Lakshmikumaran & Sridharan attorneys

International Trade

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

April 2021 / Issue – 118

Contents

April
2021

Article

ADD and CVD on goods removed from SEZ to DTA – 'Missing link' filled by Finance Act, 2021

By **Jayant Raghu Ram**

Introduction

Union Budget 2021-22 ('**Budget**') was one of the most anticipated budgets given that it was the first Union Budget to be presented after the onset of the COVID pandemic. In the Budget, while the Finance Minister announced the repeal/suspension of a number of existing anti-dumping duties ('**ADD**') and countervailing duties ('**CVD**'), the Finance Minister also proposed several legislative measures for strengthening the existing ADD and CVD mechanisms. With the recent enactment of the Finance Act, 2021 ('**Finance Act**'), Parliament has given effect to these proposed legislative changes.

One of the important legislative changes introduced by the Finance Act, by amendment of the Customs Tariff Act, 1975 ('**CT Act**'), is to allow for the imposition of ADD and CVD on goods removed from a Special Economic Zone ('**SEZ**') to the Domestic Tariff Area ('**DTA**'). This article discusses the legislative changes made to the CT Act *vide* the Finance Act and the significance of these changes.

Fiscal regime for customs duties on goods imported by SEZs

The idea of SEZs was introduced to promote the export of goods and services from India. The SEZ Act, 2005 ('SEZ Act') and the rules made thereinunder constitute the legal framework for governing SEZs. Section 26(1)(a) of the SEZ Act exempts a SEZ unit ('unit') from payment of customs duties, including ADD, CVD, and safeguard duty ('SGD') on the import of goods to carry on the authorised operations. The authorised operations of the unit may include manufacture and export of finished goods by using imported goods.

However, sometimes, it may so happen that the unit may not be able to export the goods manufactured by it. The unit may then decide to clear the goods into the DTA for sale or other purposes. In such cases, Section 30 of the SEZ Act provides that goods removed from a SEZ to a DTA shall be chargeable with duties of customs including ADD, CVD, and SGD, where applicable, as leviable on such goods when imported into India.

As an example, if rubber is imported by a unit for the manufacture of tyres, but the rubber is cleared by the unit into the DTA as such, i.e., without being used for manufacture of tyres, such raw material will be exigible to customs duties as would be applicable on imports into India. Additionally, if, for example, ADD was leviable on imports of rubber into India, the unit would have to pay ADD at the time of clearing the rubber into the DTA.

In the event the unit manufactured tyres using the imported rubber, the unit would have to pay customs duties on the tyres at the time of clearing them into the DTA. However, since Section 30 concerns itself only with the goods that are removed from the SEZ to the DTA, no customs duties including ADD would be exigible on the imported rubber that was used to manufacture the tyres. This is a limitation of the provisions of Section 30.

With regard to ADD on the imported goods used by a unit to manufacture finished goods that are cleared to DTA, the implication is that this may lead to circumvention of ADD on such imported raw materials.

Trade remedial measures imposed by the Customs Tariff Act, 1975

While Section 30 of the SEZ Act does not impose any liability to pay customs duties including ADD/CVD/SGD on the imported goods removed from a SEZ to the DTA when incorporated into a finished good, the CT Act addresses the issue. Sections 8B, 9 and 9A of the CT Act empower the Central Government to impose SGD, CVD, and ADD, respectively, on goods imported into India. With regard to SGD, sub-section (6) of Section 8B expressly prohibits the imposition of SGD on goods imported by a 100% Exporter Oriented Unit ('**EOU**') or an SEZ Unit, except in the following circumstances:

a. where the customs notification imposing SGD specifically makes it applicable to an EOU or an SEZ Unit; or

b. the good imported is either cleared as such into the DTA; or

c. the good imported is used in the manufacture of any goods that are cleared into the DTA. In such a case, SGD is levied on that portion of the article so cleared or so used as was applicable when it was imported into India.

Thus, in the case of SGD, the CT Act empowers the Central Government to collect SGD that was originally foregone at the time of import of such good by an SEZ. However, in the case of ADD and CVD, prior to the amendment by the Finance Act, the CT Act did not have similar provisions. Though sub-section (2A) of Section 9A has provisions identical to Section 8B(6) in case of goods imported by EOUs, it did not cover goods imported by SEZ units. In the case of CVD, there were no provisions whatsoever for import of goods either an EOU or a SEZ unit.

