



Apex Court upholds the validity of pre-import condition in Advance Authorization scheme

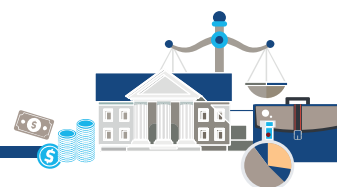
Union of India & Ors vs. Cosmo Films Ltd.¹

The Supreme Court of India ('SC') overruled the Gujarat High Court's ('HC') judgement and held that pre-import condition in the Advance Authorization Scheme ('AA') for availing benefit of exemption from Integrated Goods and Services Tax ('IGST') and GST Compensation Cess ('Cess') was valid during the period October 13, 2017 to January 9, 2019.

Facts of the case

- The appeal before the SC was directed against judgment of the Gujarat HC in case of **Shri Jagdamba Polymers Ltd. & Ors. v Union of India & Ors.**, wherein fulfilment of the 'pre-import condition' as per Paragraph 4.13 of the Foreign Trade Policy ('FTP'), read with the Handbook of Procedures ('HBP') incorporated by Notification No. 33/2015-20 and Notification No. 79/2015-Customs, was set aside.
- Prior to the GST regime, Notification No.18/2015-Customs dated April 01, 2015, exempted payment of basic customs duty ("BCD"), countervailing duty ("CVD"), special additional duty ("SAD"), safeguard duty and anti-dumping duty on inputs imported against a valid AA.
- On introduction of GST i.e., from 1 July 2017, exemption was not granted for IGST due on import of goods. Importers were therefore required to pay IGST and seek refund, upon export of the resultant goods. On October 13, 2017, an amendment was made to Notification No. 18/2015-Customs (*vide* Notification 79/2015-Customs) wherein exemption from IGST was granted, subject to satisfaction of the pre-import condition.
- The meaning of the phrase "pre-import condition" was neither defined in the FTP nor in the notification. Further, there was no mention of replenishment, in the exemption notification.
- Against this background, exporters continued their earlier practice of exports using old stock and importing inputs, i.e., duty-free goods, later in time. Said differently, exporters did not meet the pre-import condition.
- Noticing the above amendments and practices followed by exporter community, the Directorate of Revenue Intelligence ("DRI") sought to deny the IGST exemption to the importers. As per the DRI, the 'pre-import condition' stood satisfied when it was established that the goods imported against a

¹2023 (5) TMI 42 - SUPREME COURT



particular AA (license) was used (physically) in the manufacture of finished goods that were exported.

- Exporters challenged validity of the said interpretation and the pre-import condition itself before the Gujarat High Court, which set aside the (2017) Notification imposing the pre import condition on the ground that same was discriminatory and ultra vires the FTP.
- Aggrieved by the HC's decision, the revenue department preferred an appeal before the SC.

Contentions of the revenue department

AA is not Replenishment Scheme

- The spirit of the AA scheme was clear that import of inputs will be allowed duty free if the same are incorporated physically in the goods to be exported. And insertion of para. 4.27(d) clarified that 'pre-import' condition must be followed.
- In case of replenishment scheme like the 'Duty-Free Incentive Scheme', imports subsequent to exports are allowed. However, in AA scheme, exemption was granted, subject to the 'pre-import condition'.

Exports in anticipation of authorization was an exception to meet in case of necessity:

- Exports in anticipation of authorization in Para 4.27 (d) of HBP was an exception, i.e., in case of necessity although importers were availing this benefit without exception. Moreover para. 4.27(d) barred benefit of export in anticipation of authorization for the inputs with the introduction of 'pre-import condition'.

Limited applicability of Pre-Import Condition:

- Appendix-4J specified set of goods for which export obligation was different and the condition of 'pre-import' was additionally applicable. However, this does not imply that 'pre-import' condition was applicable only in respect of such listed goods.

- That the HC failed to notice that the DGFT was empowered to impose conditions across the board for any goods that are to be imported under AA, *vide* para 4.13(1) of FTP.

Respondent never challenged levy:

- The Respondents did not challenge the levy (in this case importers), rather they challenged the conditions which were contradictory and cumbersome. Placing reliance on the case of **Union of India v VKC Footsteps India (P) Ltd.**², the Revenue Department submitted that once the levy is undisputed, a Court cannot interfere with the levy.
- Exemption from paying the duty is not a matter of right, it is granted by the state keeping in mind the public interest.

Contentions by the Respondent

No rationale in imposing Pre-Import Condition

- The AA was successfully operating since its inception without the 'pre-import' condition till the Notification No. 33/2015-2020 dated October 13, 2017, was issued, and transactions were operating smoothly from January 10, 2019, when the 'pre-import' condition was deleted. So, there was no rationale in imposing 'pre-import' condition for a limited period from October 13, 2017, to January 9, 2019.

