

SC upholds the validity of mandatory fulfilment of pre-import condition for imports under advance authorisations

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Summary

The Supreme Court (SC) has upheld the requirement of the 'pre-import condition' incorporated in the Foreign Trade Policy of 2015-2020 (FTP) and Handbook of Procedures 2015-2020 (HBP) to claim exemption of Integrated Goods and Services Tax (IGST) and Compensation Cess on inputs imported for the manufacture of export goods, on the basis of 'Advance Authorisation' (AA scheme). The SC noted that the inconvenience caused to exporters by paying two duties and claiming refund could not be a ground to hold the 'pre-import' condition as arbitrary. Further, the SC observed that the FTP itself empowered the Directorate General of Foreign Trade to impose 'pre-import conditions' on articles other than those specified that the Gujarat High Court (HC) had failed to consider and had erroneously proceeded on the assumption that only the goods specified were subject to the 'pre-import condition'. Therefore, the SC has set aside the Gujarat HC judgment and held that the pre-import condition under the AA scheme for availing benefit of exemption is not arbitrary or unreasonable.

However, the SC has directed the Revenue to permit the exporters who were enjoying interim orders till the impugned judgments were delivered, to claim refund or input tax credit, and they shall approach the Jurisdictional Commissioner and apply with documentary evidence within six weeks from the date of the judgment.

Facts of the case

- The Gujarat HC had struck down the 'pre-import condition' under the AA scheme in the FTP for being unconstitutional, arbitrary and unreasonable.
- Initially, the payment of Basic Customs Duty (BCD), Countervailing Duty (CVD) and Special Additional Duty (SAD), Safeguard Duty and Anti-Dumping Duty on inputs imported against the AA, was exempted. After the introduction of GST, the CVD and SAD were subsumed, while the Integrated Goods and Services Tax (IGST) and Compensation Cess were introduced. However, the same benefit of exemption was not extended to the IGST and Compensation Cess, leading to the exporters having to avail subsequent input tax credit (ITC) or take refund of such duties. This further led to the concomitant blocking of working capital.
- The Directorate General of Foreign Trade (DGFT) extended the benefit of exemption to the IGST and Compensation Cess from 13 October 2017, subject to conditions, namely the 'pre-import condition' and 'physical exports'.
- The petitioner (Cosmos Films Limited) herein claimed that they were unaware about this condition, and continued exports in anticipation of the grant of AA, and consequently expected exemption from all custom duty levies, including the IGST and Compensation Cess.
- The HC noted that the department had interpreted 'pre-import condition' to mean that 'goods had to be imported first, and then the final product manufactured with such imported goods were to be exported'. The condition stood satisfied when inputs imported against a particular AA license were used to manufacture finished goods exported for the fulfilment of export obligation of that specific AA license. The HC stated that such interpretation is unfeasible and leads to impossibility.
- The HC noted that the department denied exemption by treating the permissible imports as 'replenishment imports'. Merely because the exports were carried out first, followed by duty-free import against authorisation, exemption cannot be denied. Such 'sudden treatment' of inputs when the HBP permitted exports in anticipation of authorisation was held to be incomprehensible and unreasonable. The HC further emphasised that the condition was subsequently withdrawn w.e.f. 10.01.2019 Para. 4.13 of the FTP Para 4.27(a) of the HBP.

SC observations and judgement [CA No. 290 of 2023 order dated 28 April 2023]:

- **Inconvenience or hardship cannot be a ground to interpret plain language of statute differently:** The SC noted that the amendment brought inconvenience to exporters who first paid the import duties and subsequently claimed refunds, subject to fulfilment of the condition. However, such hardship cannot be grounds to implicate that the pre-import condition was arbitrary. The SC expounded that 'hardship is not relevant in pronouncing on the constitutional validity of a fiscal statute or economic law'.
- **All AA holders were never treated alike:** Drawing reference from Para. 4.13(i) of the FTP, it observed that the DGFT retained power to impose pre-import condition on articles other than those mentioned in Appendix-4J and rebuffed the interpretation that only articles mentioned in Appendix-4J could be subjected to the pre-import condition. The existence of this discretion means that there is flexibility in regard to the nature of policies to be adopted, having regard to the state of export trade, and concessions to be extended in the trade and tax regime. The SC opined that all AA holders were never treated alike.

- **No blanket right to claim exemption:** There cannot be a blanket right to claim exemption, and that such a relief is dependent on the assessment of the state and tax administrators, and mechanism for its administration. The exemption from the requirement of pre-import conditions continues in respect of the old levies, which are, even as on date, not part of the GST regime. That clearly sets them apart from the new levies, the payment of which is insisted (after which refund can be sought) as a part of a unified system of levy, assessment, collection, payment, and refund.
- **Doctrine of classification cannot be applied strictly on new legislation:** When reform by way of a new legislation is introduced, the doctrine of classification cannot be applied strictly, and some allowance for experimentation, to observe the effect of the law, is available to the executive or legislature.
- **No constitutional compulsion to continue concessions granted in past:** There is no constitutional compulsion that while framing a new law, or policies under a new legislation – particularly when an entirely different set of fiscal norms are created, overhauling the taxation structure, concessions hitherto granted or given should necessarily be continued in the same fashion as they were in the past.
- **Pre-import condition cannot be arbitrary or unreasonable:** The object of the new law is the creation of new rights and obligations, with new attendant conditions. This process is bound to lead to some disruption. In this case, the disruption is in the form of requirement to pay the two duties and claim refunds. Therefore, the exclusion of benefit of imports in anticipation of AAs and requiring payment of duties with the 'pre-import condition', cannot be characterised as arbitrary or unreasonable.
- **HC judgement not sustainable:** Construing the later notification of 10 January 2019 as being effective from 13 October 2017 would be giving effect to it from a date prior to the date of its existence. In other words, the court would impart retrospectivity. To give a retrospective effect to the said notification through interpretation would be to achieve what is impermissible in law. What applies to refunds (the right to which can be curtailed legitimately), applies equally to exemptions. Therefore, the impugned judgment of the Gujarat HC need to be set aside.

Our comments

Contrary to the Gujarat HC's decisions, earlier, the Madras High Court, in the Vedanta Limited case, had also upheld the validity of the pre-import condition. The HC observed that the import is in the nature of replenishment of inputs used in already exported goods.

The SC has struck down the Gujarat HC's ruling, and thus, the exemption from levy of the IGST under Section 3 (7) and Compensation Cess leviable under Section 3 (9) of Customs Tariff Act, 1975, shall be subject to the conditions that the export obligation shall be fulfilled by physical exports only and the 'pre-import condition' during the period 13 October 2017 till 10 January 2019.

The present ruling is likely to cause hardship to the exporters, as the authorities will issue notices and they will be required to pay duty, along with interest, for the disputed period.

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