As a result, where a raw material on which ADD/CVD was leviable was imported by an SEZ unit duty free, and used to manufacture finished goods, the unit could clear such finished goods to the DTA without payment of applicable ADD/CVD on the imported raw material. This created an odd situation where, an EOU would have to pay ADD on the imported raw material when cleared as part of a finished good, to the DTA, but a similar levy would not apply when the finished goods were removed by a SEZ to a DTA.

Further, even though, similar to ADD and SGD, CVD is intended to protect the domestic industry in India from injury caused by imports, no CVD was leviable on goods cleared into the DTA either by a SEZ unit or an EOU. This created an uneven playing field with the possibility of circumvention of ADD/CVD.

The curious case of Flextronics

Even though neither the CT Act nor the SEZ Act empowered the levy of ADD or CVD on imported goods removed to a DTA as part of finished goods, the Madras High Court in the decision of Flextronics Technologies India (Pvt.) Ltd. v. State of Tamil Nadu (TCR No. 35 of 2014 decided on 18 April 2016) ('Flextronics') held otherwise. In Flextronics, it was held that the moment such imported goods were removed from the SEZ to the DTA, they were no longer protected by the exemption given by Section 26 from the levy of ADD on goods imported by the SEZ unit and such goods automatically attracted ADD.

In justifying its decision, the High Court drew strength from the provisions of Section 30 to hold that ADD was leviable on goods cleared from an SEZ to the DTA. The High Court also seems to

have been influenced by the objective of levying ADD to maintain a level playing field between imported and domestically manufactured goods, as pointed out by the Supreme Court in *Reliance Industries Ltd.* v*. Designated Authority* [(2006) 10 SCC 368].

However, it seems that it was not brought before the High Court that Section 30 does not charge any customs duties on imported goods that were used to manufacture finished goods cleared from a SEZ to the DTA. Instead, Section 30 only charges customs duties on goods cleared from a SEZ to the DTA as leviable on such goods when imported into India. Further, prior to the Finance Act, there were no provisions in the CT Act or the SEZ Act similar to Section 8B(6) of the CT Act which allowed for the levy of ADD on imported goods cleared by the unit into a DTA as part of a finished good.

Amendment by Finance Act, 2021

The Finance Act has amended Section 9 (CVD) and Section 9A (ADD) of the CT Act to allow for the levy of CVD and ADD on an imported good removed from an SEZ to the DTA, even when incorporated as part of finished goods. By the same amendments, the Finance Act has also levied CVD on imported goods removed from an EOU to the DTA, even when incorporated as part of a finished good. For ease of reference, the legal position before and after the enactment of the Finance Act is presented below:

Position before amendment by Finance Act

Imported goods cleared, as part of a finished good, to DTA from	**Liability to pay ADD**	**Liability to pay CVD**	**Liability to pay SGD**
SEZ	No	No	Yes
EOU	Yes	No	Yes

Position after amendment by Finance Act

Imported goods cleared, as part of a finished good, to DTA from	**Liability to pay ADD**	**Liability to pay CVD**	**Liability to pay SGD**
SEZ	Yes		
EOU			

Conclusion

The absence of legal provisions imposing ADD/CVD on imported goods removed from a SEZ to the DTA created a very uneven playing field. However, with the enactment of the Finance Act, the legal position has been rendered consistent. Further, though *Flextronics* rendered the legal position murky before the Finance Act, *Flextronics* tacitly identified the 'missing link' in the framework for the imposition of customs duties on goods removed from a SEZ to the DTA. This 'missing link' has now been filled by enactment of the Finance Act; a positive step in improving the coherence of the legal framework concerning SEZs and EOUs. This measure will also strengthen the Government's 'Make in India' programme by affording necessary protection to the domestic producers from any dumped or subsidized imports.