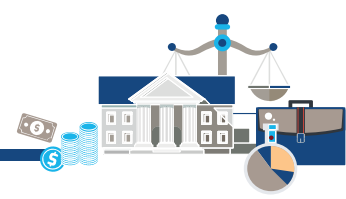
There cannot be different treatment for two levies:

- 'Pre-import' condition was made applicable only for the exemption benefit of IGST and Compensation Cess, whereas the other duties like BCD, ADD, Safeguard duty etc. were exempt without any obstruction and thus different treatment can't be imposed on two levies on the goods imported under same scheme.

One to one correlation is not possible:

- It was impossible for any manufacturer to satisfy the 'pre-import' condition and maintain one to one

² 2021 (9) TMI 626 – SUPREME COURT



correlation between import of inputs against a particular authorization.

- If 'pre-import' condition was to be made applicable to AA scheme, then the whole scheme would be nullified, as the same was unattainable. Considering it to be infeasible, the Government deleted this condition vide Notification No. 01/2019-Cus dated January 10, 2019.

Condition is ultra vires Article 14:

- Placing reliance on the case of **Laxmi Khandsari vs. State of Uttar Pradesh**³, **State of Haryana vs. Jai Singh**⁴ and **Welfare Association ARP vs. Ranjit P. Gohil**⁵, the Respondents contended that such a condition is arbitrary, as it was based on unreasonable classification of group of exporters, which had no logical connection with the purpose of law and thus it was violating Article 14 of the Constitution of India.

Condition is discriminatory:

- Placing reliance on the case of **Union of India and Ors. vs. N.S. Rathnam & Sons**⁶, the Respondents contended that such differential treatment to IGST when compared to exemption for BCD under the original Notification No. 18/2015-Customs was discriminatory.
- Imposing 'pre-import' condition in respect of two levies was arbitrary and unreasonable and in the teeth of ratio in case of **MRF Ltd., Kottayam vs. Asst. Commissioner (Assessment) Sales Tax & Ors.**⁷

Condition is ultra vires Article 19:

- The AA scheme was effectively effaced by the virtue of 'pre-import' condition and so it is required to be struck down in light of the decision in the case of **P.J. Irani vs. State of Madras**⁸, wherein it was held that if by any notification, the Act gets effaced, it was liable to be struck down.

Supreme Court's findings and decision:

DGFT is empowered to impose conditions:

- As per para 4.13(i) of the FTP, the DGFT has powers to impose 'pre import conditions' on any article that is to be imported into India.

Not an Absolute exemption:

- The exemption from the payment of IGST and Compensation Cess is not an absolute exemption rather it could only be available so long as exports made under the AAs were physical exports in nature and fulfilled the 'pre-import condition'.
- The Apex Court discussed the importance of physical exports and in case the entire exports were not physical exports, the AAs were automatically ineligible for exemption.

Hardship cannot be ground to hold pre-import condition arbitrary:

- Introduction of the 'pre-import condition' may have resulted in hardship to the exporters, as they could not continue their former practice/ pattern of importing. However, it was concluded that that cannot be a ground to hold that the insertion of the 'pre-import condition' to be arbitrary. In case of **Rohitash Kumar & Ors. Versus Om Prakash Sharma & Ors.**⁹ it was held that inconvenience or hardship is not a ground for the court to interpret the plain language of the statute differently, to give relief.
- The HC was persuaded to hold that the subsequent notification of January 10, 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 October 13. However, SC found this reasoning to be faulty.

³ 1981 (3) TMI 254 - SUPREME COURT

⁴ 2003 (2) TMI 556 - SUPREME COURT

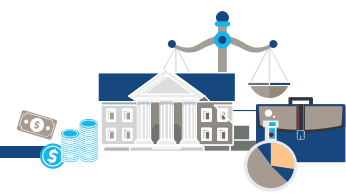
⁵ 2003 (2) TMI 482 - SUPREME COURT

⁶ 2015 (8) TMI 97 - SUPREME COURT

⁷ 2006 (9) TMI 278 - SUPREME COURT

⁸ 1961 (4) TMI 89 - SUPREME COURT

⁹ 2015 (9) TMI 116 - SUPREME COURT



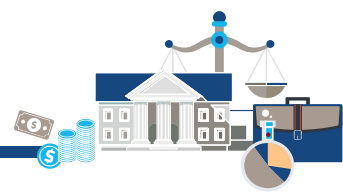
Dhruva Comments

A definitive outcome of the SC upholding the validity of the 'pre-import' condition is that the DRI and other Customs filed formations will re-commence investigations wherever necessary, which had been suspended due to the HC ruling, moreover, will adjudicate show cause notices that were issued previously.

As litigation on this topic will flare-up, importers will have to garner relevant documents and evidence to the Customs department how the 'pre-import condition' has been satisfied in each case. Importers who fail to demonstrate such satisfaction, i.e., fulfil the said condition stand exposed to IGST outgo (and compensation cess), along with interest. Potentially, penalty may be contested by importers.

While possibility of claiming set-off of IGST paid may be available however interest and penalty would be a cost, i.e., impact the bottom line of exporters.

Exporters may consider making representations before the Government, seeking retrospective applicability of Notification No. 01/2019-Cus dated January 10, 2019.



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