

Jumbo Trumpets...

UNINTELLIGIBLE DIFFERENTIA

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In a recent judgement, the Hon'ble Supreme Court, in the case of **Union of India & Ors. vs Cosmo Films Limited in Civil Appeal No(s). 290 of 2023** has overturned the decision of the Gujarat High Court, in the case of **Maxim Tubes Company Pvt Ltd. vs Union of India** reported in 2019 (2) TMI 1445 – Gujarat HC and to us, it's a bit painful overturn.

Time immemorial, imports under Advance Authorisation Scheme (AA) were exempt from payment of all import duties, namely BCD, CVD etc. With the advent of GST w.e.f July 2017, there was no threshold exemption for the IGST as well as Comp. Cess (CC), if any, payable at the time of importation under AA and the importers have to pay the IGST / CC payable on the imported goods and then take ITC of the same and thereafter get refund of the same, upon exports under AA.

In Oct 2017, the Foreign Trade Policy (FTP) as well as the corresponding Customs Notification were amended to give threshold exemption to IGST and CC for the imports made against AA but with two specific conditions, namely, the imports shall be exempt from IGST / CC only under a “pre-import condition” as well as they should be used only against “physical exports”. It is also pertinent to mention that the above conditions were exclusive to the IGST / CC exemptions under AA and were not there for the other import duties, namely BCD, etc.



Further in Jan 2019, better sense prevailed and the FTP as well as the corresponding Customs notification were amended to delete the above two conditions for the IGST / CC for the imports against AA and made it at par with the other Customs duty exemptions, namely BCD.

When the matter went to the Hon'ble HC of Gujarat, in a very reasoned judgement, the HC decided that the above two conditions were unreasonable causing impediment to the exporters on various counts and struck them down. In other words, the HC made the IGST / CC exemptions for the imports under AA free of any such conditions and made it at par with the BCD exemption, EVEN FOR THE PERIOD BETWEEN OCT 2017 TO JAN 2019.

The Revenue went on appeal against the HC decision and the Apex Court has set aside the Gujarat HC decision and has held that the two conditions, supra, brought under FTP as well as the Customs Notifications are valid and also refused to apply the Jan 2019 wisdom to the previous period between Oct 2017 to Jan 2019.

While doing so, the Apex Court has given a finding that the DGFT had powers as per Para 4.13(i) to include all articles to impose the 'pre-import condition'. It had also observed that, the discretion available in para 4.13(i) of the FTP to the DGFT means there is flexibility in regard to the nature of policies to be adopted, having regard to the state of export trade, and concessions to be extended in the trade and tax regime.



With utmost regard and respect to the Apex Court decision, we are left with the following doubt:

Para 4.13(i) of the FTP reads as under: “DGFT may, by Notification, impose pre-import condition for **inputs** under this Chapter.” *Emphasis supplied.*

This means that the DGFT has powers to impose the “pre-import condition” on any inputs but whether this would also give them power to impose pre-import condition on one levy and not to impose on another levy. In other words, whether the DGFT has the powers to impose such condition on any input BUT SHOULD IT HAVE BEEN UNIFORM TO ALL THE LEVIES. As stated earlier, for the same input, the “pre-import condition” was not available to BCD whereas the condition was cast for IGST/CC.

To us, this discrimination is an “unintelligible differentia” among similar taxes and has been exercised without any discretion, notwithstanding any authority.

Before Parting...

Since the Hon'ble Supreme Court has directed the CBIC to issue guidelines to allow input tax credit on the IGST payable consequent to this order, the authors feel that, having succeeded in the matter, the CBIC should be graceful to bring an amnesty for waiver of interest for the period from Oct 18 to Jan 19.