[The author is a Principal Associate in WTO and International Trade practice team at Lakshmikumaran & Sridharan Attorneys, New Delhi]

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
1-phenyl-3-methyl-5-pyrazolone	China PR	26/2021-Cus. (ADD)	27 April 2021	Definitive anti-dumping duty imposed
Axle for trailers	China PR	F.No.7/7/2021-DGTR	19 April 2021	Anti-dumping duty sunset review investigation initiated
Barium carbonate	China PR	22/2021-Cus. (ADD)	15 April 2021	Anti-dumping duty extended till 20 October 2021
Clear float glass of nominal thicknesses ranging from 4mm to 12mm	Malaysia	F. No. 354/31/2021-TRU	30 March 2021	Ministry of Finance decides not to impose countervailing duty as directed by DGTR
Cold Rolled/cold reduced flat steel products of iron or non-alloy steel, or other alloy steel of all width and thickness, not clad, plated or coated	China PR, Japan, Korea RP and Ukraine	F. No. 7/6/2021-DGTR	31 March 2021	Anti-dumping sunset review initiated
Copper & copper alloy flat rolled products	China PR, Korea RP, Malaysia, Nepal, Sri Lanka, and Thailand	F. No. 6/7/2020-DGTR	16 April 2021	Definitive Anti-dumping duty recommended
Flexible slabstock polyol of molecular weight 3000-4000	Saudi Arabia and United Arab Emirates	20/2021-Cus. (ADD)	5 April 2021	Anti-dumping duty imposed
Fluoro backsheet	China PR	F. No. 6/3/2021-DGTR	30 March 2021	Anti-dumping investigation initiated

Product	Country	Notification No.	Date of notification	Remarks
Hot-Rolled flat products of alloy or non-alloy steel	China PR, Japan, Korea RP, Russia, Brazil and Indonesia	F. No. 7/5/2021-DGTR	31 March 2021	Anti-dumping sunset review initiated
Melamine	China PR	19/2021-Cus. (ADD)	31 March 2021	Anti-dumping duty further extended till 30 September 2021
Normal butanol	EU, Malaysia, Singapore, South Africa and USA	F.No.7/29/2020 - DGTR	30 March 2021	Anti-dumping duty recommended to be continued after sunset review
Normal butanol or N-butyl alcohol	EU, Malaysia, Singapore, South Africa and USA	21/2021-Cus. (ADD)	12 April 2021	Anti-dumping duty continued after sunset review
Nylon filament yarn (multifilament)	EU and Vietnam	23/2021-Cus. (ADD)	20 April 2021	Exclusion from anti-dumping duty expanded
Plain medium density fibre board having thickness less than 6 mm	Vietnam, Malaysia, Thailand and Indonesia	F.No. 6/13/2020-DGTR	20 April 2021	Definitive anti-dumping duty recommended
Polytetrafluoro ethylene (PTFE)	Korea RP	24/2021-Cus. (ADD)	26 April 2021	Anti-dumping on goods from Russia extended to goods from Korea RP
Polytetrafluoro ethylene (PTFE) products	China PR	25/2021-Cus. (ADD)	26 April 2021	Anti-dumping duty imposed consequent to anti-circumvention investigation
Rubber chemicals	TDQ from China PR, EU and Russia, PVI from China PR, and CBS from China PR and EU	F. No. 6/4/2021 -DGTR	31 March 2021	Anti-dumping investigation initiated
Styrene butadiene rubber	Korea RP	F. No. 354/21/2021-TRU	30 March 2021	Ministry of Finance decides not to impose countervailing duty as directed by DGTR
Toluene Di-isocyanate	EU, Saudi Arabia, Chinese Taipei and UAE	28/2021-Cus. (ADD)	27 April 2021	Definitive anti-dumping duty imposed from date of provisional levy

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Common alloy aluminium sheet	USA	86 FR 22139 [A-533-895]	27 April 2021	Anti-dumping duty orders issued
Common alloy aluminium sheet	USA	86 FR 22144 [C-533-896]	27 April 2021	Countervailing duty orders issued
Organic soybean meal	USA	Investigation Nos. A-533-901 and C-533-902	20 April 2021	Initiation of countervailing duty and anti-dumping duty investigations by USDOC
Organic soybean meal	USA	Investigation Nos. 701-TA-667 and 731-TA-1559 (Preliminary)	3 April 2021	Initiation of preliminary phase anti-dumping and countervailing duty investigations by USITC
Raw honey	USA	Investigation No. 731-TA-1560-1564	21 April 2021	Initiation of preliminary phase anti-dumping and countervailing duty investigations by USITC
Utility scale wind towers	USA	86 FR 15897	24 March 2021	Preliminary affirmative countervailing duty determination, and alignment of final determination with final antidumping duty determination

