

# TAX FLASH NEWS

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## 'Pre-import condition' to avail IGST exemption on imports under advance authorisation of FTP is ultra vires – Gujarat High Court

### Background

Recently, the Gujarat High Court<sup>1</sup> has held that the pre-import condition contained in the Foreign Trade Policy (FTP) in respect of Advance Authorisation Scheme is ultra vires the scheme.

### Facts of the case

Foreign Trade Policy of the Central Government has various duty exemption schemes including Advance Authorisation Scheme (AA) which allows duty-free import of inputs, which are physically incorporated in export products (making normal allowance for wastage).

For implementing the scheme of duty-free import, notification no. 18/2015-Customs dated 1 April 2015 was issued under the Customs Act, 1962.

Subsequent to the introduction of Goods and Services Tax regime, Integrated GST (IGST) was applicable on import of inputs under AA as the above notifications were not amended to provide for IGST exemption. Subsequent to exporters' representations, notification no. 79/2017 – Customs dated 13 October 2017 was issued amending the aforementioned notification to allow exemption from the IGST and compensation cess. The amending notification however inserted a pre-import condition for allowing duty-free import under AA licence.

Based on the pre-import condition, department of revenue intelligence (DRI) had initiated an inquiry against manufacturers who have been importing goods against AA. In the absence of a specific definition of 'pre-import condition', the DRI had taken the view that goods have to be first imported, manufactured and then the final products manufactured using such imported goods have to be exported.

Aggrieved by the above inquiry, M/s. Maxim Tubes Company Pvt. Ltd. (petitioner), a Government recognised the export house, filed a petition before the Gujarat High Court challenging the validity of the term 'pre-import condition' in the AA of FTP. In this regard, it was argued by the petitioner that if the pre-import condition, as interpreted by DRI, is accepted then it would mean that the exemption would not be available in case of manufacturer exporter who undertakes manufacture and export of goods in a continuous cycle, where the goods are manufactured are exported in anticipation of licence/authorisation i.e. exports are made first and duty free import against the authorisation are made subsequently.

### High Court decision

The Court held that the pre-import condition for availing IGST and compensation cess exemption under AA inserted vide para 4.14 of the FTP and para (xii) inserted in notification no. 18/2015-Customs is ultra vires the AA scheme of the FTP, 2015-2020 basis the following observations:

- Export in anticipation of AA as contemplated in Para 4.27 of the Handbook of Procedure and the term 'pre-import condition' contained at Para 4.14 of FTP read with the exemption notification, cannot stand together
- Within para 4.14 of the FTP, the first part granting exemption of basic customs duty, additional customs duty, etc. and second part granting exemption of IGST and cess subject to a pre-import condition, are inconsistent with each other and leads to an anomalous situation

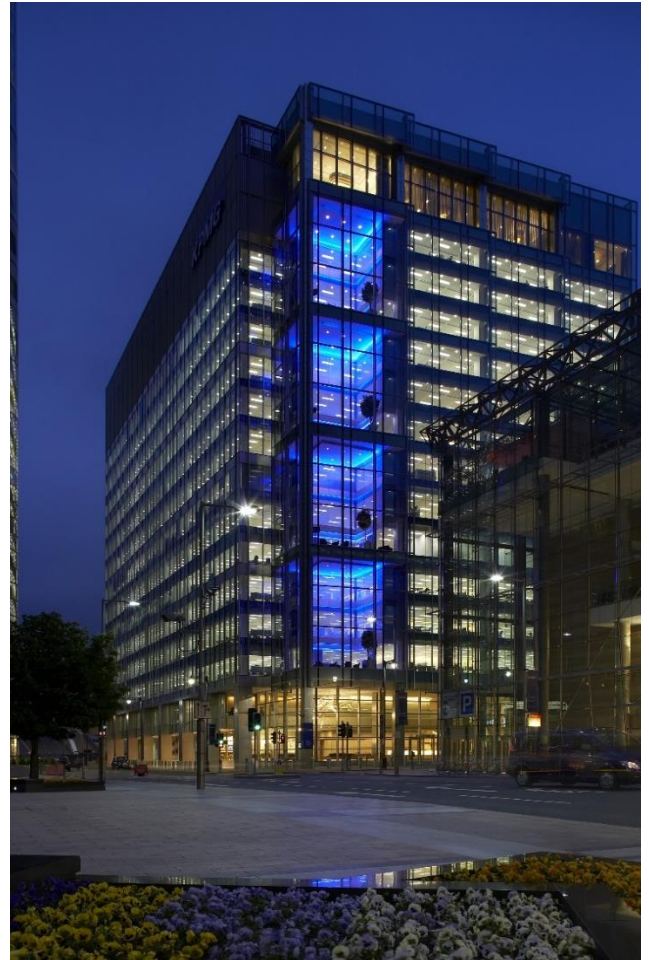
<sup>1</sup> Maxim Tubes Company Pvt. Ltd. [TS-79-HC-2019(GUJ)-NT]

- The Court also observed that the approximate time taken to complete a cycle from receipt of export order to transportation for export to overseas buyers place is approximately six months. If the exporter has to manufacture goods for export only after receipt of the AA and against inputs imported under the respective AA, then it will not be possible for the exporter to give delivery to overseas buyer within the agreed reasonable delivery period i.e. three to four month time period, in which case the overseas buyer would not be interested in purchasing the goods from them
- On account of pre-import condition for availing IGST and cess exemption, imports under the AA scheme (which has been operating successfully since many years without the condition of pre-import) have become next to impossible. This does not serve the objective of the FTP
- On account of the stringent interpretation adopted by DRI, it is more or less impossible to make any exports under an AA without violating the condition of pre-import. In effect and substance, what is given by one hand is taken away by other and therefore, the IGST and cess exemption under the AA scheme becomes more or less illusory.

With this, the court has held that all proceedings initiated for violation of 'pre-import condition' would no longer survive.

### Our comments

It is pertinent to note that the DRI had issued inquiry letters / summons to various exporters insisting exporters to pay back the IGST exemption claimed on import under AA where the pre-import condition was violated. This judgment comes as a big relief to these exporters as there would have been a cash flow and interest impact on account of the payment of the disputed IGST. However, it needs to be seen whether the government issues any clarification or challenges the judgment.



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