

CUSTOMS & FOREIGN TRADE POLICY – RECENT DEVELOPMENTS

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Wednesday, February 24, 2021
4.00 PM to 6.00 PM

Northern India Regional Council
The Institute of Chartered Accountant of India

AGENDA

1. Brief Introduction to Indian Customs;
2. Brief Introduction to Foreign Trade Policy;
3. Importance of World Customs Organization (“WCO”);
4. Trade Facilitation Measures made available by Indian Customs;
5. Customs Faceless Assessment;
6. EDI/Policy Initiatives by DGFT;
7. Bilateral/Multilateral/Regional Agreements;
8. Authorised Economic Operator (AEO) Programme;
9. Incentive Schemes;
10. Export benefits;
11. Customs In-Bond Manufacturing Scheme;
12. CAROTAR, 2020;
13. High Court Judgments;
14. Union Budget, 2021.

1. Brief Introduction to Customs Duty

As per the ancient custom, a merchant entering a kingdom with his goods had to make a suitable gift to the King. In the course of time, this 'custom' was formalised into 'Customs Duty'. The word 'customs', indicates that it is a very old tax may right from the Veda period.

Present day Customs Duty has its origin to British period.

Entry 83 of the Union List of the 7th Schedule to the Constitution of India empowers the Central Govt. to levy the customs duty. The Customs Act, 1962 was passed to consolidate Sea Customs Act, Land Customs Act and provisions for Air Customs. This is the main Act, which provides for *levy and collection of duty*, import/export procedures, prohibitions on importation and exportation of goods, penalties, offences, etc.

The Customs Tariff Act, 1975 (CTA) contains two schedules - Schedule 1st gives classification/rate of duties for imports & Schedule 2nd gives classification/rates of duties for exports. The CTA also contains provisions for other duties/cesses i.e. like IGST, compensation cess, additional duty (CVD), preferential duty, anti-dumping duty, protective duties, etc.

2. Brief Introduction to Foreign Trade Policy

The Foreign Trade Policy (FTP), is notified by Central Government, in exercise of powers conferred under S. 5 of the Foreign Trade (Development & Regulation) Act, 1992 [FT (D&R) Act], as amended. FTP is generally notified for 5 years.

The Foreign Trade Policy (FTP), 2015-2020,(as updated) is in force at present and it is due for renewal/amendment effective 1st April, 2021.

All exports and imports made are, governed by the FTP, unless otherwise specified. Objective of the FTP is trade facilitation for cutting down the transaction cost and time, thereby rendering Indian exports more competitive.

The various provisions of FTP are regulated by the Director General of Foreign Trade (DGFT) who may, by means of a Public Notice, notify Hand Book of Procedures, including Appendices and Aayat Niryat Forms or amendment thereto, if any, laying down the procedure to be followed by an exporter or importer or by any Licensing/Regional Authority or by any other authority for purposes of implementing provisions.

3. Importance of World Customs Organization (WCO)

World Customs Organization (WCO) has 180 members from Customs administrations across the world.

The WCO has provided the platform for creating many international treaties for the harmonization of Customs systems and effective communication between its member states. Kyoto convention was held in 1973 at the WCO Council Session in Kyoto, Japan which entered into force in 1974. Subsequently, rise in international trade called for an amendment to the 1973 convention which was adopted at the WCO Council's 94th Session in June 1999 and finally entered into force on February 3, 2006.

The contracting parties (member countries) agreed to the following key principles:

1. Transparency and Predictability of Customs actions;
2. Standardization of Customs actions;
3. Simplified procedures for Authorized persons;
4. Maximum use of Information Technology and obtain pre-arrival information;
5. Minimum necessary Customs control to ensure compliance with regulations;
6. Use of Risk management and Audit based controls;
7. Coordinated interventions with other border agencies;
8. Partnership with trade.

4. Trade Facilitation Measures made available by Indian Customs/DGFT

1. Simplification of rules and procedures by marking them user-friendly by simplifying the procedures.
2. ICES, launched in 1995, automated the workflow process related to clearance of import and export consignments and presently handles 98 per cent of India's international trade.
3. ICEGATE- An electronic commerce portal offers a host of services to trade including electronic filing of the import and export documents and related electronic communication between Customs and the trade.
4. In order to further expedite the process of assessment, self-assessment under S. 17 of the Customs Act was introduced.
5. CBIC has implemented 24x7 clearance facilities.
6. Accredited Client Programme (ACP) & Authorized Economic Operator (AEO) programme: An entity with an AEO/ACP status is considered a 'secure' trader and a reliable trading partner. Any economic operator such as importer, exporter, logistics provider, Customs House Agent can apply for authorization. The benefits may also include simplified Customs procedure, declarations, etc. besides faster Customs clearance of consignments of/for AEO status holders.
7. Advance Ruling Mechanism is an important trade facilitation measure which enables businesses to know in advance with certainty the customs duty liability on proposed imports and exports.

