**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 14558 of 2018**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 15184 of 2018**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 15186 of 2018**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 15743 of 2018**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 18097 of 2018**
**With**
**R/SPECIAL CIVIL APPLICATION NO. 19324 of 2018**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MS.JUSTICE HARSHA DEVANI**

**and**
**HONOURABLE DR.JUSTICE A. P. THAKER**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | |

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MESSRS MAXIM TUBES COMPANY PVT LTD
Versus
UNION OF INDIA

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Appearance:
Special Civil Applications No.14558 of 2018, No.18097 of 2018 and 19324 of 2018 :

MR PARESH M DAVE, ADVOCATE with AMAL PARESH DAVE, ADVOCATE

and MR ADITYA TRIPATHI, ADVOCATE for the PETITIONERS

MR NIRZAR S DESAI, SENIOR STANDING COUNSEL for the RESPONDENTS

Special Civil Application No.15184 and 15186 of 2018 :

MR ABHISHEK RASTOGI, ADVOCATE with MR PRATYUSHPRAVA SAHA, ADVOCATE with MR NACHIKET DAVE, ADVOCATE for the petitioners

MR NIRZAR S DESAI, SENIOR STANDING COUNSEL for the RESPONDENTS

Special Civil Application No.15743 of 2018 :

MR ABHISHEK RASTOGI, ADVOCATE with MR AAYUSH MERHOTRA, ADVOCATE and MR DIGANT POPAT, ADVOCATE for the petitioners

MR NIRZAR S DESAI, SENIOR STANDING COUNSEL for the RESPONDENTS

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE DR.JUSTICE A. P. THAKER

**Date : 04/02/2019**

**ORAL JUDGMENT**
**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Rule. Mr. Nirzar Desai, learned Senior Standing Counsel waives service of notice of rule on behalf of the respondents.

2. Since the facts and contentions raised in this batch of petitions are more or less similar, the same were taken up for hearing together and are decided by this common judgment.

3. For the sake of convenience, reference is made to the facts as appearing in Special Civil Application No.14558 of

2018 filed by Messrs Maxim Tubes Company Pvt. Ltd.

4. The petitioner is a manufacturing unit for manufacture of goods like Stainless Steel Seamless & Welded Pipes, Tubes, U-Tubes and such products. The petitioner manufactures such goods and sells them in the country and also by way of exports to foreign countries and is a Government recognized export house by virtue of substantial exports made continuously for last several years.

4.1 It is the case of the petitioner that it has been exporting substantial quantities of goods and is a reputed concern and has been conducting manufacturing, selling and exporting activities in accordance with applicable laws and various awards have been given to it, thereby recognizing the petitioner's growth and contribution to exports.

4.2 Under the Foreign Trade Act, the Central Government has been framing Export-Import Policy (also known as FTP, i.e. Foreign Trade Policy) for development, regulation and control of imports and exports in the country and has announced various duty exemption schemes, one of which is the Advance Licence scheme, which is now known as Advance Authorisation. Paragraph 4.03 of Chapter 4 of the Foreign Trade Policy 2015-20, bears the heading "Advance Authorisation" and says that Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). For laying down the procedure to be followed by an exporter or importer for the purposes of implementing the provisions of the Foreign Trade Act and the rules framed

thereunder, the Director General of Foreign Trade (DGFT) has notified the Hand Book of Procedure vide Public Notice No.1/2015-2010 for Exim Policy 2015-20. Under Chapter 4 of the Hand Book, procedure in respect of duty exemption/remission schemes is laid down. By virtue of paragraph 4.27 thereof, exports in anticipation of authorisation are permitted, with a clarification that exports made from the date of generation of file number for an Advance Authorisation may be accepted towards discharge of export obligation.

4.3 It is the case of the petitioner that provisions similar to the above referred provisions of Exim Policy 2015-20 have been made by the Central Government as well as the DGFT while framing the Exim Policy year after year. Considering the peculiarities of export business in the international trade, the facility of exports in anticipation of licence has also been allowed by the respondents to the exporters. In the petitioner's case also, Licences and Authorisations have been issued under respective Foreign Trade Policies, and the petitioner has also been allowed to export goods in anticipation of application being granted so as not to create hindrances and delays in executing export orders.



4.4 It is further the case of the petitioner that the scheme of exports in anticipation of licence is an inevitable feature of the export trade, inasmuch as, normally, an exporter like the petitioner is allowed delivery time of three to four months by the overseas buyers, and such condition for delivery time is always laid down in the sales contract and/or purchase order executed between the parties. Upon receiving such export order, a manufacturer like the petitioner would immediately

lodge an application for an Advance Authorisation for importing required materials duty free. Scrutiny and grant of such application ordinarily takes three to four weeks; and therefore, a manufacturer-exporter like the petitioner would get an Advance Authorisation about three to four weeks after receiving the export order. Thereupon, order for required raw materials could be placed to a suitable overseas supplier; and locating such suitable supplier, negotiating the price and other issues with such supplier and actual supply of the materials would take minimum three months. If the raw materials required were of extraordinary parameters and specifications, then production of such materials at the overseas supplier's end would take five to six months also. Ordinarily, the transit time for procuring the raw materials, which is normally by sea, is three weeks or a little more; and customs clearance and actual transportation of the materials from the port to the factory would also take minimum one week. Production of the export goods upon utilizing such materials would require ten to fifteen days, and delivery time for such shipments from the factory to the overseas buyer would also be a few weeks depending upon the location of the buyer and availability of sea going vessel. According to the petitioner, if any genuine manufacturer-exporter like the petitioner follows the above cycle, then it would be virtually impossible to execute an export order because the overseas buyer would not wait for a period longer than three to four months as specified in the sales contract/purchase order. Considering these peculiarities and the practical difficulties of Indian manufacturer-exporters, the above referred scheme of allowing export in anticipation of licence has been in operation for a very long time and the petitioner has also been following this method, and fulfilling

the export obligations successfully.

4.5 It is the case of the petitioner that for implementing the Government's assurance given vide Chapter 4 of the Foreign Trade Policy for allowing duty free import of inputs, appropriate notifications are being issued from time to time under the Customs Act, 1962, and related statutes. At present, Notification No.18/2015-Cus dated 1.4.2015 is in operation. As the duties levied on imported goods when this notification was issued were in the nature of additional duty, safeguard duty etc., all such duties have been referred to in paragraph 1 of the notification, and exemption from payment of all such duties was allowed when the goods were imported against a valid Advance Authorisation. However, the Goods and Services Tax (GST) regime has been brought into operation by the Central Government with effect from 01.07.2017. Till then, additional customs duty, popularly known as CVD, was being levied under section 3 of the Customs Tariff Act, 1975 on the goods imported in India in addition to basic customs duty. With the introduction of GST and such new levies from 1.7.2017, section 3 of the Customs Tariff Act has been amended, and integrated tax and Goods and Services Tax compensation cess (hereinafter referred to as "GST compensation cess") are levied and collected on any article imported into India by virtue of sub-sections (7) and (9) substituted in section 3 of the Customs Tariff Act with effect from 1.7.2017.

4.6 It is the case of the petitioner that for the goods imported against an Advance Authorisation, Notification No.18/2015-Cus., allowed exemption from various duties which were

leviable till then; but the new levies of integrated tax and GST compensation cess were not referred to at paragraph 1 of the notification; and therefore the custom authorities all over the country started levying and collecting these new levies even for the goods imported into India against an Advance Authorisation. It appears that some of the aggrieved persons approached the Delhi High Court, challenging such recoveries of integrated tax and GST compensation cess on goods imported against Advance Authorisation, whereupon an interim order came to be made by the said court.

4.7 It is the case of the petitioner that realising the error of not amending the existing notification or in not issuing a new notification for exemption from Integrated Tax and the Cess to goods imported against an Advance Authorisation, the Central Government has issued an amending Notification No.79/2017-Customs dated 13.10.2017, whereby six existing notifications have been amended, including Notification No.18/2015-Customs for imports made against Advance Authorisation. Upon incorporated of the amendments/substitutions made vide the above Notification No.79/2017-Customs in Notification No.18/2015-Cus., exemption is also granted from levies imposed under sub-sections (7) and (9) of section 3 of the Customs Tariff Act.

4.8 The grievance and the subject matter of the petitions is the insertion of “Pre-import Condition” vide condition (xii) inserted in the above notification. Simultaneously, the Central Government has issued a Notification No.33/2015-2020 dated 13.10.2017 thereby amending various provisions of the Foreign Trade Policy 2015-20, whereby the “pre-import

condition" has also been incorporated in paragraph 4.14 thereof with effect from 13.10.2017.

4.9 It is the case of the petitioner that the manufacturers-importers all over the country, including the petitioner, were unaware about the "pre-import condition" thus inserted in the Customs notification as well as in paragraph 4.14 of the current Foreign Trade Policy, and therefore, the exports were being made in anticipation of grant of Authorisation, and exemption from all custom levies including integrated tax and GST compensation cess were also allowed by the proper Customs officers while allowing imports against valid Authorisations. It appears that the Directorate of Revenue Intelligence (DRI), Kolkata noticed the above amendments and thereupon, initiated investigation against all manufacturers located all over the country who have been importing goods against Advance Authorisations. Summonses were issued by DRI, Kolkata to several such manufacturer-importers located at various places in the country; and summons has been served upon the petitioner herein also. Various details and information have been called for by the DRI, Kolkata from all such persons, including the petitioner herein, in respect of pending Advance Authorisations, imports made against such Authorisations after 13.10.2017, duties foregone for such imports, and also the exports already made or to be made after importing such goods for verifying fulfillment of pre-import condition.

4.10 It is the case of the petitioner that there is no definition or clarification about the meaning of "pre-import condition"; but the DRI officers conducting the inquiry and

investigation, hold a view that “pre-import condition” would mean that goods have to be imported first and then the final products manufactured from such imported goods have to be 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, and accordingly, exemption was admissible to the goods imported against such Authorisation. In view of this belief or impression about the “pre-import condition”, it would mean that the exemption of Notification No.18/2015-Customs would not be admissible in case of manufacturer-exporters like the petitioner, who undertake manufacturing and export of goods in a continuous cycle, and it would also mean that the exemption of the above notification would not be admissible when goods manufactured were exported in anticipation of Licence/Authorisation, because such would be a case of export having been made first and duty free import against the Authorisation having been made subsequently.

4.11 In the above view of the matter, a letter dated 3.4.2018 came to be issued by the Deputy Director, DRI, Kolkata to the petitioners informing them about the amendments in the foreign trade policy and customs notification, and also calling upon the petitioners to submit information and details in a prescribed format for ascertaining whether import of goods were made first and exports against the Authorisation under which such imports were made were effected after import of the goods, or otherwise.

