Customs and trade newsletter

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Policy updates, notifications and instructions

1. Relief in average export obligation in terms of Para 5.19 of Handbook of Procedures of FTP 2015–20[1]

For specified product groups comprising items such as image projectors, other than cinematographic, specified ores, nitrogenous mineral or chemical fertiliser and antibiotics, which experienced a decline of more than 5% in exports in 2021–22 compared to 2020–21, relief in terms of reduction in average export obligation is notified by the Directorate General of Foreign Trade (DGFT).

Accordingly, the DGFT has directed the regional offices to refix the annual average export obligation for Export Promotion Capital Goods (EPCG) authorisation for 2021–22 for the specified product groups as notified.

2. Amendment in import policy condition for implementation of CIMS[2]

Under the Coal Import Monitoring System (CIMS), the importer is required to apply for registration within a minimum of the 60th day and a maximum of the 15th day before the expected date of arrival of the import consignment[3]. However, the DGFT has now reduced the maximum time limit from 15 days to five days for registration purposes.

3. Requirement of registration of foreign food manufacturing facilities as per Food Safety and Standards (Import) First Amendment Regulations, 2021[4]

The Food Safety Standards Authority of India (FSSAI) has requested all the exporting countries to provide a list of existing manufacturers intending to export the following high-risk food products[5] to India in the specified format.

- Milk and milk products;
- Meat products including poultry, fish and their products;
- Egg powder;
- Infant food; and
- Nutraceuticals.

Based on the list of manufacturers provided by the competent authority of the exporting country, such facilities will be registered by the FSSAI on its portal.

4. Development of Digital ICS of Animal Quarantine and Certification Services (AQCS) to enhance Single Window Interface for Facilitating Trade[6]

The AQCS has developed the Digital Import Clearance System (ICS), which would enable migration from the current system of seeking online 'No Objection Certificate' through the Indian Customs EDI System to online message exchange mode. This facility will be introduced from 1 December 2022 on similar lines such as the FSSAI and Plant Quarantine Management System.

1 Policy Circular No. 44/2015-20 dated 17 November 2022
2 Notification No. 41/2015-20 dated 7 November 2022
3 As per the Policy Condition No. 7(ii) of Chapter 27 of Schedule-I (Import Policy) of ITC(HS) 2022
4 Instruction No. 30/2022-Customs dated 14 November 2022
5 Requiring mandatory registration from 1 February 2023 *vide* order dated 10 October 2022
6 Circular No. 24/2022-Customs dated 28 November 2022

5. Extending exemption benefit to display assembly of mobile phones under various FTAs[7]

Post alignment of HSN 2022, an issue existed on the availability of exemption to display assembly under Free Trade Agreements (FTAs), more specifically, under the Comprehensive Economic Partnership Agreement (CEPA) with Korea.

Now the Central Board of Indirect Taxes and Customs (CBIC) has amended the various FTA notifications by inserting a new entry into the FTA exemption schedule in the following exemption notifications to extend the benefit to flat panel display modules without driver or control circuit for cellular mobile phones[8]:

Notification No.	FTA
Notification No. 73/2005-Customs dated 22 July 2005	India–Singapore Comprehensive Economic Cooperation Agreement (CECA)
Notification No. 151/2009-Customs dated 31 December 2009	India–Korea CEPA
Notification No. 46/2011-Customs dated 1 June 2011	India– Association of Southeast Asian Nations FTA
Notification No. 53/2011-Customs dated 1 July 2011	India–Malaysia CECA
Notification No. 69/2011-Customs dated 29 July 2011	India–Japan CEPA

6. The CBIC has made the following recent updates or amendments effective from 19 November 2022

- To withdraw export duty on specified iron ore and steel products[9];
- To withdraw basic customs duty exemption on anthracite and PCI coal, coke and semi-coke and ferronickel[10]; and
- To withdraw the Agriculture Infrastructure and Development Cess exemption on anthracite, PCI coal and coking coal[11].