5. Customs Faceless Assessment

Faceless Assessment is based on the Customs Automated System assigning a Bill of Entry (BE) that is identified for scrutiny (non-facilitated BE) to an assessing officer, who is physically located at a Customs station, which is not the port of import.

The objectives is to:

- Anonymize the assessment process by removing the physical interface with Customs;
- Ensure uniformity of assessment across locations by promoting sector specific and functional specialization;
- Improve workload for efficient utilization of manpower and resources for Customs by automation of the end-to-end clearance process;
- Faceless Assessment Groups (FAG) will verify assessment of any BE and have an all India jurisdiction. It may or may not necessarily have a presence in all Customs formations. The functions of the FAGs will include:
 - May accept the self-assessment or re-assessment of the BE and pass a speaking order (unless acceptance is confirmed in writing).
 - Providing importers an opportunity of hearing through Query or via video conferencing in case the importer before proceeding with the re-assessment.

6. EDI/Policy Initiatives by DGFT

DGFT has introduced or working on the following EDI/Policy initiatives:

1. Electronic issuance of Certificate of Origin;
2. E-BRC for export realization;
3. Online application and issue of IEC, Scrips/Licenses and other documentation;
4. Digital signatures;
5. Uploading of soft copies of documents, required for various applications;
6. Time bound disposal of Applications;
7. Message exchange for transmission of export reward scrips from DGFT to Customs;
8. Message exchange for transmission of Bills of Entry (import details) from Customs to DGFT;
9. Online issuance of Export Obligation Discharge Certificate (EODC);
10. Message exchange with Ministry of Corporate Affairs for CIN & DIN;
11. Message exchange with CBDT for PAN.;
12. Facility to pay application fee using debit card / credit card.

7. Bilateral/Multilateral/Regional Agreements

The current WTO rules as well as those under negotiation envisage the eventual phasing out of export subsidies. Agreement on Subsidies and Countervailing Measures (ASCM) of the WTO defines “subsidy” as under:

The definition contains three basic elements i.e. a financial contribution, by a government or any public body within the territory of a Member which confers a benefit.

Therefore, Remission of Duties and Taxes on Exported Products (‘RoDTEP’) is being introduced to replace the existing MEIS scheme for exports of goods from India.

Agreements that are currently being negotiated or signed:

- a. The South Asian Free Trade Area (SAFTA) is an agreement which created a free-trade between Afghanistan, Bangladesh, Bhutan, **India**, the Maldives, Nepal, Pakistan and Sri Lanka to reduce customs duties of specified goods to zero.
- b. Transatlantic Trade and Investment Partnership (TTIP): Trade and investment agreement under negotiation between the European Union and the US.
- c. Regional Comprehensive Economic Partnership (RCEP): FTA between 16 countries: ASEAN (10), Australia, China, Japan, Korea and New Zealand. India is a party to the RCEP negotiations.
- d. The agreements are bound to challenge India’s industry in many ways. Indian industry needs to gear up to meet these challenges for which the Government will have to create an enabling environment.

8. Authorised Economic Operator (AEO) Programme

Authorised Economic Operator (AEO) Programme;

Programme developed by following the guidelines of WCO for implementation to secure supply chain of imported and export goods;

The intention is to give AEO certified operators preferential treatment in terms of less Customs examination, relaxed procedural requirements etc.;

Any economic operator such as importer, exporter, logistics provider, Customs House Agent can apply for authorization subject to the criteria that the applicant is:

- a. Able to establish a record of compliance in respect of Customs and other legal provisions;
- b. Able to demonstrate satisfactory systems of managing commercial and, where appropriate; transport records;
- c. He is financially solvent;
- d. Able to demonstrate satisfactory systems in respect of security and safety standards.

Guidelines on merging of two facilitation schemes namely ACP and AEO into a combined three-tier AEO programme are issued vide Customs Circular. no. 33 dated 22.07.2016 as amended.

9. Incentive Schemes

Various incentive schemes as per FTP 2015-2020:

- a. Merchandise Exports from India Scheme (MEIS);
- b. Service Exports from India Scheme (SEIS);
- c. EPCG which allows import / Procurement of capital goods without payment of Customs Duties/IGST.

