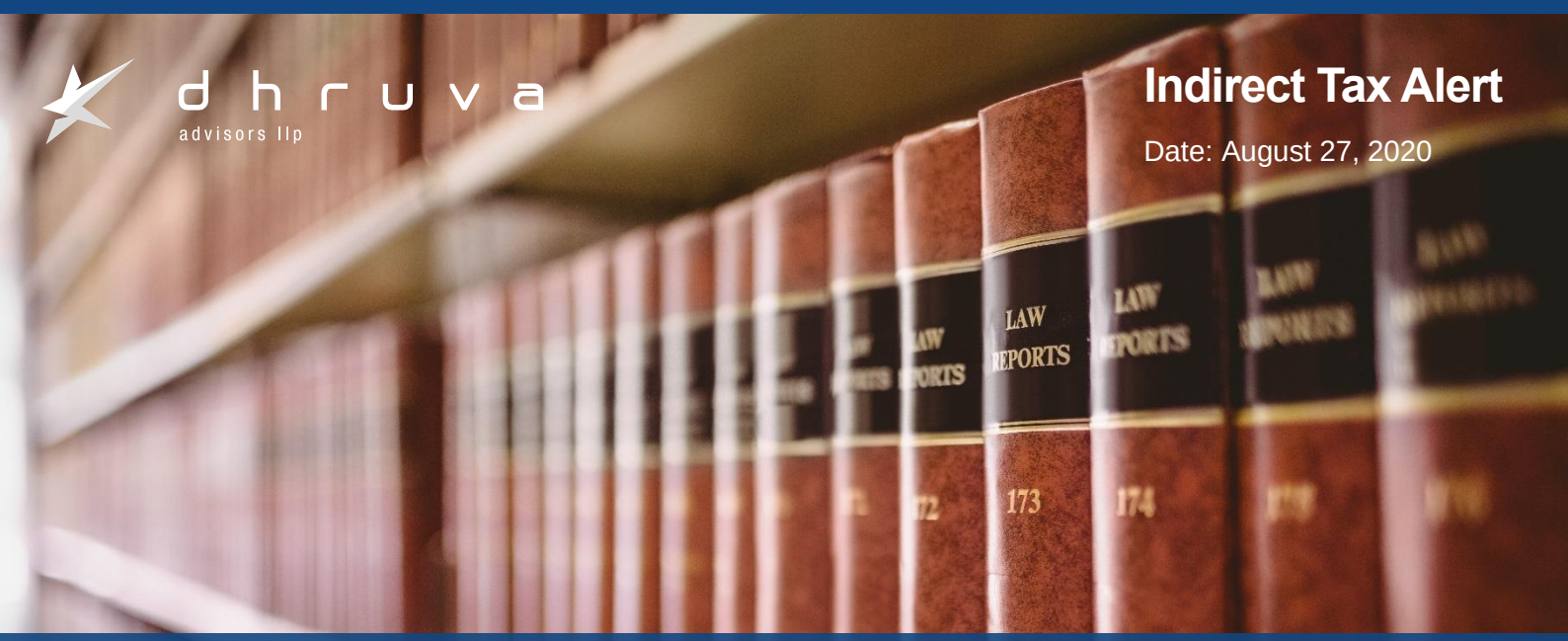

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Indirect Tax Alert

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Procedure for claiming preferential tariff rate of customs duty under Free Trade Agreements

The Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020

In light of the amendment to section 28DA of the Customs Act, 1962 a greater onus is placed on the importers claiming preferential duty benefits under a Free Trade Agreement ('FTA').

1. The Customs Act has stipulated provisions to place a greater responsibility and obligation on importers in order to ensure that the imported goods satisfy the Rules of Origin criterion and are deserving of a preferential rate. This includes possessing sufficient information concerning origin and content value, by providing this data to the authorities as when and directed.
2. Authorities, after the amendment have greater powers, with the provisions providing for temporary suspension of the preferential treatment given to goods pending verification, or even disallowance of the claim on the basis of information furnished by the importer, without further verification, for reasons to be recorded in writing.
3. The relevant authority may reject preferential tariff treatment given to the imports of identical goods from the same producer or exporter where verification establishes non- compliance (unless sufficient information is furnished to show that the identical goods meet the Certificate of Origin ('CoO') requirements).
4. Certain specific situations have been incorporated whereby the preferential treatment can be refused without any verification, for example where the item is not eligible or where any alteration in the CoO has not been authenticated by the issuing authority, etc.

The Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020 ('the Rules') have now been notified vide Notification No. 81/2020 – Customs (N.T.), dated 21 August 2020, to prescribe the detailed procedure for claiming benefit under the FTAs and the powers of verification of the authorities. The Rules will come into force from 21 September 2020. A summary of these procedures and requirements is described here

A. <u>Procedure to claim the preferential tariff (Rule 3)</u>

- The importer is required to make a declaration in the bill of entry ("BoE"), that the goods are originating goods entitled to the preferential rate, indicate the notification details under

which the preferential rate is claimed and mentioning the detail of the CoO on the BoE;

- The officer can deny the benefit of the preferential rate without verification where the CoO is found to be incomplete, has alteration that are not authenticated by the issuing authority, has expired or is issued for an item not eligible for the preferential tariff. In such a case the CoO will be marked as 'INAPPLICABLE' by the competent authority.