WTO News

India's mandatory 'non-GM cum GM free certificates' for food imports questioned by USA

The United States has again raised serious concerns with India's new measure mandating 'non-GM (genetically modified) origin and GM free certificates' for certain agricultural imports into India. According to the document G/SPS/GEN/1901, dated 1 April 2021, circulated in the WTO's Committee on Sanitary and Phytosanitary Measures, the United States has requested India to withdraw the order. The US Department of Agriculture has also proposed technical cooperation to develop alternatives to the non-GM origin and GM free certificate. Referring to the FSSAI's clarification dated 8 February 2021, establishing a 1% tolerance in imported food consignments, the USA has also requested India to provide the scientific justification for establishing the tolerance at this

level and provide any relevant risk assessments or international standards on which this tolerance is based.

GCC's selective tax on sweetened drinks questioned in Committee on Market Access

European Union, Japan, Switzerland, and the USA have raised concerns about the transparency and application of the selective tax on carbonated soft drinks, malt beverages, energy drinks, sports drinks, and other sweetened beverages by member countries of Cooperation Council for the Arab States of the Gulf ('**GCC**'). Asking number of questions on the selective tax regime of such products, the document circulated in the WTO's Committee on Market Access on 16 April 2021 at the request of the delegations of the European Union, Japan, Switzerland, and the United States, also asks whether the selective tax will be applied to all beverages in which the total sugar content, from either naturally occurring and/or added sugars, exceeds a minimum threshold. It is also asked as to whether the GCC Member State governments have an updated timeline on the study currently underway on a new excise tax model and its implementation plan under the GCC Unified Excise Tax Agreement? The GCC comprises of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

India Customs & Trade Policy Update

Anti-dumping sunset review – Time lines revised for filing applications

The Directorate General of Trade Remedies in the Ministry of Commerce and Industry has revised the timelines for filing applications for considering initiation of sunset review investigations. Withdrawing the relaxations provided last year by Trade Notice No. 2/2020, dated 20 April 2020, the DGTR has prescribed a new procedure under which the domestic industry would be required to normally file the application seeking extension to continue the ADD measures at least 270 days before the date of expiry of the concerned measures. However, in case of *bona fide* hardships substantiated with evidence, the DGTR may consider the application filed with less than 270 days remaining. The Trade Notice No. 3/2021, dated 12 April 2021 issued for this purpose also notes that extension of imposed anti-dumping duty pending the completion of sunset review investigation would be sought on a case basis as per the provisions. It may be noted that according to the Trade Notice, the same would not apply in case of *Narrow woven fabric from China* (anti-dumping duty expiring on 5 October 2021) and *Low ash metallurgical coke from Australia and China* (anti-dumping duty expiring on 24 November 2021). In both these cases, the petition for sunset review needs to be filed by 30 April 2021.

India-Japan CEPA – Deeper tariff concessions notified

Effective rate of duty on certain imports from Japan under the India-Japan Comprehensive Economic Partnership Agreement has been reduced to 'zero', except for all goods covered under Tariff Item 84082020 and sub-heading 870840 of the Customs Tariff. Notification No. 69/2011-Cus. has been amended for this purpose by Notification No. 20/2021-Cus, dated 30 March 2021 with effect from 1 April 2021.

India-Mauritius CECPA effective from 1 April 2021 – Rules of Origin and tariff notification notified

The CBIC has notified the Customs Tariff (Determination of Origin of Goods under Comprehensive Economic Cooperation and Partnership Agreement between the Republic of India and the Republic of Mauritius) Rules, 2021. These rules have come into force from 1 April 2021 and will govern the preferential rate of duty for import of goods from Mauritius to India. Notification No. 38/2021-Cus (N.T.), dated 31 March 2021 has been issued for the purpose. Further, Notification No. 25/2021-Cus., dated 31 March provides for effective rate of duty for specified imports originating from Mauritius.

Copper and Aluminium – Mandatory registration of imports of certain products

A new policy condition has been inserted in Chapters 74 and 76 of the ITC (HS), 2017 whereby Import Policy of the goods falling under specific HS codes has been amended from 'free' to 'free subject to compulsory registration under the Non-Ferrous Metal Import Monitoring System ('**NFMIMS**')'. The annexure to the Notification No. 61/2015-20, dated 31 March 2021 issued for the purpose, also provides the specific HS codes for which registration will be mandatory under NFMIMS. The importers of goods covered under these specific HS codes are required to submit advance information of import consignments and will have to obtain a registration number before the arrival of the consignment.