MEIS is being replaced by Remission of Duties and Taxes on Exported Products (RoDTEP) exports of goods from India. RoDTEP Scheme W.E.F. 01-Jan-2021 on export of goods.

RODTEP Scheme:

1. The RoDTEP would refund to exporters the embedded duties/taxes that were so far not being rebated/refunded. For example, VAT on fuel used in transportation, Mandi tax, Duty on electricity used during manufacturing etc. The rebate would be claimed as a percentage of the FOB value of exports.
2. An exporter desirous of availing the benefit of the RoDTEP scheme shall be required to declare his intention for each export item in the shipping bill or bill of export.
3. The RoDTEP shall be allowed, subject to specified conditions and exclusions. However, the rates are yet to be announced.
4. Once the rates are notified, System would automatically calculate the RoDTEP amounts for all the items where RoDTEP was claimed. No changes in the claim will be allowed after filing of export general manifest.
5. No benefit is granted where exports is against advance authorization or by SEZ or by EOU.

10. Export Benefits

Advance Authorisation Scheme:

AA scheme neutralizes actual impact of duty on inputs which are meant for export production. This scheme primarily provides “exemption” from actual duties on inputs.

Duty Drawback:

Refund of duties paid on inputs for export production. This amounts to “remission (refund)” of duties actually paid. (Refer S. 73 & 74 of Customs Act).

Refund of IGST:

- a. Exports without payment of GST under LUT and claiming refund of ITC;
- b. Exports with payment of IGST and claiming refund of IGST.

“The above are Export benefits and not incentives”.

11. Customs In-Bond Manufacturing Scheme

- CBIC issued Manufacturing and Others Operations in Special Warehouse Regulations (MOOWR) issued and amended from time to time.
- Factory is declared as private bonded warehouse. No geographical restrictions. New facility can be set up or an existing facility can be converted.
- **Eligibility:**
 - Owner of warehoused goods undertaking Manufacturing and “Other operations”. Imports in bulk, “re-packing/processing” and exporting- can be considered to be eligible.
 - Export of goods “as such” is also eligible subject to payment of interest if goods warehoused beyond a specified time limit.
- Import of raw materials and capital goods are allowed without payment of duties of Customs and IGST for manufacturing and other operations in a bonded manufacturing facility (deferral of duties).
- Benefits granted are in addition to existing benefits (domestic procurement of machinery against EPCG license).
- Upon export, the corresponding duties stand waived.
- Upon clearance to domestic market, applicable duties (or imported goods attributable to goods cleared).

11. Customs In-Bond Manufacturing Scheme

- Pay duties upon removal of capital goods to domestic markets.
- Delinked to obligation of exports i.e. no export commitments w.r.t quantum/time limits/value addition.
- Applicable even for importers engaged in sale/removal of goods in domestic market.
- Principle of Self-assessment followed.
- Commissioner of Customs acts as the single point of contact for all approvals.
- Common application cum approval form for a license. Bond has to be executed. License once obtained, valid for perpetuity.
- No regular visit by officers except mandatory visit during grant of permission.
- Unlimited period of warehousing.
- All records digitally in a single format.

12. The Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (CAROTAR, 2020)

- Supplements the existing operational certification procedures under different trade agreements such as FTA/ PTA/ CECA/ CEPA, etc.

Reasons:

- To check import of low quality and dumping of goods by a third country routed through an FTA partner country.
- To check duty evasions.
- Existing trade agreements extends duty concession to goods which fulfils “made-in criteria”. Criteria can be based on factors such as domestic value addition (‘DVA’) and substantial transformation. Instance, ASEAN-India FTA requires DVA of 35% plus change in tariff sub-heading (Aluminium wire rod from China drawn into Wire in Sri Lanka provided cost of the rod is less than 65% of value of final goods).
- Issued to curb the misuse of trade agreements. Applicable where importer wish to claim reduced rate of duty benefit.
- Mere Certificate of Origin (CoO) would not be sufficient. Declaration by importer that goods qualifies as originating goods for preferential rate of duty required. Certain origin related information along with CoC details to be mentioned in Bill of Entry. Details as mentioned in Form I (contains end no. of details including production process / proprietary details) would be required to be submitted if doubt related to origin.
- Powers with proper officer:
 - Denial of preferential claim (such as CoO not in prescribed format);
 - Require information (where reasons to believe that origin criteria not met);
 - Penal action.