4.12 The petitioners' representatives appeared before the DRI, Kolkata office and submitted the details in respect of the imports made after 13.10.2017 along with exports made under the concerned Authorisations in the format prescribed by the DRI officers. A summary statement of the imports made by the petitioner against Advance Authorisations from November, 2017 to June, 2018 where exports have already been made before importing such goods is prepared by the petitioner on the basis of the information and details submitted before the DRI authorities; whereupon it transpires from such details that if "pre-import condition" as understood by the DRI officers is to be satisfied, then taxes in the nature of integrated tax and GST compensation cess aggregating to Rs.1,61,63,653/- would be payable with interest thereon. It appears that further summons have also been served upon the petitioners, who have requested for more time in respect thereof.

4.13 It is in the above circumstances, that the petitioners have approached this court challenging the "pre-import condition" laid down under Notification No.18/2015-Cus., and also in paragraph 4.14 of the Foreign Trade Policy, 2015-20.



5. In response to the averments made in the petition, the fifth respondent – Directorate of Revenue Intelligence has filed an affidavit-in-reply contending that exemption can never be a matter of right and that it is granted by the Government keeping in mind the interest of the public at large. Whether the Government is being benefited or not, cannot be a basic criterion for determination of legality of a notification issued by the Government. The question is whether the authority acted

within their jurisdiction while issuing such notification or not. It is stated in the affidavit-in-reply that the exporters are at liberty to export first and import at a later stage in terms of paragraph 4.12 of the Hand Book of Procedures, Volume-I (presently covered by paragraphs 4.27 and 4.28 of the Hand Book of Procedures, Volume-I [2015-20]. However, the said provision does not offer carte blanche to the importer to regulate his imports and exports without complying with the other conditions imposed in the policy and the relevant customs notification. The said provision was made as an exception, to keep the option open for the willing exporters, subject to the condition that the same would be availed at the risk of the exporter only. An exporter is allowed to export in anticipation of Advance Authorisation in terms of paragraph 4.12 of the Hand Book of Procedures, Volume-I, only when either the norms are not fixed in the SION, or they are willing to fulfill their export obligation first. As the process of fixing norms takes considerable time, said provision leaves a window of opportunity for the importer to export in advance at their own risk of not being considered towards discharge of export obligation.

5.1 It is further averred that the amendment in paragraph 4.14 of the Foreign Trade Policy (2015-20) brought in terms of the DGFT Notification No.33/2015-20 and corresponding Customs Notification No.79/2017 dated 13.10.2017 to avail benefit of the exemption of IGST, an importer/exporter is required to strictly follow the conditions of paragraph 4.1.3 (4.03 of Foreign Trade Policy (2015-20). According to the respondents, it is the prerogative of the petitioners to decide whether they are willing to continue with their pattern of

business of exporting in anticipation of Advance Authorisation or would prefer to use the duty free materials for the purpose of manufacture of the export goods, which would be exported under the same Advance Authorisation. In case of the former, they cannot claim the benefit of IGST exemption for the simple reason that the "pre-import condition" is not observed.

5.2 It is further averred that prior to introduction of GST, imports allowed under Advance Authorisations were exempted from payments of BCD, CVD, SAD, ADD, safeguard duty, etc., subject to compliance of a set of conditions imposed contained in Customs Notification No.18/2015 dated 1.4.2015, that governs such exemption. When GST was rolled out, CVD and SAD were subsumed into IGST. In terms of section 3 of the Customs Tariff Act, such IGST was made payable at specified rate, whenever imports are made. However, a major change that was brought into the policy was to not allow exemption from payment of IGST directly at the time of import under Advance Authorisation. Such exemption was allowed in an indirect way by allowing refund of IGST paid at the time of imports under Advance Authorisation within a specified time. The importers, therefore, started paying IGST on goods imported under Advance Authorisation with effect from 1.7.2017, and were getting outright exemption from BCD, ADD, safeguard duty, etc., whereas the IGST paid was being refunded. It is the case of the respondents that the legislative intent was made clear by imposing IGST on one and all imports made under Advance Authorisations, on or after 1.7.2017, without differentiating between the status of the Advance Authorisation, whether it was issued prior to or after introduction of GST. It was a policy decision, which could have

been reversed or altered only by the statutory body called "GST Council".

5.3 it is further the case of the fifth respondent in the affidavit-in-reply that because of the problem in GSTN, the committed refund of IGST was getting delayed, which resulted in blocking of working capital for many business houses. Considering the gravity of the situation, the GST Council came up with the idea of allowing exemption from IGST when imported under Advance Authorisations, and accordingly, the DGFT issued Notification No.33/2015-20 dated 13.10.2017 which was backed by Customs Notification No.79/2017 dated 13.10.2017, issued by the Department of Revenue, amending the parent Notification No.18/2015 dated 1.4.2015.

5.4 It is further averred in the reply that both, the DGFT as well as the Department of Revenue notifications, offered exemption from the integrated tax leviable under sub-section (7) of section 3. However, such exemption was not absolute. Two specific conditions were imposed, viz., (i) export obligation has to be fulfilled through physical exports only; (ii) the exemption is subject to pre-import condition, which implies that only after the import of the goods is commenced, such goods are required to be used for manufacture of export goods, which will be ultimately exported.

5.5 It is the case of the respondents that the DGFT and the Department of Revenue could have used a cut-off date and Advance Authorisations issued after 13.10.2017 could have been declared to have been eligible for such benefits only, but they did not do so. It was kept open ended to extend benefit to

the importers, who might have followed those two conditions, even in respect of the Advance Authorisations issued to them earlier. In case of insertion of the cut-off date, it would have made them ineligible for the benefit, therefore, the policy makers, in their own wisdom, kept the door ajar for the eligible importers, to enjoy the benefit, irrespective of the date/period of issuance of Advance Authorisation, subject to compliance of the conditions imposed.

5.6 It is further stated in the affidavit-in-reply that inferring that “No manufacturer in the country was aware of the meaning and scope of pre-import condition”, is misleading and incorrect in nature. Para 4.13 of the Foreign Trade Policy, 2015-20) has been in existence (under different Paras in different Policy periods) for years. Since 2003, all drug companies have been importing their raw materials sourced from unregistered sources, under pre-import condition. Silk in any form, raw sugars, natural rubbers, tea, spices and precious metals etc., are allowed to be imported under "pre-import condition" only. The "pre-import condition" is in-built within the Advance Authorisation scheme itself, and in terms of para 4.03 of the policy, which is integral part of the police since its inception, it has been continuously hammered upon the potential exporters, that they are allowed to import only those inputs under Advance Authorisation scheme, which would be physically incorporated in the export goods. The "pre-import condition" demands that the goods allowed under the Authorisation are required to be imported first and such goods are required to be utilized for the purpose of manufacture of the finished goods, which are in turn exported under the subject Advance Authorisation. As a matter of fact, the

concept of pre-import is in-built within the Advance Authorisation Scheme itself. Simply because the petitioner deliberately ignored the said provisions and acted at their convenience, does not mean that this was alien to the importers working under the scheme.

5.7 According to the respondents, the petitioner is under an incorrect impression that the Advance Authorisation scheme is a scheme for replenishment. Had it been so, DGFT would not have to launch other schemes like Duty Free Incentive Scheme, which allows exports prior to import and licences are made transferable under the Foreign Trade Policy. The "pre-import condition" is in-built in the Advance Authorisation scheme. The importers are duty bound to utilize the duty free imported materials for the purpose of manufacture of export goods, which are subsequently exported.

5.8 It is further averred that “pre-import condition” means that the entire materials covered by the Advance Authorisation should invariably be imported first, either in entirety or in a phased manner, for use in the process of manufacture of the finished goods, which in turn would be exported, towards the said Advance Authorisation only. It is not necessary to import in totality, one is allowed to import in piecemeal, if need be. The only condition is that the very materials imported duty free under a specific Advance Authorisation, have to be used for manufacture of the goods to be exported under the said Advance Authorisation towards discharge of export obligation. Physical incorporation of the duty free imported materials in the export goods is the demand for pre-import condition, which is required to be religiously followed.

5.9 The aspect of physical incorporation of the input materials in the export goods have been covered under para 4.03 of the Foreign Trade Policy (2015-20). According to the respondents, a combined reading of para 4.03 of the Foreign Trade Policy in force at the time of issuance of the Authorisations, and the Notification No.31/2003 dated 1.8.2013 read with Circular No.3/2013 (RE-2013) dated 2.8.2013, makes it obvious that benefit of exemption from payment of customs duty is extended to the input materials, subject to strict condition that such materials would be exclusively used in the manufacture of export goods which would be ultimately exported. Therefore, the importer does not have the liberty to utilize such duty free materials otherwise, nor does he have the freedom to export goods manufactured out of something, which was not actually imported.

5.10 According to the respondents, the test of fulfillment of "pre-import condition" is being determined in the following manner:

*“(i) If the importer fulfills part or complete export obligation, in respect of an Advance Authorisation, even before commencement of any import under the subject AA, it is implied that such imported materials have not gone into production of export goods, by which EO has been discharged. Therefore, "pre-import condition" is violated.*

(ii) *Bill of Entry date of the first import under an Advance Authorisation is prior to the date of Shipping Bill, through*

*which exports have been made. But documentary evidence establishes that the consignments, so imported, were received and goods manufactured out of the same were exported much later. Documentary evidence also proves, part or full of the goods exported, were made out of raw materials, which were not imported under the subject Advance Authorisation. Therefore, "pre-import condition" is violated.*

*(iii) In cases, where multiple input items are allowed to be imported under an Advance Authorisation, and out of a set of import items only a few are imported prior to commencement of export. Evidently, in the production of the export goods, except for the item already imported, the importer utilized materials other than the duty free materials imported under the subject Advance Authorisation. The other input materials are imported subsequently, which do not go into production of the finished goods, exported under the said Advance Authorisation. Therefore, "pre-import condition" is violated.*

*(iv) In some cases, preliminary imports are made prior to export. Subsequent exports are made in a scale which is not commensurate with the imports already made. Scrutiny of particulars of export clearly establishes the fact that the quantum of exports made is much more than the corresponding imports made during that period, establishing the fact that materials used for manufacture of the export goods were procured otherwise. Rest of the imports are made later and corresponding exports are either nil or far less. It is evident that the imported materials have not been utilized in entirety for manufacture of the export goods, and therefore, "pre-import condition" is violated."*

5.11 It is asserted that each and every importer had two options, either to continue paying IGST on the goods imported under Advance Authorisations, without bothering about the physical export/pre-import condition, as they had been doing, since 01.07.2017, or to avail benefit of IGST, but for that they were required to comply with pre-import condition.

6. On behalf of the first respondent– Union of India, an affidavit-in-reply has been filed by the Deputy Director General of Foreign Trade, wherein it has been averred that the Government of India has been taking various steps towards boosting India's share in the international trade. Therefore, the Directorate General of Foreign Trade, Department of Commerce, Government of India, has been formulating and implementing the Foreign Trade Policies under section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The present Foreign Trade Policy, 2015-20 provides a framework for increasing exports of goods and services as well as generation of employment and increasing value addition in the country.

