



**SUNG & Company**  
Chartered Accountants



**TaxTru**

# **Impact of “Pre-Import Condition” & “Rule 96(10)”**

## Topics to be covered



**Advance Authorization**

**Pre-Import Condition**

**Rule 96(10)**

**Handling Litigation & Way Forward**

# Advance Authorization

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*"Hardship is not relevant in  
pronouncing on the constitutional validity  
of a fiscal statute or economic law"*

*State of Madhya Pradesh v Rakesh Kohli*

## Advance Authorization

The Advance Licensing Scheme also known as 'Duty Entitlement Exemption Certificate (DEEC)' was introduced in the Foreign Trade Policy (FTP) in the year 1976.

The objective of the Scheme was to provide registered exporters with their requirement of basic inputs/raw materials at international prices without payment of Customs duty in India subject to the condition of export of manufactured goods with specific percentage of value addition.

The name of the Scheme was subsequently changed to 'Advance Authorisation Scheme' (AAS) under FTP 2004-09 effective from 1 September 2004.

Advance Authorisation (AA) is issued to allow duty free import of inputs, which are physically incorporated in the export product, allowing normal allowance for wastage. In addition, fuel, oil and catalyst that is consumed/utilised in the process of production of the export product, is also allowed duty free. AAs are issued based on Standard Input Output Norms (SION) fixed by the Directorate General of Foreign Trade (DGFT) and also on the basis of adhoc/self-declared norms subject to approval by the Norms Committees (NC)/Self-ratification Scheme of FTP.

## IGST Exemption – Background

With the introduction of Goods and Service tax (“GST”) scope of Section 3 was extended to levy Integrated Goods and Services Tax (“IGST”) on import of goods, however, the benefit of Advance Authorization as notified vide **Notification No. 18/2015 – Customs** and **Notification No. 20/2015 – Customs** both dated **01 April 2015** was amended so as to disallow any such exemption from levy of IGST.

In a nutshell, Scheme of Advance Authorization did not provide for exemption from IGST!

## Consequences of not providing IGST Exemption

It resulted in substantial increase in accumulation of credit, necessity of filing refund applications, increase in cash flow and associated costs such as additional working capital, interest cost, banking cost, etc.

It also resulted in agitation across industries and eventually compelled the GST council to provide relaxation, which came in less than four months from the implementation of GST regime.

## Pre-Import Condition

**Notification 79/2017 dated 13th October, 2017** of Customs was issued to extend the benefit of Advance Authorization to exempt import of goods from levy of IGST.

Exemption was provided for a limited time till March 2018, then subsequently, multiple notifications were issued to exempt IGST. But at last, vide **Notification 37/2022 (Customs) dated 30<sup>th</sup> June 2022**, the government modified **18/2015-Customs** and provided the IGST Exemption permanently.

Although the relaxation addressed many of the issues being faced by the industry, the benefit came with a 'pre-import condition', meaning an exporter must first import the goods, utilize it in the manufacture of export goods and physically export the goods so manufactured.

The strict nexus between import of duty-free goods and physical export of goods manufactured using the same, was aimed at eliminating any possibility of misuse of the scheme.



## Pre-Import Condition - Aftermath

With the pre-import condition, an exporter was thus restricted from availing the Advance Authorization on 'replenishment' basis in which an exporter could first undertake exports and then avail the corresponding benefit of exemption on subsequent imports.



This facility, which was being widely utilized in erstwhile regime, provided a procedural ease from physical identification of the goods imported under Advance Authorization and independent bookkeeping of such stock.



With a restriction of 'pre-import condition', and 'physical export' the exemption benefit was reduced in its utility.



Due to this issue, various Petitions were filed for challenging the vires of the restrictions citing them as defeating the very purpose of the Advance Authorization scheme.



Delhi HC in the case of Jindal Dychem Vs. UOI vide W.P.(C) 8677/2017 and CM APPL. 35637/2017 allowed the petition on the ground that, 'if the exporter has fulfilled export obligation pursuant to its Advance Authorization, then no further action is required', in effect, nullifying the pre-import condition.

## Pre-Import Condition Removed!

After a lot of agitation and petitions, finally, Vide **Notification No. 1/2019 -Customs and Notification No. 53/2015-20 both dated January 10, 2019**, which withdrew the Pre-import condition, and also extended the benefit of Advance Authorization to deemed exports.

This amendment however brought with it a necessity to furnish a bond binding the importer to use the imported material in his factory or in the factory of his supporting manufacturer if it has availed the facility of Input Tax Credit and thereafter furnish a certificate from Chartered Accountant to evidence that imported goods have indeed been used in the said manner.

Even though, the widened scope of the benefit brings with it few compliance requirements, the step is by and large a welcome step and in line with GST council's approach to effectively address grievances of the assesseees at large.

## Pre-Import Condition Removed!

With the pre-import condition in place, there were various inquiries and litigations that were initiated against “importers” who failed to comply with the pre-import condition and IGST exemption was being denied to them.

Gujarat High Court however in the matter of **Maxim Tubes Company Pvt. Ltd. [2019 (368) ELT 337 (Guj-HC)]** struck down the pre-import condition as being ultra vires the Advance Authorization Scheme as contained in the Foreign Trade Policy, 2015-20 as well as the provisions of the Handbook of Procedures.

