



## ERGO

*Analysing developments impacting business*

### GUJARAT HIGH COURT STRIKES DOWN PRE-IMPORT CONDITION

9 February 2019

On 4 February 2019, the Gujarat High Court, in the case of Yasho Industries Limited, Cosmo Films Limited and Gujarat Fluorochemicals Limited quashed the pre-import condition for advance authorisation scheme. The summary of this landmark decision argued by us is provided below:

#### Background

On introduction of the Goods and Services Tax (GST) on 1 July 2017, up-front exemption was not allowed with respect to Integrated GST (IGST) in case of imports under the advance authorisation scheme. We filed and argued several writ petitions against this anomaly. The Delhi High Court issued favourable interim orders (final favourable orders followed) to allow duty free imports. Subsequently, vide Notification Number 79/2017-Cus, dated 13 October 2017, the up-front exemption was granted to all exporters subject to a 'pre-import' condition.

The term 'pre-import' was not defined in the notification. The authorities, including the Directorate of Revenue Intelligence (DRI) narrowly interpreted this condition to mean that the export obligation should be fulfilled only after all imports under the advance authorisation license are completed and that there should be a one-to-one correlation between imports and exports.

This condition was challenged in various Courts and we obtained interim relief in a few petitions. Consequently, the Government, vide Notification Number 1/2019-Cus, dated 10 January 2019, removed the 'pre-import' condition prospectively. As a corollary, the issue gained significance for the period from 13 October 2017 to 9 January 2019.

#### Arguments of the petitioners

- The 'pre-import' condition is violative of Article 14 of the Constitution to the extent that it creates an artificial discrimination between exporters who proactively fulfil their export obligations prior to import of goods (i.e. import for the purpose of replenishment of stocks) vis-à-vis other assesseees
- The arbitrary 'pre-import' imposed does not satisfy the objective of the scheme and defeats the public interest

- Under Chapter IV of the Foreign Trade Policy, 'pre-import' condition can be imposed only in case of specific products such as drugs, etc. and hence, cannot be imposed on all imports
- 'Pre-import' condition is unconstitutional based on the doctrine of void for vagueness
- Fulfilment of the 'pre-import' condition in certain cases may lead to impossibility of performance
- Policy or executive decisions are not beyond the pale of judicial scrutiny

## Gujarat High Court decision

The Gujarat High Court pronounced the order on 4 February 2019, to quash the 'pre-import' condition as being *ultra vires* the Constitution. A copy of the order is awaited.

## Comment

*The 'pre-import' condition was causing undue hardship to exporters who had opted for the advance authorisation scheme. The Gujarat High Court has put an end to this misery even for the interim period between 13 October 2017 to 10 January 2019 by striking down the pre-import condition as arbitrary, ultra vires and violative of the Constitution.*

*It is hoped that the Government issues appropriate amendment/clarification so that the 'pre-import' condition is made redundant from its very inception.*

- *Abhishek A Rastogi (Partner) and Abhishek Deodhar (Associate)*

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)

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### Mumbai

One Indiabulls Centre, 13<sup>th</sup> Floor  
Tower 1 841, Senapati Bapat Marg  
Mumbai 400 013, India

T: +91 22 6636 5000  
E: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)

### New Delhi

Ashoka Estate, 12th Floor  
24 Barakhamba Road  
New Delhi 110 001, India

T: +91 11 4151 5454  
E: [delhi@khaitanco.com](mailto:delhi@khaitanco.com)

### Bengaluru

Simal, 2nd Floor  
7/1, Ulsoor Road  
Bengaluru 560 042, India

T: +91 80 4339 7000  
E: [bengaluru@khaitanco.com](mailto:bengaluru@khaitanco.com)

### Kolkata

Emerald House  
1 B Old Post Office Street  
Kolkata 700 001, India

T: +91 33 2248 7000  
E: [kolkata@khaitanco.com](mailto:kolkata@khaitanco.com)