Melon seeds – Import restricted

Import of melon seeds falling under HS Code 12077090 has been put under 'restricted' category with the condition of fulfilment of Policy Condition (4) of the Chapter 12 of the ITC(HS). According to Policy Condition (4), import is permitted for sowing without a licence subject to the new Policy on Seed Development, 1988 and in accordance with import permit granted under Plant Quarantine (Regulation of Imports into India) Order, 2003. Notification No. 3/2015-20, dated 26 April 2021 amends Chapter 12 of Schedule I (Import Policy) of ITC(HS), 2017.

Mosquito killer racket – Import prohibited if CIF value less than INR 121 per racket

The Import Policy of mosquito killer racket classifiable under ITC(HS) Codes 85167920 and 85167990 has been revised from 'Free' to 'Prohibited' if C.I.F. value is below INR 121 per racket. Amendments have been made in this regard in Chapter 85 of the Schedule I to the ITC(HS), 2017 by Notification No. 2/2015-20, dated 26 April 2021.

Remdesivir injection and API – Export prohibited

Export of Remdesivir injection and Remdesivir Active Pharmaceutical Ingredients (API), falling under ITC (HS) Codes 293499 or 300490 or any other Code, has been prohibited with effect from 11 April 2021. As per Notification No. 1/2015-20, dated 11 April 2021, the provision under Para 1.05 of the Foreign Trade Policy 2015-20 regarding transitional arrangement is not applicable for this notification. Amendments for this purpose have been made in Schedule II (Export Policy) of ITC(HS), 2017.

Verification of identity of exporters, importer or Customs broker – New Regulations notified

Customs (Verification of Identity and Compliance) Regulations, 2021 have been notified on 5 April 2021 to provide for verification of persons who are newly engaging in import or export activity (after introduction of these Regulations). These regulations will also apply in case of persons who may have engaged in import or export activity or availed or claimed the benefits mentioned in sub-clause (a) to (f) of Section 99B(3)(i) of the Customs Act, 1962 or engaged as a Customs Broker in such activity or in availing or claiming such benefits prior to the commencement of these regulations. Persons selected for verification must furnish number of specified documents on the Common Portal within prescribed time. It may be noted that the regulations also provide for physical verification of the address by the proper officer. These regulations notified by Notification No. 41/2021-Cus. (N.T.), dated 5 April 2021 also provide for a penalty for contravention of the provisions.

Ratio Decidendi

Classification of parts and accessories of toys in Chapter 95 – Chapter Note 3 on sole or principal use – 'Suitable for use' and 'principally suitable for use'

The United Kingdom's Upper Tribunal (Tax and Chancery Chamber) has upheld the decision of the First-tier Tribunal (FTT) that the clothing and wigs used with dolls and stuffed toys should be classified as parts and accessories of stuffed toys within sub-heading 9503 00 41. The clothing and wigs had slits in them to allow the tail and protruding ears of the bears (stuffed toys) to be pulled through them.

The FTT had concluded that the fact that the clothing items and wigs were suitable for use with dolls did not prevent their being principally suitable for use with stuffed toys. Relying on Chapter Note 3 to Chapter 95 of the Combined Nomenclature adopted under Article 1 of EC Regulation 2658/1987, the Upper Tribunal was of the view that it was not necessary to resort to General Interpretative Rule 3 for the purposes of classification here and that an article can have a principal use with items in only one heading or subheading. Note 3 directs that parts and accessories which are solely or principally suitable for use with articles which fall within Chapter 95 must be classified with those articles.

The Upper Tribunal was also of the view that reference to 'parts and accessories' in the sub-heading 9503 00 29 (relating to dolls) may extend beyond parts and accessories which are suitable for use 'solely or principally' with dolls. The Tribunal hence dismissed the plea that the purpose of Note 3 was to mandate a comparison at chapter level and that Note 3 operates only to assist the classification of items as between headings in different chapters of the CN. [*Build-a-Bear Workshop UK Holdings Limited* v. *Commissioner, HMRC* – Decision dated 29 March 2021 in Appeal Numbers UT/2020/0051 and 0054, UK's Upper Tribunal Tax and Chancery Chamber]

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com