B. Information in possession of the importer (Rule 4)

The importer is required to **maintain the following details in Form I for at least 5 years** [from the date of filing of BoE] and produce it as and when requisitioned by the customs officers:

- The production process undertaken in the country of origin and the originating criteria claimed by the importer. In the case of wholly obtained ("WO") goods the importer would be required to mention the process that makes it WO;
- Where the goods are not WO, the inputs / components used in the production of the goods have to be categorized into the following three categories:
  - (i) Whether such inputs / components are manufactured and produced by the manufacturer of final goods
  - (ii) Whether inputs / components are procured locally by the manufacturer [of final goods] from third parties
  - (iii) Where procured from third parties, the manufacturer has obtained confirmation and proof of origin of these inputs / components

Where the origin is unascertainable, the inputs / components will be treated as non-originating. The points that will be considered are:

- Whether the de minimis criteria have been satisfied along with the percentage value or quantity as applicable;
- Whether accumulation / cumulation provisions have been applied along with the manner and extent of cumulation;
- Whether any additional criteria (such as the use of indirect / neutral materials, packing materials etc.) are applied along with the details of criteria and material used;
- Whether the value content criteria are applied along with the details of the percentage of local value content and components which constitute value addition;
- Whether the change in tariff classification rule has been applied along with the HS of the non-originating material / components used in production of final goods;
- Whether process rules were applied along with details of rule applied;
- Whether the CoO has been issued retrospectively, along with the reason for such retrospective issuance
- Whether the consignment has been directly shipped from the country of origin; if not then an explanation of how the provisions of the concerned agreement are met and how the condition of direct shipment is satisfied

The onus of the accuracy and truthfulness of the information is on the importer;

C. Process of requisition of information by the customs officer (Rule 5)

- Where the officer has reason to believe that origin criteria is not met, he will seek information from the importers.
- The importer must provide information within ten (10) days from requisition. Where the importer fails to provide such details or the officer is not satisfied with the information [provided], the officer will send a verification proposal to the nodal officer [i.e. Director (ICD), CBIC].

D. Verification process (Rule 6)

- When there is (i) a doubt about the authenticity and genuineness of the CoO; or (b) where there is reason to believe that origin criteria mentioned in the CoO has not been met or the claim is valid [only where the importer fails to provide satisfactory documents]; (iii) or where the verification is undertaken on a random basis; the customs officer may through the nodal officer [i.e. Director (ICD), CBIC], ask for the verification of the CoO from the Verification Authority [in the exporting country] either at the time of clearance or thereafter.
- The standard operating procedure for a verification request is prescribed under Circular No. 38/2020 – Customs, dated 21 August 2020 ('the Circular').
- The Circular further clarifies that the time limit of five (5) years for seeking information and initiating verification will be subject to any other time limit prescribed under the FTA / Trade Agreement.
- Where information provided by the Verification Authority is incomplete or non-specific additional information or a verification visit is to be sought from the Verification Authority
- The Verification Authority is to provide the information within the time prescribed under the FTA /Trade Agreement and where no such timeline is prescribed, within 60 days from the request being communicated
- During the verification process the preferential treatment will be suspended and goods to be cleared pursuant to provisional assessment, subject to the importer furnishing security for an amount equal to difference between the duty provisionally assessed and the preferential duty claimed
- Where the information is received from the Verification Authority [within the prescribed time], verification will be concluded within the time timeline prescribed under the FTA/Trade Agreement or within 45 days of receipt of information or within the extended period allowed by the Principal Commissioner / Commissioner of Customs
- Where the Verification Authority fails to respond to a verification request or does not provide the requisite information in the manner provided or the information provided proves that goods do not meet origin criteria, the customs officer may deny the claim without further verification.
- **Identical goods (Rule 7)** – Where the goods originating from an exporter / producer do not meet the origin criteria, any claim for identical goods imported from the same exporter will be denied without further verification, until it is demonstrated that the origin criteria have been fulfilled by the exporter.

E. Miscellaneous provisions

- Where the customs officer believes that the importer has failed to exercise reasonable care to ensure the accuracy and truthfulness of the information, the officer will verify all subsequent BoEs [where preferential tariff benefit has been claimed], until the importer demonstrates that he is taking reasonable care.
- Any suppression of facts, wilful misstatement or collusion with the exporter will attract penal consequences.

Dhruva Comments:

As per the provisions, importers are made responsible for ensuring that the originating status of the goods [as mentioned in the CoO] for which they claim preferential tariff treatment, is accurate. A mere submission of a "certificate of origin" would not absolve the importer from the responsibility of ensuring compliance with the rules relating to the originating status of the goods. The procedure introduced through the Notification is a long drawn process, unless the importer is able to provide the requisite information upfront and the customs officers are satisfied with the information produced.

The Government has indicated that the procedures introduced will not override the processes and timelines

mentioned in the FTA / Trade Agreements. However, the procedures introduced clearly ignore that such preferential rates and treaty benefits have their genesis in the economic integration between nations and form the backbone of multilateral trade across the globe. By introducing such restrictions in the Customs Law, the Indian Government is deterring importers from availing such benefits and questioning and challenging the very foundation of the pact that was put in place by all the siging nations. Any doubts to the veracity of the documents issued by partner countries needs to be addressed / fixed through diplomatic channels and by encouraging dialogue with other member nations.

Most of the trade agreements provide that the authorities in the importing country can request the importers to produce documents or details on the origin of goods prior to initiating any retroactive check; however such provisions do not contemplate a situation that where an importer [for whatever reasons] fails to produce such details, the benefit can be denied without undertaking the retroactive check or without following the dispute resolution mechanism prescribed for such circumstances of discord.

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