7 Notification No. 61/2022-Customs dated 25 November 2022
8 Referring to CTH 8524.11.00 or CTH 8524.12.00 or CTH 8524.19.00
9 Notification No. 58/2022-Customs dated 18 November 2022
10 Notification No. 59/2022-Customs dated 18 November 2022
11 Notification No. 60/2022-Customs dated 18 November 2022

Key judgments

1. 'Viewsonic Creative Touch Interactive Flat Panel' are ADP machines classifiable under CTH 8471.41.90[12]

In the instant case, the applicant sought an advance ruling on the classification of 'Viewsonic Creative Touch Interactive Flat Panel'. The subject good is an all-in-one (AIO) computer system that functions like a large-size tablet computer and has an inbuilt motherboard, microprocessor, graphics card and memory plus storage. It also has an embedded Android Operating System (OS).

The matter involved a question on whether to classify the subject goods as automatic data processing (ADP) machines (i.e., referring to CTH 8471.41.90) or as other units of ADP machines (i.e., referring to CTH 8471.80.00).

To merit classification under heading 8471, the goods must be capable of performing the following functions in terms of the relevant chapter notes[13]:

- Storing the processing programme;
- Freely programmed following the requirements of the user;
- Performing arithmetical computations; and
- Executing, without human intervention, a processing programme that requires them to modify their execution by logical decision during the processing run.

Considering that the product met the above conditions, the Customs Authority for Advance Ruling held that the good merits classification under CTH 8471.41.90 as 'Other ADP machines'.

Furthermore, relying on the technical literature, working and features of the good, the authority concluded that the good is an AIO system, which is a fully functional ADP machine that operates without restrictions.

2. Considering the principal function as ADP, 'tablet computers' are classifiable under CTH 8471.30.90.[14]

In the instant case, the applicant sought an Advance Ruling on whether portable and touch computers[15] are classifiable under the CTH 8471.30.90 as 'portable ADP machines'.

These goods are portable devices used to run mobile apps, capture bar codes, shoot photographs and videos and provide voice and data communications. These devices combine personal computer and scanning functions in a single device that can be outfitted with custom software applications that monitor deliveries, track assets and manage inventories. They work on Windows or Android OS and offer the same functionality as a desktop computer or laptop.

The Customs Authority for Advance Ruling, relying on the functionalities and features of the said product, highlighted Note 3 to section XVI of the Customs Tariff Act, 1975, which clearly stipulates that a composite machine performing various functions should be classified according to the principal function performed by such a device. In the instant case, for the products under consideration, ADP appears to be the main function, while other functionalities are auxiliary and can be viewed on any desktop or laptop computer.

Considering the principal function as ADP, tablet computers are classifiable under CTH 8471 and not under CTH 8517, even though the product has cellular connection functionality. The circular[16] highlights that the

[12] Ruling No. CAAR/Mum/ARC/31/2022
[13] Note 6(A) to Chapter 84 of Customs Tariff Act, 1975
[14] Ruling No. CAAR/Mum/ARC/32/2022
[15] Vehicle mount mobile computer, rugged wearable voice and data mobile computer, enterprise tablet, rugged tablet, mobile computer, mobile computers with integrated handheld ultrahigh frequency, Radio Frequency Identification reader
[16] Circular No. 20/2013-Customs dated 14 May 2013

difference between a 'smartphone' and 'tablet computer', is not based on whether the product has a voice calling function or not but on the principal features for which it has been designed and developed.

Therefore, the Customs Authority for Advance Ruling concluded that based on the principal function, portable or tablet computers appear to merit classification under CTH 8471.30.90 as 'portable ADP machines'.

3. Rough and semi-finished casting being parts of injection moulding machines are classifiable under CTH 8477.90.00[17]

In the instant case, the applicant sought an Advance Ruling on the classification of spheroidal graphite iron castings (whether rough or semi-finished) designed following the design of the injection moulding machine. The size, shape and function of the casting parts are specific to the model and the size of the injection moulding machines. These castings have their own specific function or role in the process and cannot be used for any other purpose. These are parts of the injection moulding machine suitable for use solely with a particular machine type.

The Customs Authority for Advance Ruling clarified that the explanatory notes to CTH 7325 (covering other cast articles of iron or steel) provide for the following exclusions:

- Castings that are products falling under other headings of the nomenclature (e.g., recognisable parts of machinery or mechanical appliances); or
- Unfinished castings that require further working but have attained the essential character of such finished products.