6.1 It is further stated that in order to prevent cash blockage of exporters due to upfront payment of IGST/Compensation Cess on imports of inputs, exemption from IGST/Compensation Cess was granted for goods imported under AA/EPCG authorisations through the issuance of DGFT Notification No.33/2017 dated 13.10.2017 and Customs Notification No.79/2017-Cus dated 13.10.2017 subject to "pre-import condition". It is further averred that exemption from IGST was given through the impugned notification in order to prevent

cash blockage of exporters due to upfront payment of IGST on import of inputs etc. In case of replenishment imports after exports, the issue of cash blockage does not arise. Since exports have already taken place and GST legislation provides for complete zero-rating, extending IGST exemption on replenishment imports would imply double benefit to the authorisation holder. Therefore, the Advance Authorisation holder is not adversely affected and is in no way prejudiced by the impugned notification. The IGST paid on replenishment material can be availed as input tax credit for payment of GST.

6.2 Reliance has been placed upon the decision of the Madurai Bench of the Madras High Court in the case of ***M/s Vedanta Ltd. v. Union of India***, rendered on 29th October, 2018 in W.P. (MD) Nos.18435 to 18438 of 2018 and allied matters.

7. An affidavit-in-reply has also been filed on behalf of the second respondent– Principal Commissioner of Customs, more or less reiterating what has been stated in the affidavits-in-reply filed by the other respondents. It has been stated that the “pre-import condition” is not a new term. Para 4.14 of the Foreign Trade Policy 2015-20 stipulates that imports under Advance Authorisation for physical exports are exempt from whole of the integrated tax and compensation cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 and such imports shall be subject to pre-import condition. The principal customs exemption Notification No.18/2015-Cus. dated 1.4.2015 has also explained situations of pre-import and post-export wherein conditions (iv) and (vi) refer to import made after the

discharge of export obligation (i.e. post-exports). The aforesaid provisions of Foreign Trade Policy 2015-20 have been incorporated and given effect through Customs Notification No.79/2007-Cus. Dated 13.10.2017. Therefore, the condition of pre-import in respect of inputs to be incorporated in the export product under Advance Authorisation cannot be stated to be arbitrary.

8. Mr. Paresh Dave, learned counsel for the petitioner in Special Civil Application No.14558 of 2018, vehemently assailed the impugned condition of pre-import by submitting that this condition is wholly unreasonable and illegal because it would severely hamper exports of goods from India and it would be virtually impossible for most of the manufacturers-exporters (if not for all of them) to avail benefit of Advance Authorisation scheme because of the pre-import condition. It was contended that this condition which has now been laid down for Advance Authorisations has no nexus with the objective of the Advance Authorisation scheme and that this condition appears to have been inserted in para4.14 of Foreign Trade Policy and also in the customs exemption notification without any rationale, basis or objective. It was argued that such condition has no nexus with the objective of encouraging exports for which Advance Authorisation Scheme is constituted. According to the learned counsel, only because levies in the nature of central excise duty and CVD are withdrawn and the GST regime is introduced by subsuming all such duties and taxes, there is no reason or justification for introducing “pre-import condition” for the Advance Authorisation Scheme. There is no rationale or logic for such condition when the Scheme has been operating successfully

for more than fifteen years, and there is even otherwise no possibility of any misuse of the exemption for goods imported against valid Authorisations due to actual user condition. It was submitted that only because the GST has been ushered in, putting condition of pre-import is not justified.

8.1 It was emphatically argued that the “pre-import condition” virtually sets at naught the entire Advance Authorisation scheme because it is impossible to comply with this condition. It was submitted that for executing export orders, the Indian manufacturers normally get three to four months by virtue of such condition of delivery laid down under sales contract/purchase order. After lodging an application for Authorisation, three to four weeks are taken by the DGFT Office to grant the Authorisation; the negotiations with overseas suppliers of concerned inputs/materials would take some time, and delivery of such inputs and materials, including transportation which is ordinarily through sea, normally takes about three to four weeks; customs clearance of such goods and bringing them to the factory would require about one week; then the production of finished goods upon utilization of such imported goods/materials would take about ten to fifteen days; and delivery of the goods to the overseas buyer would also take a few weeks depending upon the location of the buyer and availability of a sea going vessel after the goods are cleared from the manufacturer’s factory; and thus a period of five to six months would be required if "pre-import condition" is followed for executing an export order. It was urged that it would be virtually impossible to honour the obligation and commitment of delivering goods within three to four months, which is the period of delivery

normally agreed in international trade.

8.2 Mr. Dave submitted that moreover, there is no benefit that the Government derives out of such "pre-import condition", inasmuch as if money is paid as taxes, it will be allowed by way of credit and ultimately have to be returned, but in the process, the funds get blocked. Therefore, such condition is *ultra vires* articles 14 and 19(1)(g) of the Constitution of India.

8.3 Reliance was placed upon the decision of the Supreme Court in the case of ***Express Newspapers v. Union of India***, *(1985) 1 SCC 641*, for the proposition that even if the power to grant exemption under section 25 of the Customs Act, 1962 is assumed to be a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation, even then the notification is liable to be questioned on the ground that it is an unreasonable one. It was submitted that there has been no "pre-import condition" in respect of duty free imports under Advance Authorisation scheme in the past, and therefore, it is not understandable as to why such a condition is now imposed by the Central Government with regard to the Advance Authorisation scheme. It was pointed out that all import duties leviable on goods imported in India against a valid Authorisation have been exempt right from the time when the Central Government has introduced the scheme of Advance Licence (now called Advance Authorisation) for facilitating genuine manufacturer-exporters. Even after the introduction of GST levies, the policy of the Government not to actually collect import duties including integrated tax as well as GST

compensation cess continues; but exemption from such levies, which are nothing but in the nature of import duties, is allowed subject to “pre-import condition”, which is not at all justified because a new nomenclature of an import levy would not change the nature of such levies nor the nature of exemption allowed from recovery of import duties for goods imported against Advance Authorisations. It was submitted that only because local levies like central excise duty, service tax and value added tax are now subsumed in one tax, namely, goods and services tax, and accordingly, integrated tax and compensation cess are levied under section 3 of the Customs Tariff Act instead of levying Additional Customs Duty equal to the duties of excise levied and collected on similar goods if manufactured in India, the exemption from such import duties cannot be made subject to fulfillment of a new condition like “pre-import condition”. It was urged that when no such “pre-import condition” had ever been laid down by the Central Government while allowing exemption from import duties for the goods imported against Advance Authorisations, laying down such “pre-import condition” now only because of change in the local levies (viz. exemption from GST instead of excise duty, service tax, value added tax etc.) is wholly unjustified and irrational. It was contended that the impugned “pre-import condition” apparently does not have any relevance to the policy and purpose of the Advance Authorisation scheme, and therefore, imposition of such condition is a colourable exercise of powers by the Central Government.

8.4 The attention of the court was invited to Chapter 4 of the Handbook of Procedure, 2015-20 and more particularly to paragraph 4.27 thereof, to submit that exports in anticipation

of authorisation are still allowed thereunder. It was submitted that the procedure laid down by way of Hand Book of Procedure for implementing the provisions of the Foreign Trade Act as well as the provisions of Foreign Trade Policy still allows a person to export goods in anticipation of Authorisation after lodging an application through the EDI system and obtaining a file number for an Advance Authorisation. However, this procedure is set at naught in view of the "pre-import condition" now imposed vide paragraph 4.14 of the Foreign Trade Policy and clause (xii) of Notification No.18/2015-Cus. It was contended that the fact that the Central Government has not made any change in paragraph 4.14 of the Hand Book of Procedure accompanying the Foreign Trade Policy, 2015-20, also signifies that "pre-import condition" has no nexus with any objective sought to be achieved under the Advance Authorisation scheme. Such condition is, therefore, not a *bona fide* restriction on genuine manufacturer-exporters and has been imposed in colourable exercise of powers and deserves to be struck down as such in the interest of justice.

8.5 It was submitted that the Advance Licence scheme, now called Advance Authorisation, has been in operation for more than a decade; and this scheme under the Foreign Trade Policy as well as exemption from import duties allowed under the Customs Act for goods imported against Advance Licence/Authorisation have been successfully implemented in the form that existed prior to 13.10.2017. In other words, even without "pre-import condition", the provisions of the Foreign Trade Policy for Advance Authorisation and the provisions of the exemption notifications under the Customs

Act for goods imported against Advance Licences/ Authorisations have been successfully operated.

8.6 It was contended that it is nobody's case that because of absence of "pre-import condition" under the Foreign Trade Policy and Customs notification, the Government's objective in respect of Advance Authorisation Scheme under the Foreign Trade Policy was defeated, or that there was abuse or misuse of the provisions of the Foreign Trade Policy and/or Custom notifications in absence of "pre-import condition". It was submitted that on the contrary, absence of "pre-import condition" has resulted in a very healthy situation of manufacturer-exporters like the petitioners, continuously manufacturing and exporting goods, and such cycle resulting in a substantial foreign exchange income for the Union Government. Therefore, imposing "pre-import condition" now under the Foreign Trade Policy as well as the Customs notification is wholly unreasonable, arbitrary and illogical action on part of the Central Government. This condition would hit manufacturer-exporters like the petitioners so hard that it would be virtually impossible for them to export goods availing the benefit of Advance Authorisation scheme, and such a situation would not only result in violation of fundamental rights of a citizen under article 19(1)(g) of the Constitution of India, but it would also adversely affect the interest of the Union Government since there will no longer be any foreign exchange earnings.

8.7 It was submitted that since the manufacturer-exporters like the petitioners cannot comply with "pre-import condition", the imports shall have to be made on payment of integrated

tax as well as GST compensation cess and such other levies; and thereafter the manufacturer-exporters would have to avail ITC (Input Tax Credit) under the GST laws for utilizing such ITC for payment of GST and such levies for domestic transactions; and refund shall have to be claimed for such ITC if it could not be utilized for other transactions. Thus, in the ultimate analysis, the Union Government shall not earn any revenue; whereas manufacturer-exporters shall have to undergo the rigors of paying such levies at the time of import of the goods and then availing its credit or refund. But substantial funds of the manufacturer-exporters would remain blocked for a long time, and any procedural irregularity or infraction while claiming ITC or refund would result in a situation where such credit would remain unutilized with the manufacturer-exporters. Thus, “pre-import condition” does not result in any revenue accrual for the Union Government and, therefore, also, such condition has no rationale or logical connection with the policy and purpose of the GST, nor with the Foreign Trade Act and the Foreign Trade Policy framed thereunder.

