

IGST exemption vis-à-vis pre-import condition

CA Venkat Prasad
CA Hemanth Kumar

Advance Authorisation (AA), is one of the schemes under Foreign Trade Policy, 2015-20 (hereinafter referred to as the 'FTP') which allows the manufacturer exporter or merchant exporter to **import inputs without payment of customs duties** in terms of chapter 4 of FTP read with Notification No.18/2015 Cus dated 01.04.2015 as amended. The AA holder has to fulfill prescribed export obligation (EO) corresponding to the duty free imports made. The duty exemption claimed needs to be paid back along with interest @ 15% to the extent of unfulfilled EO. In case of the exporters *qua* AA holders having continuous export business, there is practice prevailing to export the goods well before the first import made against the advance authorization. Such export products are actually manufactured using the existing stock. The cycle of import and export goes on. One would not be maintaining the one to one correlation of the imports vis-à-vis corresponding export orders. In fact, the advance authorization scheme itself provides for the export in anticipation of benefits under this scheme.

Prior to introduction of the GST, the exemption was available for all types of customs duties including CVD (Additional customs duty popularly known as countervailing duty) and SAD (Special Additional duty or countervailing duty for sales tax). The notification expressly permitted the duty-free imports even after fulfillment of the export obligation.

With the introduction of GST (w.e.f. 01.07.2017), the levies of the CVD & SAD are subsumed and IGST is being levied on imports. However, the earlier exemption of CVD & SAD against the advance authorization was not extended to IGST in the initial days of GST, forcing the exporters to pay IGST at the time of import and claim refund thereafter. This discontinuation of the exemption has caused working capital troubles to the exporters as there would be considerable time gap between payment of IGST at the time of import and receiving refund later from the Government.

Understanding the aforesaid difficulties, Government has issued Notification No.79/2017-Cus., dated 13.10.2017 restoring the earlier position i.e. exempting the IGST against the advance authorization. The said exemption was *inter alia* subjected to the '**Pre-import**' condition. The meaning of the said phrase was neither defined in the FTP policy nor in the notification.

Not being completely aware of the newly imposed 'pre-import' condition and also its meaning & scope, the exporters *qua* AA holders just continued their earlier practice of

making exports using old stock and importing the duty-free goods later. The customs officers also allowed the same and did not raise any objection.

The Government vide Notification No. 01/2019-Cus dated 10.01.2019 has omitted the 'pre-import condition'. It is not clear from this notification, whether this amendment is prospective or retrospective thereby retaining the ambiguity of the effect of 'pre-import' condition for IGST exemption during the intervening period i.e. 13.10.2017 to 09.01.2019.

According to the Customs department "pre-import condition" would mean that goods have to be imported first and then the final products manufactured from such imported goods and exported, and only when it was established that goods imported against a particular Authorisation were used in relation to manufacture of finished goods exported for fulfillment of Export Obligation of that particular Authorisation, that the "pre-import condition" was satisfied. It is learnt that DRI officers have been denying the IGST exemption during the intervening period i.e. 13.10.2017 to 09.01.2019 for the goods imported subsequent to the exports.

Petitions were filed before various High courts challenging the 'pre-import' condition and the interpretation adopted by the DRI as stated supra. While the Madras HC in the case of **Vedanta Limited v. UOI** 2018 (19) G.S.T.L. 637 (Mad.) upheld the said condition and department's stand, the Hon'ble HC of Gujarat in case of **Maxim Tubes Company Pvt Ltd. v. UOI** 2019 (2) TMI 1445 has struck down the 'pre-import' condition. The revenue department has appealed to the Hon'ble Supreme court which has stayed the above decision and final decision is pending as of now.

As the decision is stayed by the Hon'ble SC & normal period of limitation of 2 years for raising customs duty demands is coming nearer (For October 2017, it is already over), the customs department has speeded up their investigation and has started raising the demands after denying the IGST exemption during the intervening period 13.10.2017 to 09.01.2019 as stated supra.

In view of the above, the available courses of action are as follows:

- ✓ Contest the demands raised, if any, without payment of any IGST now. If the matter is decided in favour of the trade, cases would be closed without any cost. If the matter gets decided against the trade, the IGST along with interest may have to be paid.
- ✓ Pay IGST under protest (using TR-6 Challan) and contest the matter before the appellate forums/courts to its logical end. The amount paid using Tr-6 challan would not be available as ITC as TR-6 challan would not be a proper document for availment of ITC as per Rule 36 of the CGST Rules, 2017. If the matter is decided in favour of the trade the amount paid would be refunded. Otherwise, the interest

@15% shall be paid from the import date till the payment of IGST. Under this option, the interest meter would stop once the IGST is paid.

- ✓ Pay IGST along with interest (through re-assessment order from port authorities) and take ITC of IGST paid immediately and contest the matter till its logical end. If the matter is decided in favour of the trade the interest paid would be refunded. Otherwise, it becomes the cost. Under this option, even if the case is lost, interest paid would only be a cost as IGST paid is available as ITC.

In the authors' view, the 'pre-import' condition may not stand in the judicial review and hopefully the Hon'ble SC will uphold the decision of Hon'ble HC of Gujarat in the case of *Maxim Tubes (Supra)* and strike down the 'pre-import' condition.

This article was published in Tax guru at the below link:

<https://taxguru.in/goods-and-service-tax/igst-exemption-vis-a-vis-pre-import-condition.html>

For any further queries/comments please write to venkataprasad@hiregnage.com/
hemanth@hiregange.com.

Our Locations: Bangalore | Hyderabad | Visakhapatnam | NCR (Gurgaon) | Mumbai | Pune | Chennai | Guwahati |

www.hiregange.com