As injection moulding machines are classifiable under CTH 8477.10.00, the rough and semi-finished casting (basis the drawings shown) are specifically covered under CTH 8477.90.00 as 'parts' of the injection moulding machine.

4. Drone kits including products with individual functionality will be separately classifiable[18]

In the instant case, the applicant sought an Advance Ruling on the classification of the DJI Mini 3 Pro Fly More drone kit and the rate of duty applicable to the said product.

The composite kit is used specifically in photography with the DJI Mini 3 Pro drone. The said unmanned aerial vehicle, incorporating a built-in camera for aerial videography and photography, is categorised as a nano drone according to Drone Rules, 2021. The composite kit under consideration comprises the following items:

- Intelligent flight battery;
- Two-way charging hub;
- Propellers;
- Screws;
- Shoulder bag; and
- USB 3.0 type -C data cable.

The above goods were presented as a kit comprising separately classifiable items. These items were packed together for retail sale. As individual products in the kit do not meet a particular need or carry out a specific activity (e.g., the shoulder bag and USB type-C data cable could be used for purposes other than for the drone), each product will merit a separate classification based on its individual functionality.

Accordingly, the Customs Authority for Advance Ruling ruled that the goods will be classified under their respective heading and assessed for the customs duty as applicable to that specific classification.

[17] Ruling No. CAAR/Mum/ARC/37/2022
[18] Ruling No. CAAR/Mum/ARC/33/2022

5. Price of contemporaneous goods can only be considered for valuation when goods are imported at the same time, subject to the lowest import price available for comparison[19]

In the instant case, the import of Polyvinyl Chloride (PVC) flex sheet occurred from April to July 2006, while the import of similar goods happened in February 2006, based on which import value was enhanced by the customs authorities.

The Ahmedabad bench of the Customs Excise and Service Tax Appellate Tribunal (CESTAT), noted that one of the conditions while applying the price of contemporaneous goods is that the import of similar goods should have occurred at the same time. As both the imports did not occur simultaneously and the market of PVC flex sheet during that period was volatile, the import value of a similar good will not be considered comparable.

Lastly, the CESTAT observed that the said goods were imported at a lower cost, insurance and freight value during that period by another third-party importer. Therefore, the CESTAT held that while applying the price of contemporaneous goods when more than one price is available, the lowest price should be considered for the assessment. Hence, the enhancement of import value is not justified.

6. 'Condition of sale' becomes a mandatory test for Customs Valuation[20]

In the instant case, the importer was engaged in the import of two goods, i.e. 'fermenters and control panel assembly' and 'design engineering and site run' under separate bills of entry (BoE). However, as the said goods were sold together in a single contract and also imported together under the same airway bill, the officers alleged that they were meant to be used together, and hence, the value of the design engineering and site run was required to be added to the value of the fermenters under Rule 9(1)(e) of the Customs Valuation Rules, 1988 (now, Rule 10(1) (e) of Customs Valuation Rules, 2007) (Valuation Rules).

Rule 9(1)(e) of the Valuation Rules deals with any other payments made by the buyer to the seller as a condition of the sale of the imported goods. The New Delhi bench of the CESTAT held that the sale of the design engineering and site run was not a condition for the sale of the fermenters by the overseas supplier because the fermenters were also sold without the design engineering and site run. Moreover, the agreements and invoices nowhere reflected that unless the importer buys the design engineering and site run, the fermenters will not be sold. Therefore, the CESTAT held that the value of the design engineering and site run cannot be included in the assessable value of the fermenters.

7. Importer cannot be deprived of substantive benefit due to an inadvertent error[21]

In the present case, the importer requested an amendment in its BoE to avail of the benefit of an existing exemption notification that was missed out because of an inadvertent error on the part of the clearance house agent.

The Ahmedabad bench of the CESTAT held that the amendment of the BoE under section 149 of the Customs Act, 1962 is permissible based on the documentary evidence that existed at the time when goods were cleared. As the existing exemption notification existed and was available to the importer at the time of the filing of the BoE, the amendment was allowed.

8. Limitation period of one year will not apply when the duty is paid under protest[22]

The matter involved a question of whether the limitation period of one year under section 27(1B) of the Customs Act, 1962 will apply to the refund claim of duty paid under protest.