8.8 It was further submitted that compliance of “pre-import condition” is even otherwise an impossibility because it is not possible for manufacturer-exporters like the petitioners to satisfy the revenue officers about utilization of the goods imported against a particular Authorisation in relation to manufacture of finished goods exported for fulfillment of export obligations of that Authorisation. Only in case of goods having identification marks like serial number or machine number and the like, it may be possible to establish utilization of such goods imported against a particular Authorisation in respect of that particular Authorisation. But, in cases like the

present one where goods are imported with reference to quantities and weight without any specific identification marks, it is virtually impossible to establish that a particular consignment of goods imported against a specific Authorisation was utilized for manufacture of finished goods which were exported for fulfillment of export obligations of that Authorisation only. Therefore, even if "pre-import condition" were to be adhered to, it would not be possible for the manufacturer-exporters to establish before the revenue officers that the goods so imported prior to manufacture and export of the finished goods were actually utilized in relation to manufacture of a particular consignment of finished goods which was exported for fulfillment of obligations qua such Authorisation. The "pre-import condition" is, thus, impossible to be fulfilled.

8.9 Mr. Dave next submitted that many manufacturer-exporters like the petitioner have been granted Authorisations prior to 13.10.2017 when there was no "pre-import condition" either in the Foreign Trade Policy or in the Customs notification. Exports have been made by all such manufacturer-exporters by offering them as fulfillment of export obligation in respect of Authorisations which are utilized for duty free imports subsequently. But "pre-import condition" now laid down by the Union Government would take away the vested right of such manufacturer-exporters in respect of duty free imports against such Authorisations. It was submitted that the petitioners and similarly situated manufacturer-exporters would not be in a position to avail exemption under Notification No.18/2015-Cus by importing any goods against pending Authorisations because exports have already been

made in respect of such Authorisations and would, therefore, be gravely prejudiced.

8.10 Lastly, it was pointed out that subsequently by a notification dated 10th January, 2019 being Notification No.53/2015-20, the Government has found deletion of condition (xii) to be in public interest, and, therefore, now the controversy involved in the present case is limited to a period of about thirteen months only, between 13.10.2017 and 9.1.2019. It was submitted that the amendment is only curative though it has taken a longer time.

8.11 Reliance was placed upon the decision of this court in the case of ***Shree Renuka Sugars Ltd. v. Union of India***, *2018 (360) ELT 483 (Guj.)*, wherein the court referred to the decision of the Supreme Court in the case of ***W.P.I.L. Ltd. v. Commissioner of Central Excise, Merut,*** *2005 (181) E.L.T. 359 (SC)*, wherein the court considered a case where exemption notification was withdrawn and a fresh notification was issued shortly thereafter exempting duty of excise on parts used in manufacturing of power driven pumps. The court noted that there was a consistent policy of the Government of India to grant such exemption. The later notification did not grant exemption for the first time. It was held that such notification was merely clarificatory and hence, would apply with retrospective effect. The court also placed reliance upon the decision of this court in the case of ***Gujarat Paraffins Pvt. Ltd. v. Union of India***, *2012 (282) E.L.T. 33 (Guj.)*, where the court has considered a case where the Government of India had taken corrective measure of reintroducing the exemption after a gap of about sixteen months, and held that

such exemption would have retrospective effect. It was submitted that in the facts of the present case, there was no condition of pre-import insofar as the Advance Authorisation Scheme is concerned and subsequently, by the above notification dated 10.1.2019, the condition for pre-import had been deleted, and, therefore, such amendment should be considered to be a curative amendment and be applied retrospectively.

8.12 It was submitted that insofar as the Government is concerned, it is not possible for it to give retrospective effect. In this regard, the attention of the court was invited to the decision of the Supreme Court in the case of ***Cannanore Spg. And Wvg. Mills Ltd. v. Collector of Customs and Central Excise***, *(1969) 3 SCC 112*, wherein the court held that the rule-making authority has not been vested with the power under the Central Excise and Salt Act to make rules with retrospective effect and therefore, the retrospective effect purported to be given under Ex. P-12 was beyond the powers of the rule-making authority. It was submitted that the Notification dated 10.1.2019 would still hit the petitioners for the period prior thereto and the grievance for thirteen months still survives.



8.13 Reliance was placed upon the decision of the Supreme Court in the case of ***Vasu Dev Singh v. Union of India***, *(2006) 12 SCC 753*, for the proposition that the nature of delegated legislation can be broadly classified as: (i) the rule-making power; and (ii) grant of exemption from the operation of a statute. In the latter category, the scope of judicial review would be wider as the statutory authority while

exercising its statutory power must show that the same had not only been done within the four corners thereof but otherwise fulfills the criteria laid down by the Supreme Court in *P. J. Irani v. State of Madras, AIR 1961 SC 1731*. The court held that if by a notification, the Act itself stands effaced; the notification may be struck down. It was submitted that the entire Advance Authorisation scheme is effaced by virtue of the pre-import condition and therefore, such condition is required to be struck down. Reliance was placed upon the decision of the Supreme Court in the case of ***Laxmi Khandsari v. State of U.P.***, *(1981) 2 SCC 600*, wherein the court held that in imposing restrictions, the State must adopt an objective standard amounting to a social control by restricting the rights of the citizens where the necessities of the situation demand. When the validity of a law placing restriction upon the exercise of fundamental rights in article 19(1) is challenged, the onus of proving to the satisfaction of the court that the restriction is reasonable lies upon the State. It was submitted that this is not a case of first time exemption. Now that they seek to place restriction, the respondents must show that the condition has been inserted is to remove some evil, else such condition would be violative of the petitioner's right under article 19(1)(g) of the Constitution of India. It was, accordingly, urged that there being no rationale behind introducing the condition of pre-import which has no nexus with the object sought to be achieved by the Advance Authorisation Scheme, the same is violative of the petitioner's fundamental rights under article 19(1) of the Constitution of India, and deserves to be set aside.

9. Mr. Abhishek Rastogi, learned counsel with Mr.

Pratyushprava Saha, learned advocate for the petitioners in Special Civil Applications No.15184 and 15186 of 2018 and Mr. Aayush Mehrotra and Mr. Digant Popat, learned advocates for the petitioners in Special Civil Application No.15743 of 2018, submitted that Notification No.18/2015-Customs dated 1.4.2015 was issued in public interest and hence, the subsequent notification cannot overlook the public interest. It was submitted that the Advance Authorisation Scheme introduced vide Notification No.18/2015-Customs dated 1.4.2015 was intended to grant upfront exemption on the import of inputs which would be used in the manufacture of goods that are exported. It was submitted that with effect from 1st July, 2017, the curtailment of the benefit of upfront exemption on Integrated Goods and Service Tax and Compensation Cess chargeable under section 3(7) and section 3(9) of the Customs Tariff Act, 1975, payable on the inputs and subsequent conditional allowance of such upfront exemption with effect from 13th October, 2017 was not in accordance with the spirit of the scheme. It was submitted that the right to avail the input tax credit of the IGST paid by the petitioners on the inputs stems from the right granted under section 16 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") empowers the petitioners to avail credit of any taxes paid on inputs, services and capital goods which are used in the course or furtherance of business. There is no additional benefit being given under the Advance Authorisation Scheme.

9.1 It was argued that the amending customs notification fails to define the term "pre-import condition" and that the absence of a clear direction as to what would amount to a

"pre-import condition", makes such condition ambiguous and vague and hence, the petitioners cannot be compelled to adhere to the same. It was submitted that the ambiguity of the manner in which "pre-import condition" has to be fulfilled is illustrated by the problems faced in the following scenarios:

(a) Considering the business model run by the petitioners, all imports cannot be made at once. Import of raw material must be done in batches and depends on export order. It is unclear whether "pre-import" signifies that all imports under the licence should be made before any export of the finished goods.

(b) Owing to the absence of a clear definition of "pre-import", the petitioners are unsure whether they have met "pre-import" obligation when one batch is imported under a particular Advance Authorisation licence before exports whereas the other batch is imported after meeting export obligation. It is also unclear whether this qualifies as a violation of "pre-import condition" for all transactions made under the licence. That further begs the question whether the fulfillment of the conditions should be looked at qua the transaction or qua the Advance Authorisation.

(c) It is also unclear whether, in order to satisfy the "pre-import condition", the petitioners are required to showcase records indicating one-to-one co-relation of the imported inputs with the finished products. While it may be possible for the automobile sector to adhere to this requirement, as its inventory of inputs can be easily identified in its exported products, it may not be possible for the petitioners to identify

inputs based on the date of import, once they get mixed with the stock of inputs already procured.

(d) The petitioners businesses are such that exports will occur as per export orders received and it may not be possible to fulfill export obligations or meet its export orders when they follow “pre-import condition”. There may also be instances where a batch of inputs is imported, refined and exported before the next batch is imported. This would mean that there would be intermittent or overlapping transactions of import and export, in such cases, the petitioners would be penalized for violation of pre-import conditions.

9.2 It was submitted that therefore, it is not clear whether the term “pre-import condition” covers all these variations in trade or can these be treated as an exception. All these situations / scenarios showcase the vagueness and arbitrariness with which the "pre-import condition" is sought to be implemented. It was argued that the principle evolved by the courts is that in the face of vagueness, a taxing provision shall fail when it does not satisfy the test given under article 14 of the Constitution. It was submitted that the impugned notifications, by failing to define the term “pre-import condition”, are liable to be struck down under the doctrine of *void* for vagueness. In support of such submission, the learned counsel placed reliance upon the decision of the Supreme Court in case of ***Shreya Singhal v. Union of India***, *AIR 2015 SC 1523*. It was submitted that the impugned condition suffers from the incurable defect of vagueness and is consequently liable to be struck down on this ground alone.

9.3 Mr. Rastogi further submitted that the intelligible differentia is applicable to different classes of exporters. In the present case, there are two sets of exporters, one set is given the benefit of Advance Authorisation Scheme; however, the "pre-import condition" puts both the class on a par, viz., those having advance licences and those who do not. It was submitted that when the levy of IGST on imported goods is given the same treatment as the levy of basic customs duty, there is no reason why the unconditional exemption of basic customs duty granted to licence holders under the Advance Authorisation Scheme cannot be extended to IGST exemption available for goods imported under the same scheme. It was submitted that this differential treatment in respect of IGST benefit as compared to basic customs duty exemption under the customs notification is not justified and fails the test of reasonable classification under article 14 of the Constitution of India.

9.4 Referring to conditions (iv), (v) and (vi) of the impugned notification, it was submitted that there is a direct conflict with the process specified under the said conditions and condition (xii) of the notification. It was submitted that condition (iv) lays down the process in case the imports have been made before the fulfillment of export obligation. There is no indication of any additional obligation that is required to be fulfilled other than execution of a bond. Similarly, in condition (v), the process to be followed in case where the imports follow the discharge of export obligation has been laid out. As per this process, the Advance Authorisation holder is only required to furnish a bond in case it was availing the benefit under rule 18 or 19 of the erstwhile Central Excise Rules, 2002 or CENVAT

Credit Rules, 2004. As per this process, the duty exemption benefit shall still be available if the bond as required is furnished. However, as per condition (vi), where the Advance Authorisation holder has not availed the benefit under rule 18 or 19 of the erstwhile Central Excise Rules, 2002 or CENVAT Credit Rules, 2004, and sufficient proof is submitted to that extent by the Advance Authorisation holder, there is no requirement to furnish any bond. It was submitted that in view of conditions (v) and (vi), it is clear that the intention is to provide the benefit of Advance Authorisation on imports made post-exports. In such a scenario, extending benefit in relation to IGST only to imports under pre-import condition, as laid out in condition (xii), is arbitrary as it renders the options under conditions (v) and (vi) of the impugned notification redundant.