However, Madras HC upheld the validity of the Pre-Import condition in case of **Vedanta Ltd Vs. UOI 2019 (1) TMI 85.**

## Timeline

Period prior to 13th  
October 2017

Period from 10th  
January onwards

Period from 13th  
October 2017 to  
10th January 2019

## Rule 96(10)

At this juncture, it is pertinent to note that Rule 96 was amended w.e.f 23.10.2017 vide Notification No. 3/2018-Central Tax dated 23.01.2018, whereby sub-rule (10) was inserted, so as to disallow refund of IGST paid on exports by an exporter, who has received supplies on which the supplier has availed the benefit of the following notifications –

### **Notification No. 48/2017-Central Tax, dated 18th October 2017**

- Notifying certain supplies as deemed exports under Section 147 of the CGST Act.

### **Notification No. 40/2017- Central Tax (Rate), dated 23rd October 2017**

- Notification prescribing CGST rate of 0.05% on intra-State supply of goods by a registered supplier for export subject to specified conditions.

### **Notification No. 41/2017- Integrated Tax (Rate), dated 23rd October 2017**

- Notification prescribing IGST rate of 0.1% on inter-State supply of goods by a registered supplier for export subject to specified conditions.

## Rule 96(10)

### **Notification No. 78/2017-Customs, dated 13th October 2017**

- Notification to amend Notification No. 52/2003-Cus dated 31.03.2003, it exempt goods imported by EOUs from customs duties and IGST and compensation cess. However, at present, exemption from payment of IGST and compensation cess is only till 31 st March 2018.

### **Notification No. 79/2017-Customs, dated 13th October 2017**

- Notification to amend various Customs exemption notifications to exempt IGST and compensation cess on import of goods under, inter alia, AA/EPCG Schemes. However, at present, exemption from payment of IGST and compensation cess is only till 31 st March 2018.

## Rule 96(10)

According to Rule 96(10) as introduced originally (extracted above), the “exporter” was allowed to export goods on payment of IGST only if the said exporter has not received goods from a “supplier” who had availed the benefit of any of the notifications specified in the said rule.

However, after multiple amendments, the rule now provides that an exporter who is availing the benefit of the notifications specified in (b) or receives supplies from a person who is availing the benefits under clause (a) of Rule 96(10) will not be entitled to claim refund of IGST paid on export of goods w.e.f 9-10-2018.

## Timeline

Till 23rd October  
2017.

After 9th October  
2018.

Between 23rd  
October 2017 to 9th  
October 2018.



## Supreme Court Judgement

1. Judgment lays down the important aspects from Exporter's and Revenue Side and very well acknowledges the fact that it was a hardship.
2. But judgment is based on the "arbitrary or unreasonable" nature of the introduction of the "Pre-import" condition.
3. Giving a Retrospective effect to the Notification is impermissible.
4. Comparison between Refund and Exemption has been given, and how the legislation has the power to introduce both with conditions.
- 5. If any refund/ITC is to be claimed, the same is to be adjudicated on merits by the respective jurisdiction.**

## Learnings

Judgment's essence matches with VKC Footwear Judgement, Important Para of VKC, which is quoted,

*"A claim to refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in Clause (i) of the first proviso allowed a refund of the unutilized ITC in the case of zero-rated supplies made without payment of tax. Under Clause (ii) of the first proviso, Parliament has envisaged a refund of unutilized ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to a refund, the submission that goods and services must necessarily be treated at par on a matter of a refund of unutilized ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions, and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive."*

Ultimately, the court did not incline toward hardship, but the powers were enforced through legislative machinery.

## Pre – Import Condition ~ Rule 96(10)

It is pertinent to note that till 23rd October 2017 there was no implication of Rule 96(10) of the CGST Rules, 2017 on anyone including the Advance Authorization holders.

However, with the introduction of pre-import condition and Rule 96(10) from 23rd October 2017 till 10th January 2019 there was a double whammy on the “importer” and corresponding “exporter”.

The importer was not getting the benefit of IGST exemption on imports which they were promised at the time of being given the scheme and also were being barred from refund while exporting goods on the payment of IGST.

However, it is important to note that the removal of the pre-import condition from 10th January 2019 onwards was accompanied with the additional benefit of allowing the Advance Authorization holders to fulfil their export obligations even by domestically clearing goods as per Notification No. 48/2017-Central Tax.

## Common Period – Possible Scenarios

### 13<sup>th</sup> October 2017 – 10<sup>th</sup> January 2019

1. Violated Pre - Import Condition but followed Rule 96(10)
2. Violated Rule 96(10) but followed Pre – Import Condition
3. Violated both the Conditions

### 13<sup>th</sup> October' 2017 to 8<sup>th</sup> October' 2018

Pre-Import Condition – Yes | Rule 96(10) – No

### 9<sup>th</sup> October' 2018 to 10<sup>th</sup> January' 2019

Pre-Import Condition – Yes | Rule 96(10) - No

## Regularization

### **13<sup>th</sup> October' 2017 to 8<sup>th</sup> October' 2018**

Pre-Import Condition – Yes | Rule 96(10) – No

**Way Forward** It's a violation of Pre – Import Condition, if IGST Exemption was taken, the same is to be refunded back. Rule 96(10) for this period is not applicable due to the Prospective Applicability of NN 54/2018.

### **9<sup>th</sup> October' 2018 to 10<sup>th</sup> January' 2019**

Pre-Import Condition – Yes | Rule 96(10) - No

## Way Forward

During this period there is a double whammy of these provisions. Thus, possible scenarios are here as follows:-

- 1. IGST Exemption on Import was availed, but export was made without IGST – Only Pre – Import Violation.**
- 2. IGST Exemption on Import was not availed, but export was made with IGST – No Violation**
- 3. IGST Exemption on Import was availed, but exports were made with IGST – Rule 96(10) Violation**

Thanks!

**This issue is bothering you ?**

Feel free to reach me at



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