The Chennai bench of the CESTAT clarified that the second proviso to section 27(1) of the Customs Act, 1962 states that the limitation of one year will not apply when the duty is paid under protest and emphasised the wordings of sub-section (1B), which starts with the phrase 'save as otherwise provided in this section', thereby implying 'except to the extent a specific provision is made'. In other words, if no

[19] 2022-TIOL-979-CESTAT-AHM
[20] 2022-TIOL-1027-CESTAT-DEL
[21] 2022-VIL-798-CESTAT-AHM-CU
[22] 2022-VIL-852-CESTAT-CHE-CU

exception has been provided in the section, then in all cases, the limitation of one year must be computed from the date on which the judgement, decree or order of the court has been passed.

Therefore, as the said proviso specifically highlights that the limitation of one year is not applicable in case the duty is paid under protest, the operation of sub-section (1B) will not come into effect in the instant case.

9. The DGFT has the power only to clarify the doubts raised on the interpretation of the FTP and not to amend or introduce new conditions under the FTP[23]

In the instant case, the exporter applied for the Status Holder Incentives Scrip (SHIS) benefit as it is engaged in the export of plastic products that are eligible for such an incentive. However, the Addl. DGFT rejected the application on the ground that the exporter is operating as a 100% EOU, and thus, not eligible for the SHIS benefit.

The Madras High Court held that the Foreign Trade Policy (FTP) nowhere restricts the issuance of SHIS to a 100% EOU. Further, reliance was placed on the judgement in the case of Yum Restaurants[24] wherein the court held that the DGFT is only empowered to interpret the FTP, and hence, cannot introduce new conditions and criteria under the guise of interpreting the FTP. The court remarked that the DGFT is only provided power to clarify the doubts raised on the interpretation of the FTP and by applying such powers the DGFT cannot amend the FTP itself.

Therefore, as the FTP does not restrict benefits under SHIS to 100% EOUs and the plastic category products are clearly eligible for such an incentive, the benefit of SHIS would be allowed.

10. Refund of duty paid on account of clerical errors does not require re-assessment of BoE and can be corrected under section 154 of the Customs Act, 1962[25]

In the instant case, during the post-clearance audit, the importer was issued a letter demanding the anti-dumping duty (ADD) on imported goods. Later, the ADD was found to be wrongly charged, and hence, the importer filed a refund of such erroneous ADD collected. However, the refund claim was rejected on the ground that the assessment of BoE was not challenged by the importer.

The Ahmedabad bench of the CESTAT relied on the judgements of Tata Iron & Steel Co. Limited *v.* CC (Port), Kolkata and Celcius Refrigeration Private Limited *v.* CC, New Delhi, wherein for clerical errors, re-assessment was held not needed before the filing of the refund claim and that such clerical mistakes can be corrected in terms of the provisions of section 154 of the Customs Act, 1962. The CESTAT opined that where a refund is the logical consequence of correction of some clerical or accidental error, under section 154 of the Customs Act, 1962, the importer should not be denied the benefit merely because no appeal was made against the BoE or assessment order.

11. Import of capital goods by exporters availing of the benefit of export incentive schemes will be exempted from IGST and Compensation Cess with effect from 1 July 2017[26]

With the introduction of the GST regime, imports made under the EPCG scheme were exempted from IGST and Compensation Cess through an amendment notification[27]. However, in the instant case, the importer had already paid the IGST on the import of capital goods under the EPCG scheme for the period 1 July 2017 to 13 October 2017, and therefore, contended that such exemption should have a retrospective effect and hence, he must be refunded with the IGST paid so far.

The Bombay High Court noted that the Central Government always intended to exempt imports of capital goods under the EPCG scheme from payment of additional duty. Therefore, the amending notification must be read as being clarificatory or curative in nature. Otherwise, the whole class of importers who had imported capital goods under the said scheme during the relevant period would be left uncovered from the GST and Compensation Cess exemption. Thus, the importer was entitled to a refund of IGST paid on such imports.

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23 TS-487-HC-2022(MAD)-FTP
24 TS-13-HC-2015(DEL)-FTP
25 2022-TIOL-1016-CESTAT-AHM
26 2022-VIL-773-BOM-CU
27 Notification No. 79/2017-Customs dated 13 October 2017