9.5 It was further submitted that the "pre-import condition" is an unworkable restriction, inasmuch as the petitioners had already discharged their export obligation before making exports under the Advance Authorisation, hence, it is impossible for the petitioners to comply with the "pre-import condition" at this stage. Since the law cannot compel the petitioners to do something that is impossible, this unworkable restriction in the form of "pre-import condition" should be set aside.

9.6 Referring to the judgment of the Madurai Bench of the Madras High Court in the case of ***M/s Vedanta Ltd. v. Union of India*** (supra), it was submitted that the court has not understood Appendix 4J and has not considered paragraph 4.13 as 4.14 of the Foreign Trade Policy. It was submitted that there is no revenue risk as referred to by the court, inasmuch

as it is not the case of the respondents that there is diversion of imported goods in the local market. It was urged that the said decision was rendered on the basis of an erroneous understanding of facts and the spirit of the Advance Authorisation scheme and hence, this court may consider the captioned writ petition on their own merits, without relying upon the decision of the Madras High Court. It was, accordingly, urged that the petitions require to be allowed by granting the relief as prayed for therein.

10. Opposing the petitions, Mr. Nirzar Desai, learned Senior Standing Counsel for the respondents, at the outset, submitted that the conditions in the Foreign Trade Policy as well as in the exemption notification being in the nature of a fiscal policy, are not amenable to judicial review and hence, the petitions deserve to be dismissed on this ground alone. Reliance was placed upon the decision of the Supreme Court in the case of ***Indian Oil Corporation Ltd. v. Kerala State Road Transport Corporation***, *(2018) 12 SCC 518*, wherein the court held that the grant of subsidy is a matter of privilege, to be extended by the Government, it cannot be claimed as of right. No writ lies for extending or continuing the benefit of privilege in the form of concession. The court held that the decision of the Government of India not to extend subsidy to bulk consumers, could not be said to be an arbitrary decision, discriminatory or in violation of the principles contained in Article 14 of the Constitution of India and that, such policy decisions are not amenable to judicial review. The court placed reliance upon its earlier decision in the case of ***State of Rajasthan v. J. K. Udaipur Udyog Ltd.***, *(2004) 7 SCC 673*, wherein it was observed that exemption is a privilege. In fiscal

matters, the concession granted by the State Government to the beneficiaries cannot confer upon them legally enforceable right against the Government to grant a concession, except to enjoy the benefits of the concession during the period of its grant. Enjoyment is defeasible one and can be taken away in exercise of very power under which such exemption was granted. It was submitted that therefore, there is no vested right in the petitioners to claim continuation of the earlier policy.

10.1 Reliance was also placed upon the decision of the Supreme Court in the case of ***Shri Bakul Oil Industries v. State of Gujarat***, *(1987) 1 SCC 31*, wherein the court held that a concession can be withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. The court held that as the State was under no obligation, in any manner known to law, to grant exemption, it was fully within its powers to revoke the exemption by means of a subsequent notification.

10.2 It was submitted that the petitioners did not commence import or export on account of any promise held by the Government and that this being an exemption notification, it is always permissible for the Government to withdraw any benefit granted thereunder. It was submitted that initially, under the Foreign Trade Policy and the exemption notification, the benefit of exemption in respect of integrated tax and compensation cess had not been granted and that it was pursuant to the representations made by manufacturers-exporters, that the Notification No.33/2015-2020 and Notification No.79/2017-Cus dated 13.10.2017 had been

issued amending the earlier exemption notification and granting exemption from the levy of integrated tax and compensation cess and, therefore, it is not open for the petitioners to make a grievance in respect of the same, inasmuch as, such amendments have been made on account of the grievances voiced by them. It was submitted that it is not mandatory for the petitioners to avail benefit of exemption and that it is not permissible for them to dictate the terms.

10.3 Insofar as the object of the impugned condition is concerned, it was submitted that there are three fold objectives. It was submitted that exemption from IGST was given through the impugned notification in order to prevent cash blockage of exporters due to upfront payment of IGST on import of inputs etc. In case of replenishment imports after exports, the issue of cash blockage does not arise. Since exports have already taken place and GST legislation provides for complete zero-rating, extending IGST exemption on replenishment imports would imply double benefit to the authorisation holder. It was submitted that IGST paid on replenishment material can be availed as input tax credit for payment of GST.



10.4 Reliance was placed upon the decision of the Supreme Court in the case of ***Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal****, 2010 (260) ELT 3 (SC)*, wherein the court held that the law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain

exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption. It was submitted that in the absence of the impugned condition, the petitioners would be getting double benefit by claiming input credit on the imported goods and not paying taxes on the export.

10.5 The learned senior standing counsel further reiterated the contentions raised in the affidavit-in-reply filed on behalf of the respondents. It was, accordingly, urged that the petitions do not merit acceptance and the impugned condition being part of fiscal policy, no intervention is warranted by this court.



11. In rejoinder, Mr. Paresh Dave, learned counsel for the petitioners submitted that the three reasons assigned by the respondents for placing condition of pre-import are:

(i) replenishment import after exports;

(ii) zero-rating results in double benefit and

(iii) they can get the credit and refund.

It was submitted that there is nothing like replenishment in the present case and it is a continuous cycle whereby goods are

imported and used for manufacture and exported. Moreover, insofar as replenishment is concerned, there are special schemes under the Foreign Trade Policy and there is no question of replenishment under the Advance Authorisation Scheme. It was submitted that scheme of replenishment is totally different from the Advance Authorisation Scheme. Insofar as credit and refund are concerned, it was submitted that under rule 3(1)(vii) of the Cenvat Rules, credit is allowed. Reliance was placed upon the decision of this court in the case of ***Filco Trade Centre Pvt. Ltd. v. Union of India***, *2018 (17) GSTL3 (Guj.)*, wherein the court in the facts of the said case, had observed that since decades, the credits would be available to a first stage dealer on all purchases towards the manufacturing duty. No time frame of the past dealings was envisaged under such rules. The same grounds of physical identification of goods preventing undue advantage being taken and the administrative convenience would exist even then. The court opined that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140 of the CGST Act, such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. The court held that this retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of “in order to co-relate the goods or administrative convenience” prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such

restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year. The court held that the impugned provisions though did not make hostile discrimination between similarly situated persons, the same did impose a burden with retrospective effect without any justification. It was submitted that the above decision would be squarely applicable to the facts of the present case, inasmuch as the same factors, parameters and considerations would prevail even after coming into force GST regime and hence, there is no rational or reasonable basis for imposition of the impugned condition of pre-import. It was submitted that the object of the scheme is (a) boosting of exports, (b) employment generation, and (c) making the exporter and exports competitive in the international market; and therefore, the condition of pre-import has no nexus with the object sought to be achieved and it on the contrary sets the Advance Authorisation Scheme at naught and hence, should be struck down.

11.1 Insofar as the contention raised by the learned advocate for the respondents that this being a fiscal policy, judicial review is barred, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Express Newspapers v. Union of India*** (supra), wherein the court held that the claim made on behalf of the Government that the impugned notifications are beyond the reach of administrative law, cannot be accepted without qualification. The court assumed for the purposes of those cases that the power to grant exemption under section 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate

legislation; and held that even then the notification is liable to be questioned on the ground that it is an unreasonable one. It was submitted that therefore, the contention that the writ petitions challenging the impugned notification will not lie, does not merit acceptance.

12. The principal challenge in these petitions is to the "pre-import condition" in paragraph 4.14 of the Foreign Trade Policy 2015-2020 inserted vide Notification No.33/2015-2020 dated 13.10.2017 and such "pre-import condition" introduced by clause (xii) in Notification No.18/2015-Customs by virtue of Notification No.79/2017-Customs dated 13.10.2017. The challenge arises in the following backdrop:

13. Chapter IV of the Foreign Trade Policy 2015-20 provides for "Duty Exemption/Remission Schemes". One of the duty exemption schemes is the Advance Authorisation (AA). Clause 4.03 of the policy makes provision for Advance Authorisation and reads thus:

> *"**4.03 Advance Authorisation***
> *(a) Advance Authorisation is issued to allow duty free import of input, which is physically incorporated in export product (making normal allowance for wastage). In addition, fuel, oil, catalyst which is consumed/ utilized in the process of production of export product, may also be allowed.*
> *(b) Advance Authorisation is issued for inputs in relation to resultant product, on the following basis:*
> *(i) As per Standard Input Output Norms (SION) notified (available in Hand Book of Procedures);*
> *OR*
> *(ii) On the basis of self declaration as per paragraph 4.07 of Handbook of Procedures."*

13.1 Some other relevant provisions of the Foreign Trade Policy insofar as the controversy involved in the present case, are paragraphs 4.13, 4.14 and 4.16, which, as they stood at the relevant time when Foreign Trade Policy 2015-2020 came to be introduced, read as under:

> *"**4.13 "pre-import condition"in certain cases***
>
> *(i) DGFT may, by Notification, impose "pre-import condition" for inputs under this Chapter.*
>
> *(ii) Import items subject to "pre-import condition" are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).*
> *(iii) Import of drugs from unregistered sources shall have pre-import condition."*
>
> *"**4.14 Details of Duties exempted***
>
> *Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any."*
>
> *"**4.16 Actual User Condition for Advance Authorisation***
>
> *(i) Advance Authorisation and/or material imported under Advance Authorisation shall be subject to 'Actual User' condition. The same shall not be transferable even after completion of export obligation. However, Authorisation holder will have option to dispose of product manufactured out of duty free input once export obligation is completed.*
>
> *(ii) In case where CENVAT/input tax credit facility on input has been availed for the exported goods, even after completion of export obligation, the goods*

*imported against such Advance Authorisation shall be utilized only in the manufacture of dutiable goods whether within the same factory or outside (by a supporting manufacturer). For this, the Authorisation holder shall produce a certificate from either the jurisdictional Customs Authority or Chartered Accountant, at the option of the exporter, at the time of filing application for Export Obligation Discharge Certificate to Regional Authority concerned.*

*(iii) Waste / Scrap arising out of manufacturing process, as allowed, can be disposed off on payment of applicable duty even before fulfillment of export obligation."*

13.2 In exercise of powers conferred under paragraph 1.03 of the Foreign Trade Policy 2015-2020, the Director General of Foreign Trade (DGFT) has notified the Handbook of Procedures by a Public Notice dated 1st April, 2015. Paragraph 4.27 thereof provides for "Exports in Anticipation of Authorisation" and to the extent the same is relevant for the present purpose, reads thus:

*"**4.27 Exports in Anticipation of Authorisation***

*(a) Exports/supplies made from the date of EDI generated file number for an Advance Authorisation, may be accepted towards discharge of EO. Shipping/Supply document(s) should be endorsed with File Number or Authorisation Number to establish co-relation of exports/supplies with Authorisation issued."*

13.4 Thus, this paragraph permits exports in anticipation of authorisation and permits exports towards discharge of export obligation on the basis of the file number even prior to Advance Authorisation being granted. This condition has not been modified and export in anticipation of authorisation is

permitted. This policy still exists.