13. SC stayed Gujarat HC judgment invalidating Pre-Import Condition and Gujarat HC granted interim stay from any coercive action

- Exemptions from IGST vide notification no. 79/2017- Customs dated 13.10.2017 was granted subject to pre-import condition.
- Later vide notification no. 1/2019- Customs dated 10.01.2019, condition of pre-import was removed.
- DRI issued SCNs by narrowly interpreting that only after all imports are completed before exports against advance authorisation and there is one to one co-relation, exemption from IGST on imports can be granted.
- Gujarat High Court in the case of R/SCA 14558 of 2018 quashed pre-import condition for intervening period.
- Term pre-import is not defined in FTP policy. It can be understood to mean prior to manufacture or prior to export. As such, the term is vague.
- Pre-import condition can be applied only on specified products such as drugs as per Chapter IV of FTP.
- Pre-import condition is contrary to the business principles of exports. Instead concept of replenishment is established business practice.
- Revenue appeal is sub-judice before Supreme Court (SLP No. 33803/2019).
- SCNs issued by DRI should be kept in call book till the matter is sub-judiced.
- If coercive action taken by DRI, fit case to approach jurisdictional High Court praying for interim relief.

13. IGST Refunds along with Advance Authorization benefit

- Rule 96(10) prohibits Refund of IGST alongside imports against AA benefit, etc. (though BCD exemption can be claimed).
- Even though the wordings seems to be *quo* person but actually *quo* export consignment.
- Department insisting pay-back of IGST refund with interest.
- **Issues:**
 - If paid back, no mechanism provided to take back ITC/Cash;
 - Timeline to claim refund of ITC may have expired;
 - No LUT may have been applied.
- **Remedies:**
 - Approach HC challenging the validity of rule [**Watson Pharma (WP 813 of 2018) Bombay HC**] or
 - Forego IGST exemption claimed on imports with interest since amount involved would be lesser. Get BOE re-assessed as per S. 17 and claim ITC (Bombay HC granted interim stay from coercive action in **Prashi Pharma (WP 436 of 2021)** or
 - Get shipping bill amended (as per S. 149) if export obligation discharge certificate not issued and export obligation can be completed within specified period.

13. Gujarat HC judgment on grant of IGST refund on import against EPCG authorisation

- Additional duties of Customs was exempt in pre-GST regime on imports against EPCG authorization;
- Under GST, from 1st July, 2017 till 12th October, 2017, no exemption of IGST on imports against EPCG authorization was granted.
- Notification no. 79/2017- Customs dated 13th October, 2017 was issued granting exemption prospectively.
- FTP essential zero rates the imports against EPCG authorization. Notification is issued in exercise of powers conferred by S. 25 of Customs Act to implement such policy. As such, the notification is a not a notification simpliciter but has a larger purpose to serve.
- It was held that even for the intervening period, notification has to be read as clarificatory or curative in nature.
- It was directed to grant refund of IGST along with interest.
- No appeal has been filed by revenue against this judgment and as such is now a established precedent.
- As such, refund application (with customs authority at port of import) or request letter can be filed even now for grant of refund of IGST along with interest.
- **Fit case to approach High Court for grant of refund along with interest.**
- Same ratio applies for imports against advance license or against special authorization, etc.

14. Union Budget 2021

- Confiscation of goods entered for exportation under wrongful claim of remission or refund of any duty or tax;
- Import duties on several goods have been changed in a calibrated manner to encourage manufacture in India.
- Penalty in case where any person has obtained any invoice by fraud, etc. to utilize Input Tax Credit on the basis of such invoice for discharging any duty or tax on goods, under claim of refund of any duty or tax.
- Certain amendments to be specified in documents may be done directly on the common customs electronic portal.

14. Union Budget 2021

- Common customs electronic portal for facilitating registration, filing of BOE, shipping bills, etc. to be notified alongside service of orders, summons, notices etc. among other mediums used for such service.
- Exemption granted under S. 25(1) shall be valid upto 31st March falling immediately after two years from the date of such grant, unless otherwise specified, varied or rescinded.
- Two-year time limit, further extendable by one year by the Commissioner, for completion of any proceedings under this act which would culminate in issuance of a notice under S. 28.
- BOE needs to be presented before the end of the day (including holidays) preceding the day of arrival of vessel/aircraft. CBIC may extend time limit, which shall not be later than the end of the day of such arrival. Earlier BOE was required to be presented before the end of the next day following the day (excluding holidays).

Thank you!

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