14. By virtue of Notification No.18/2015-Cus. dated 1.4.2015 issued in exercise of powers under sub-section (1) of section 25 of the Customs Act, 1962, materials imported into India against a valid Advance Authorisation were exempted from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 and from the whole of the additional duty, safeguard duty, transitional product specific safeguard duty and anti-dumping duty leviable thereon, respectively, under sections 3, 8B, 8C and 9A of the Customs Tariff Act.

15. When the Goods and Services Tax Acts came into force with effect from 1st July, 2017, there was no corresponding amendment in this notification. However, section 3 of the Customs Tariff Act, 1975 came to be amended by substituting sub-section (7) and sub-section (9) thereof, whereby levy of integrated tax as leviable under section 5 of the Integrated Goods and Service Tax Act, 2017 and levy of Goods and Service Tax compensation cess at such rate as is leviable under section 8 of the Goods and Service Tax (Compensation to States) Cess Act, 2017 [GST compensation cess] came to be incorporated therein. Sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act, as amended, reads thus:

> *"(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding 40% as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8).*

*(9) Any article which is imported into India shall, in addition, be liable to the Goods and Services Tax compensation cess at such rate, as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (10).”*

16. Thus, section 3 of the Customs Tariff Act, as amended after the coming into force of the GST regime, provides for levy of the following additional duties:

- sub-section (1) provides for levy of a duty (referred to as additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India;
- sub-section (3) provides for levy of such additional duty as would counter-balance the excise duty leviable on any raw materials, components and ingredients of the same nature as, or similar to those, used in the production or manufacture of such article;
- sub-section (5) provides for such additional duty as would counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India [SAD];
- sub-section (7) provides for levy of integrated tax as leviable under section 5 of the Integrated Goods and Services Tax Act, 2017; and
- sub-section (9) provides for levy of Goods and Services Tax compensation cess at such rate as is leviable under section 8 of the Goods and Services Tax (Compensation to States) Cess Act, 2017 [GST compensation cess].

17. However, since there was no corresponding notification exempting the additional duties leviable under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act, the exporters were required to pay integrated tax and GST compensation cess and take input tax credit as applicable under GST Rules. However, import under Advance Authorisation continued to be exempt from payment of basic customs duty and additional customs duty specified in sub-sections (1), (3) and (5) of section 3 of the Customs Tariff Act, education cess, anti-dumping duty, safeguard duty and transition product specific safeguard duty, wherever applicable.

18. It appears that since integrated tax and GST compensation cess was levied even against Advance Authorisation, the same came to be challenged before the Delhi High Court in a number of petitions, wherein interim relief came to be granted. According to the respondents (as averred in the affidavits-in-reply), because of the problem of goods and services tax, the committed refund of IGST was getting delayed, which resulted in blocking of working capitals for many businesses.



19. Thereafter, the Central Government issued an amending notification dated 13th October, 2017 in exercise of powers under sub-section (1) of section 25 of the Customs Act, 1962 being Notification No.79/2017-Cus dated 13.10.2017 *inter alia* amending the opening paragraph of Notification No.18/2015-Cus dated 1.4.2015 whereby the material imported into India was exempted from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs

Tariff Act and from the whole of the additional duty leviable thereon under sub-sections (1), (3) and (5) of section 3, integrated tax leviable thereon under sub-section (7) of section 3 and goods and services tax compensation cess leviable under sub-section (9) of section 3 of the Customs Tariff Act. The amending notification also introduced a proviso in condition (viii), after the proviso which reads thus:

> *"Provided further that notwithstanding anything contained hereinabove for the said authorisations where the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act, has been availed, the export obligation shall be fulfilled by physical exports only;"*

Moreover, the above notification also inserted condition (xii) which reads thus:

> *"(xii) that the exemption from integrated tax and the goods and services tax compensation cess leviable thereon under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act shall be subject to pre-import condition."*

20. Thus, insofar as the exemption from levy of integrated tax leviable thereon under sub-section (7) of section 3 and goods and services tax compensation cess leviable under sub-section (9) of section 3 of the Customs Tariff Act is concerned, it was subject to the rider that the exemption from integrated tax and GST compensation cess shall be subject to the

condition that the export obligation shall be fulfilled by physical exports only and shall also be subject to “pre-import condition”. Significantly, together with the amendment of the exemption notification, vide Notification No.33/2015-2020 dated 13th October, 2017, paragraph 4.14 of the Foreign Trade Policy 2015-2020, has also been amended and now reads thus:

> "***4.14: Details of Duties exempted***.
>
> *Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition.”*

21. It is the insertion of the condition of pre-import in condition (xii) in Notification No.18/2015-Cus and paragraph 4.14 of the Foreign Trade Policy which hurts the petitioners and similarly situated persons the most. For the purpose of deciding the validity of condition (xii) of the above notification and the pre-import condition in paragraph 4.14 of the Foreign Trade Policy, it would be necessary to examine the relevant provisions of the Foreign Trade Policy and Handbook of Procedure to understand how the scheme of Advance

Authorisation operates.

22. Paragraph 4.27 of the Foreign Trade Policy envisages exports in anticipation of authorisation and as noticed earlier, in terms of the cycle of import-manufacture-export carried out by the petitioners, the delivery time allowed by the overseas buyers is about three to four months. The approximate time taken for the entire cycle from receipt of export order to transportation for export of overseas buyers, as put forth by the petitioners, is as follows:

| Sr.No. | Particulars | Normal time taken |
|---|---|---|
| 1 | Application for Advance Authorisation and granting the Authorisation | 3 to 4 weeks |
| 2 | Locating a supplier, price negotiations, placing purchase order and delivery of inputs/ materials at Indian Port (Normal transit time in sea transportation being 3 to 4 weeks). | 3 months |
| 3 | Customs clearance and transportation from the Port to the factory | 1 week to 10 days |
| 4 | Manufacture of finished goods by utilizing imported materials | 10 days to 15 days |
| 5 | Transportation of the goods from factory to the Port and customs clearance at the Port | 1 week to 10 days |
| 6 | Transportation for export to overseas buyer's place | 3 to 4 weeks |

23. Thus, it takes approximately a minimum of six months for the cycle to be completed. In case of many exporters, the period of delivery can be less than three to four months also, whereas the time taken as shown in paragraph 22 would be

more or less similar, that is, about six months. Now, if the exporter has to manufacture goods for export only after receipt of the Advance Authorisation and against inputs imported under the respective Advance Authorisations, it would not be possible for the exporter to give delivery within three to four months, in which case the overseas buyer would not be interested in purchasing goods from him and would look for buyers elsewhere.

24. Now, in view of the condition of pre-import as interpreted by the Directorate of Revenue Intelligence and other revenue authorities, insofar as exemption from levy of integrated tax and GST compensation cess against an advance licence is concerned, the goods allowed under the authorisation are required to be imported first and such goods are required to be utilized for the purpose of manufacture of the finished goods, which are in turn exported under the Advance Authorisation. It has been asserted in the affidavit-in-reply of the Directorate of Revenue Intelligence (DRI) that “pre-import” condition means that the entire materials covered by the Advance Authorisation should invariably be imported first, either in entirety or in a phased manner, for use in the process of manufacture of the finished goods, which in turn would be exported, towards the said Advance Authorisation only. It is not necessary to import in totality, one is allowed to import in piecemeal, if need be. The only condition is that, the materials imported duty free under a specific Advance Authorisation has to be used for manufacture of the goods to be exported under the said Advance Authorisation towards discharge of export obligation. Physical incorporation of the duty free imported materials in the export goods is the demand of pre-import

condition, which is required to be religiously followed.

25. As to how rigorous and stringent this process is as per the DRI can be better understood from the averments made in the affidavit-in-reply of the DRI, the relevant portion whereof is extracted herein below for ready reference:

> *"9.10 Primarily DRI has taken up cases involving violations of the provisions of the recently amended Policy in terms of para 4.14 of the Foreign Trade Policy (2015-20) read with Customs Notification No.79/2017 dated 13.10.2017. The cases can be divided into two broad categories-*
>
> *a. IGST benefit being availed against Advance Authorisations, for which export obligations have been discharged through deemed exports, either in full or partially. This is in clear contravention of the requirement of the Policy and the Customs notification, which demand, fulfilling EO through physical exports only, therefore, the importers are not eligible for IGST exemption.*
>
> *b. IGST benefit availed against Advance Authorisations without observing the pre-import condition. Again, such non-observance of pre-import condition is in direct conflict with the basic requirement of para 4.14 & the customs notification, and the goods, so imported, become ineligible for such benefit of IGST against such imports. The test of fulfillment of pre-import condition is being determined in the following manner:*

*(i) If the importer fulfills part or complete export obligation, in respect of an Advance Authorization, even before commencement of any import under the subject AA, it is implied that such imported materials have not gone into production of export goods, by which EO has been discharged. Therefore, pre-import condition is violated.*

*(ii) Bill of Entry date of the first import under an Authorisation is prior to the date of Shipping Bill, through which exports have been made. But documentary evidence establishes that the consignments, so imported, were received and goods manufactured out of the same were exported much later. Documentary evidence also proves part or full of the goods exported, were made out of raw materials, which were not imported under the subject Advance Authorisation. Therefore, pre-import condition is violated.*

*(iii) In cases, where multiple input items are allowed to be imported under an Advance Authorisation, and out of a set of import items only a few are imported prior to commencement of export. Evidently, in the production of the export goods, except for the item already imported, the importer utilized materials other than the duty free materials imported under the subject Advance Authorisation. The other input materials are imported subsequently, which do not go into production of the finished goods, exported under the said Advance*

*Authorisation. Therefore, pre-import condition is violated.*

*(iv) In some cases, preliminary imports are made prior to export. Subsequently exports are made in a scale which is not commensurate with the imports already made. Scrutiny of particulars of export clearly establishes the fact that the quantum of exports made is much more than the corresponding imports made during that period, establishing the fact that materials used for manufacture of the export goods were procured otherwise. Rest of the imports are made later and corresponding exports are either nil or far less. It is evident that the imported materials have not been utilized in entirety for manufacture of the export goods, and therefore, pre-import condition is violated."*

26. Thus, in case there is any shortage of raw material imported against an Advance Authorisation, to meet with such exigency, if the importer uses raw material imported against another Advance Authorisation, it will be considered as breach of pre-import condition. In case the exports are made in anticipation of authorisation in terms of paragraph 4.27 of the Handbook, since the raw material used in the goods so imported would not have been imported under that particular advance licence, the "pre-import condition" would be held to be violated and consequently, the importer would be denied exemption from levy of integrated tax and GST compensation cess. Thus, an importer who manufactures goods in a cycle as delineated in some of the earlier paragraphs, would no longer be in a position to do so and all exports made in anticipation of

authorisation as permitted by paragraph 4.27 of the Handbook of Procedure would be held to be in breach of the "pre-import condition" insofar as levy of integrated tax and GST compensation cess are concerned. Therefore, in respect of all Advance Authorisations which were subsisting on the date when the exemption notification in respect of integrated tax and GST compensation cess was issued, the condition of pre-import would be likely to have been violated and the importer would not be entitled to the benefit of exemption.

27. Considering the above interpretation of the condition of physical export and pre-import put forth by the DRI, it is more or less impossible to make any exports under an Advance Authorisation without violating the condition of pre-import. In effect and substance, what is given by one hand is taken away by the other. In other words, in the light of the condition of pre-import, the benefit of exemption from levy of integrated tax and GST compensation cess becomes more or less illusory.

28. At this stage, it may also be germane to refer to paragraphs 4.13 and 4.14 of the Foreign Trade Policy before and after the amendment of paragraph 4.14 vide notification No.33/2015-2020 dated 13th October, 2017, which read thus:

> *"**4.13 "pre-import condition" in certain cases***
>
> *(i) DGFT may, by Notification, impose "pre-import condition" for inputs under this Chapter.*
>
> *(ii) Import items subject to "pre-import condition" are listed in Appendix 4-J or will be as indicated in Standard Input Output Norms (SION).*

*(iii) Import of drugs from unregistered sources shall have pre-import condition."*

"***4.14: Details of Duties exempted***.

*Imports under Advance Authorisation are exempted from payment of Basic Customs Duty, Additional Customs Duty, Education Cess, Anti-dumping Duty, Countervailing Duty, Safeguard Duty, Transition Product Specific Safeguard Duty, wherever applicable. Import against supplies covered under paragraph 7.02 (c), (d) and (g) of FTP will not be exempted from payment of applicable Anti-dumping Duty, Countervailing Duty, Safeguard Duty and Transition Product Specific Safeguard Duty, if any. However, imports under Advance Authorisation for physical exports are also exempt from whole of the integrated tax and Compensation Cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, 1975 (51 of 1975), as may be provided in the notification issued by Department of Revenue, and such imports shall be subject to pre-import condition."*

29. Thus, paragraph 4.13 is a provision which is specifically made for "pre-import" condition and provides for the categories of cases to which such condition has to be applied. In paragraph 8 of the affidavit-in-reply of the Directorate of Revenue Intelligence it has been stated that "*Para 4.13 (Foreign Trade Policy-2015-20) has been in existence (under different Paras in different Policy periods) for years. Since, 2003, all drug companies have been importing their raw materials sourced from unregistered sources, under pre-import condition. Silk in any form, Raw Sugars, Natural Rubbers, Tea Spices and precious metals etc are allowed to be imported under pre-import condition only. As already stated, pre-import condition is in-built within the Advance Authorization Scheme itself, and in terms of Para 4.04 of the Policy, which is integral part of the Policy since its inception, it*

*has been continually hammered upon the potential exporters, that they are allowed to import those inputs under Advance Authorisation scheme, which would be physically incorporated in the export goods*." Thus, even according to the respondents, there is a specific provision in the Foreign Trade Policy specifying inputs which are to be imported under pre-import condition, viz. paragraph 4.13. Therefore, if a condition of pre-import has to be put in respect of any input, ideally such input should find place in paragraph 4.13 of the Foreign Trade Policy, which is not so in the present case. Due to the condition of pre-import contained in paragraph 4.14 and condition (xii) of the notification, though the inputs imported by the petitioners may not fall within the categories enumerated in paragraph 4.13 of the Foreign Trade Policy and are as such not subject to the pre-import condition, the same become subject to the condition of pre-import qua specific levies viz. integrated tax and GST compensation cess, which creates an anomalous situation, inasmuch as the import of the inputs against an Advance Authorisation is subject to several levies under section 3 of the Customs Tariff Act and in respect of the levies under sub-sections (1), (3) and (5) thereof, there is no pre-import condition; however, insofar as integrated tax and GST compensation cess leviable under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act, 1975 are concerned, for the purpose of exemption from such levies, such imports would be subject to "pre-import condition", as a result of which if the importer wants the benefit of exemption from the levy of integrated tax and GST compensation cess, the fact that the other levies are not subject to "pre-import condition" becomes immaterial inasmuch as the same input would be subject to the pre-import condition qua integrated

tax and GST compensation cess which would, therefore, result in the input being subject to pre-import condition in respect of all the levies.

30. At this juncture, reference may be made to paragraph 9.8 of the affidavit-in-reply filed on behalf of the Directorate of Revenue Intelligence, which reads thus:

> *"9.8 Present or the erstwhile Policy, has never had any provision for issuance of Advance Authorizations, compartmentalizing it into multiple sections, part of which may be compliant to a particular set of conditions and another part with a different set of conditions. Agreeing to the claim of considering part of the imports in compliance with pre-import condition, when it is admitted by the importer that pre-import condition has been violated in respect of an Advance Authorization, would require the Policy to create a new provision, to accommodate such diverse set of conditions in a single Authorization. Neither the present set of Policy nor the Customs notification has any provision to consider imports under an Advance Authorization by hypothetically bifurcating it into an Authorization, simultaneously compliant to different set of conditions. As of now, the Advance Authorisations are embedded with a particular set of conditions only. An authorisation can be issued either with pre-import condition or without it. Law doesn't permit splitting it into two imaginary set of Authorizations, for which requirement of compliances are different."*

31. Reference may also be made to paragraph 5 of the letter dated 3.4.2018 of the Directorate of Revenue Intelligence addressed to the petitioner M/s Maxim Tubes Company Private Limited (Annexure-R), wherein it has been stated thus:

> *"5. Combined provisions of the Policy and the subject Customs Notification, clearly mandate only imports under pre-import condition would be allowed with the benefit of such exemption. Therefore, no such exemption can be availed, in respect of the Advance Authorizations, against which exports have already been made before commencement of import. In particular because, an Advance Authorisation cannot be bifurcated or compartmentalize to make a portion of import made under it conforming Pre-import condition, and the rest otherwise."*

32. Thus, in terms of the interpretation put forth by the DRI as referred to hereinabove, compliance is required of the authorisation as a whole and in case the condition of pre-import is violated, the entire Advance Authorisation gets vitiated. Consequently, even paragraph 4.27 of the Handbook, which is specifically applicable to Advance Authorisation, just remains in the Handbook and has no relevance whatsoever. Firstly, for the reason that if the importer wants the benefit of exemption from integrated tax and GST compensation cess in respect of such imports, he has to comply with the "pre-import condition"; and secondly, because in terms of the interpretation put forth by the Directorate of Revenue Intelligence violation of condition of pre-import would vitiate the entire authorisation, which may mean that in case of breach of condition of pre-import, the importer may be denied all the benefits available under such Advance Authorisation, including exemption in respect of levies other than integrated

tax and GST compensation cess, in respect of which there is no “pre-import condition”. Therefore, export in anticipation of Advance Authorisation as contemplated in paragraph 4.27 of the Handbook and the “pre-import condition” contained in paragraph 4.14 of the Foreign Trade Policy and condition (xii) of the exemption notification, cannot stand together.

33. Thus, by virtue of the amended paragraph 4.14 of the Foreign Trade Policy, even in case of inputs not falling within the ambit of paragraph 4.13, if such inputs have been imported against an Advance Authorisation, the same are subject to “pre-import condition” insofar as claim for exemption from the levy of integrated tax and GST compensation cess under sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act is concerned. In other words, all the raw materials imported against an advance licence are subject to the “pre-import condition”. Thus, while under the Foreign Trade Policy, vide paragraph 4.13 specific inputs have been subjected to the condition of pre-import considering the nature of such inputs, under paragraph 4.14 which merely provides for the details of duties exempted, all the raw materials imported under an Advance Authorisation, whatever be their nature, have been made subject to “pre-import condition” for the purpose of availing the benefit of exemption from integrated tax and GST compensation cess.

34. Moreover, a piquant situation has been created whereby the very same inputs which are not subject to “pre-import condition” insofar as payment of basic customs duty, additional customs duty, education cess, anti-dumping duty, safeguard duty and transition product specific safeguard duty

are concerned, are subject to condition of pre-import insofar as integrated tax and GST compensation cess are concerned, thereby setting at naught the first part of paragraph 4.14, inasmuch as if the very same inputs are subject to the condition of pre-import qua some levies, it would amount to importing the inputs subject to the condition of pre-import even qua the other levies. Thus, an anomalous situation has arisen, whereby the second part of paragraph 4.14 is inconsistent with the first part thereof and renders the first part redundant.

35. The Foreign Trade (Development and Regulation) Act, 1992 has been enacted to provide for development and regulation of foreign trade by facilitating imports into, and augmenting exports from India and for matters connected therewith or incidental thereto. The Foreign Trade Policy, 2015-2020 has been notified in exercise of powers conferred under section 5 of the Foreign Trade (Development and Regulation) Act, 1992. The objective of the Foreign Trade Policy, 2015-2020, as stated in the affidavit-in-reply of the Director General of Foreign Trade is to provide a framework for increasing exports of goods and services as well as generation of employment and increasing value addition in the country. Paragraph 1.06 of the Foreign Trade Policy provides thus:

> *"**1.06 Objective**:*
>
> *Trade facilitation is a priority of the Government for cutting down the transaction cost and time, thereby rendering Indian exports more competitive. The various provisions of FTP and measures taken by the Government in the direction of trade facilitation are consolidated under this chapter for the benefit of*

*stakeholders of import and export trade."*

Another objective of the Foreign Trade Policy as can be culled out from paragraph 4.4 of the affidavit-in-reply filed on behalf of the first respondent is to prevent cash blockage of exporters due to upfront payment of IGST/Compensation Cess on import of inputs. Therefore, the objective of the policy is to boost exports by facilitating trade. One of the means of facilitating such trade is to prevent cash blockage of exporters due to upfront payment of IGST/Compensation Cess on import of inputs.

36. The question that arises for consideration is whether the impugned "pre-import condition" in any manner furthers the objective of the Foreign Trade Development Act and the Foreign Trade Policy. From the facts as emerging from the record as discussed hereinabove, in view of the "pre-import condition", it is not possible for the manufacturers-exporters to import duty free imports against an Advance Authorisations. Besides, considering the stand adopted by the Department of Revenue Intelligence in its affidavit-in-reply as referred to hereinabove, the policy has been interpreted very stringently by them in view whereof, if the condition of pre-import is not satisfied, the importer would not get any benefit under the Advance Authorisation, even in respect of levies which are not subject to "pre-import condition". The consequence is that with the advent of the Goods and Services Tax regime (which merely subsumes the earlier levies), on account of the condition of pre-import stipulated to get the benefit of exemption from the levy of integrated tax and GST compensation cess, imports under the Advance Authorisation

scheme (which has been operating successfully since many years without the condition of pre-import), have become next to impossible, which certainly does not subserve the objective of the Act and the Foreign Trade Policy. Moreover, in absence of compliance with the condition of pre-import, the exporters would be liable to make upfront payment of IGST/Compensation Cess on import of inputs, thereby defeating the objective of preventing cash blockage of exporters. When a scheme is formulated by the respondents, it has to be workable as a whole. The scheme of Advance Authorisation has been working smoothly without any hitch for all these years (nothing has been pointed out on behalf of the respondents that there were any difficulties or irregularities on account of non-imposition of the "pre-import condition"), therefore, in the absence of anything adverse, there was no necessity to change the scheme by subjecting the two levies referred to in sub-section (7) and sub-section (9) of section 3 of the Customs Tariff Act to the condition of pre-import. More so, when the Foreign Trade Policy has a separate paragraph 4.13 which provides for "pre-import condition" in respect of specific inputs, there is no rationale for placing a condition of pre-import qua any inputs than those specified under paragraph 4.13. As discussed hereinabove, though in paragraph 4.14 the condition of pre-import is not qua specific inputs, but for availing benefit of exemption from levy of integrated tax and GST compensation cess, in effect and substance, it operates as a condition for pre-import qua all the raw material imported under an Advance Authorisation.

37. Last but not least, vide Notification No.01/2019-Cus dated 10th January, 2019, the Central Government in the Ministry of

Finance (Revenue Department), in exercise of powers conferred by sub-section (1) of section 25 of the Customs Act, 1962, on being satisfied that it is necessary in the public interest so to do, has amended Notification No.18/2015 dated 1st April, 2015, whereby, *inter alia*, condition (xii) has been omitted. Therefore, the Government has found it to be in public interest not to have a condition of pre-import for availing the benefit of exemption from integrated tax and GST compensation cess leviable on material imported against an Advance Authorisation, which vindicates the stand of the petitioners.

38. Clearly therefore, the condition of pre-import militates against the Advance Authorisation Scheme and therefore, the impugned condition (xii) in Notification No.18/2015-Cus dated 1st April, 2015 introduced vide Notification No.79/2017 dated 13th October, 2017 as well as the amendment in paragraph 4.14 of the Foreign Trade Policy made vide Notification No.33/2015-2020 dated 13th October, 2017, to the extent the same imposes a "pre-import condition" in case of imports under Advance Authorisation for physical export for exemption from the whole of the integrated tax and GST compensation cess leviable under sub-section (7) and sub-section (9) respectively, of section 3 of the Customs Tariff Act, do not meet with the test of reasonableness and are also not in consonance with the scheme of Advance Authorisation. For the reasons recorded hereinabove, this court respectfully does not agree with the view taken by the Madurai Bench of the Madras High Court in ***M/s Vedanta Ltd. v. Union of India*** (supra).

39. At this stage, the contentions advanced on behalf of the

revenue may also be dealt with. The contention in paragraph 9.4 of the affidavit-in-reply that physical incorporation of the duty free imported materials in the export goods is the demand of pre-import condition, which is required to be religiously followed and that the aspect of physical incorporation of the input materials in the export goods has been covered under paragraph 4.03 of the Foreign Trade Policy, 2015-2020, which specifically demands for such physical incorporation of imported material in the export goods, which is possible only when imports are made prior to export; does not explain as to why when physical incorporation was already provided under paragraph 4.03, there was any necessity to impose condition of pre-import under paragraph 4.13. Such contention therefore, does not merit acceptance. Besides, such contention also flies in the face of paragraph 4.27 of the Handbook, which specifically allows imports in anticipation of Advance Authorisation.

40. The stand of the respondents before this court is that the petitioners have a choice not to avail of the benefit of Advance Authorisation if they are not happy with the conditions therein and that the petitioners cannot dictate what the policy should be. In the opinion of this court, the take it or leave it stand adopted by the respondents in the various affidavits filed before this court, does not behove the Central Government. The Government cannot grant a benefit on the one hand and take it away on the other, and say that it is open for the beneficiary to take it or leave it. Such benefit then becomes illusory and consequently though a benefit is sought to be granted under sub-section (1) of section 25 of the Customs Act, in effect and substance, there is no benefit at all. The

powers under sub-section (1) of section 25 of the Customs Act have to be exercised in public interest and not for the sake of exercising such powers. Clearly therefore, the impugned condition which renders the very scheme of Advance Authorisation nugatory, does not have any nexus to the objective of the Advance Authorisation Scheme, viz., to boost exports, rendering it unsustainable in law.

41. On behalf of the respondents, to justify the condition of pre-import, it has been stated and repeatedly re-stated that exemption from IGST was given through the impugned notification in order to prevent cash blockage of exporters due to upfront payment of IGST on import of inputs etc. In case of replenishment imports after exports, the issue of cash blockage does not arise. Since exports have already taken place and the GST legislation provides for complete zero-rating, extending GST exemption on replenishment imports would imply double benefit to the authorisation holder.

42. Thus, though paragraph 4.27 of Handbook of Procedures notified in exercise of powers under paragraph 1.03 of the Foreign Trade Policy, 2015-2020 clearly permits exports in anticipation of authorisation by endorsing the file number or authorisation number to establish co-relation of export/supplies with authorisation issued, the respondents want to treat such permissible imports made in anticipation of authorisation as replenishment, and though for the purpose of benefit of exemption from the other levies imposed under sections 3(1), 3(3) and 3(5) of the Customs Tariff Act for decades the procedure was permitted, and is permitted even now, for the purpose of exemption from levy of IGST and GST

compensation cess, such imports have suddenly become replenishment imports. As to how such imports are replenishments is incomprehensible. The learned counsel for the petitioners has submitted that there is nothing like replenishment in the present case and that, it is a continuous cycle whereby materials are imported for manufacture, used for the purpose of manufacturing the export goods, and exported. One fails to understand as to how import of goods in anticipation of Advance Authorisation under paragraph 4.27 of the Handbook and permitted in respect of other levies under section 3 of the Customs Tariff Act, amounts to replenishment merely because the taxes which were earlier in the nature of sales tax etc., are now subsumed in the goods and services tax. Furthermore, the learned counsel for the respondents has not been able to explain the same to this court. Moreover, insofar as replenishment is concerned, there are special schemes under the Foreign Trade Policy, which are specifically replenishment schemes. The Advance Authorisation scheme does not envisage replenishment of inputs and hence, there is no question of replenishment involved insofar as this scheme is concerned.



43. Insofar as the benefit of zero-rating resulting in double benefit is concerned, rule 3(1)(vii) of the Cenvat Credit Rules allows credit. Prior to July, 2017, if duties were paid under sub-sections (3) and (5) of section 3 of the Customs Tariff Act, credit was admissible. However, now the levies under sub-sections (3) and (5) of section 3 of the Customs Tariff Act are replaced by sub-sections (7) and (9) of section 3 of the Customs Tariff Act and there is no change in the basic scheme warranting a different procedure.

44. At this stage, reference may be made to the decision of this court in the case of ***Filco Trade Centre Pvt. Ltd. v. Union of India*** (supra), wherein this court held thus:

> *"30. To sum up we are of the opinion that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140A such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year.*
>
> *31. In the conclusion we hold that though the impugned provision does not make hostile discrimination between similarly situated persons, the same does impose a burden with retrospective effect without any justification."*

45. Insofar as the contention regarding double benefit to the exporter is concerned, except for raising such contention, despite a pointed query by the court, the learned counsel for the respondents is not in a position to point out as to how the exporter gets any double benefit.

46. Insofar as the contention regarding maintainability of these writ petitions challenging a policy decision is concerned,

it may be apposite to refer to the decision of the Supreme Court in ***Express Newspapers v. Union of India*** (supra), wherein the court proceeded on the assumption that for the purposes of those cases the power to grant exemption under section 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation, and held that even then the notification is liable to be questioned on the ground that it is an unreasonable one. Thus, the contention that this being a policy decision is beyond the pale of challenge before this court, does not merit acceptance.

47. In the facts of the present case, having regard to the scheme of Advance Authorisation and the historical background as well as the contentions advanced on behalf of the respondents, and considering the fact that for years together right since the inception of the Advance Authorisation Scheme, the Government did not find any nexus between the condition of pre-import and the objective of this Scheme, this court is of the considered view that the impugned exemption notification and paragraph 4.14 of the Foreign Trade Policy, to the extent the same are subject matter of challenge in these petitions, cannot be said to meet with the test of reasonableness.

48. In the light of the above discussion, this court is of the view that paragraph 4.14 of the Foreign Trade Policy whereby a condition of pre-import has been put for availing the benefit of exemption from levy of integrated tax and GST compensation cess vide Notification No.33/2015-2020 dated 13th October, 2017 as well as the condition (xii) inserted in

Notification No.18/2015 dated 1st April, 2015 vide Notification No.79/2017 dated 13.10.2017, are *ultra vires* the scheme of the Foreign Trade Policy, 2015-2020 and the Handbook of Procedure and are, therefore, required to be quashed and set aside.

49. While the respondents have now amended the exemption notification being Notification No.18/2015 dated 1st April, 2015, by deleting condition (xii), such notification has not been given retrospective effect. The learned counsel for the petitioners has drawn the attention of the court to the decision of the Supreme Court in ***Cannanore Spg. And Wvg. Mills Ltd. v. Collector of Customs and Central Excise*** (supra) for the proposition that the rule-making authority has not been vested with the power under the Central Excise and Salt Act to make rules with retrospective effect, to submit that, therefore, even if the respondents do consider the grievances of the petitioners, they would not be in a position to grant any relief as the notification cannot be given retrospective effect, and hence, it would not be possible for the respondents to grant the benefit of deletion of condition of pre-import retrospectively. It, therefore, appears that the Government, even if so deems fit, may not be in a position to grant the benefit given under the notification dated 10th January, 2019 retrospectively. The grievance of the petitioners for the period under consideration would, therefore, have to be addressed by this court.

50. For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The “pre-import condition” contained in paragraph 4.14 of the Foreign Trade Policy, 2015-2020

inserted vide Notification No.33/2015-2020 dated 13.10.2017 and inserted vide clause (xii) in Notification No.18/2015-Cus vide Notification No.79/2017-Cus dated 13.10.2017, are hereby struck down as being *ultra vires* the Advance Authorisation Scheme as contained in the Foreign Trade Policy, 2015-2020 as well as the provisions of the Handbook of Procedures. Consequently, all proceedings initiated for violation of "pre-import condition" would no longer survive. Rule is made absolute accordingly in each of the petitions, with no order as to costs.

**(HARSHA DEVANI, J)**

**(A. P. THAKER, J)**

B.U. PARMAR