



# **INTERNATIONAL TRADE - INTRODUCTION & BROAD FRAMEWORK**

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# Constitutional background



- Art 246 – Centre – List I (Entry -83-Duties of Customs including export duties) , State – List II, List III-Concurrent
- Art 248 – Subject to Art 246A Parliament has power to make laws in matters not enumerated in State List and the Concurrent List
- Art 249 –Parliament to legislate matters referred in State List in the national interest (GST also included)
- Art 250 – Power of Parliament during proclamation of emergency
- Art 265 – No Tax shall be levied or collected except by authority of law
- Art 271- power to levy surcharge of duties and taxes by centre (excluding GST)
- Art 14- Equality before law – equal protection of laws within India
- Art 19 –right to freedom – 19(1)(g) – all citizens right to carry on any trade/business

# Delegated Legislation



Act – Primary legislation

Rules – Secondary legislation

❑ law cannot be framed as complete Code by itself – provisions such as application, enforcement, procedure left to Rule making power of Executive

❑ Rules help govern the law- Rules cannot go beyond Statute

FTP – FTDR Act, 92 – FTD ( R) Rules 93

SEZ Act, 2005 – SEZ Rules, 2006

Customs Act, 1962 – Rules/Regulations

# Foreign Trade Policy – Historical background



- Import Trade Controls first came into existence during 2<sup>nd</sup> world war – under Defence of India Rules
- Thereafter Import & Export (Control) Act 1947 (IECA) came into force
- 1991 liberalization of policy – import restrictions reduced drastically
- Export incentives objected by WTO – discourage free competition – income tax incentives withdrawn – other incentives replaced periodically – DEPB- FMS/FPS- MEIS/SEIS – ROSTCL – RoDTEP
- Foreign Trade Policy FTP - Foreign Trade (Development & Regulation) Act 1992- FTDR 1992 – Administered by Ministry of Commerce
- Foreign Trade (Regulation) Rules 1993

# WTO - Guidelines



## WTO broad Guidelines

- Trade without discrimination
- To promote fair competition
- Predictable access to market
- To encourage development/economic reforms

# Foreign Trade Policy – FTP



- **CHAPTER 1 - LEGAL FRAMEWORK AND TRADE FACILITATION**
- **CHAPTER 2 - GENERAL PROVISIONS REGARDING IMPORTS AND EXPORTS**
- **CHAPTER 3 - EXPORTS FROM INDIA SCHEMES – MEIS, SEIS, Status Holder**
- **CHAPTER 4 - DUTY EXEMPTION/REMISSION SCHEMES – AA, DFIA, RoSCTL - RoDTEP**
- **CHAPTER 5 - EXPORT PROMOTION CAPITAL GOODS SCHEME – EPCG**
- **CHAPTER 6 – EOU/EHTP/STP/BTP (Excluding SEZ)**
- **CHAPTER 7 - DEEMED EXPORTS – goods do not leave country – payment INR of FFE**
- **CHAPTER 8 - QUALITY COMPLAINTS AND TRADE DISPUTES – Exporters/importer-Foreign buyer/supplier**
- **CHAPTER 9 – DEFINITIONS – terms under FTP**

# FTP – Legal Framework



## Foreign Trade Policy – Features

- FTP notified by CG – 2015-2020
- Handbook of Procedures – procedural aspects of policy
- Appendices & Aayat Niryat Forms (AANF)- 41 forms- ANF-2A-IEC, ANF-3A-MEIS, ANF-5B-Redemption-EPCG
- Standard Input Output Norms – SION- 11 Categories – Chemicals, Engg, Food, Leather, Textile, Misc
- ITC (HS) classification of import & Exports

## Chapter -1 – FTP

1.00 – Notified by CG by virtue of powers under Sec.5 of FTDR Act 1992

1.02 - CG reserves right to amend FTP in public interest

1.03 – DGFT by Public Notice notify Hand Book of Procedures (HBP)including Appendices – Aayat Niryat Forms – to be followed by importer/exporter, Licensing Authority, any authority – for implementing FTDR Act, Rules and FTP

# ITC – HS – Classification



Col.1 – ITC HS Code (EXIM Code) – 6 digit code – harmonized with WCO

Col.2 – Item Description

Col-3 – Import policy Regime – Prohibited – Restricted (Import License – ANF 2B) – import allowed through State Trading Enterprises (STE) – FREE

Col.4 – Policy Condition

36020010 --- Industrial explosives

30041030 --- Amoxycillin

05071010 --- Ivory

49070020 --- Bank notes

Restricted (import policy)

FREE - Import of Oxytocin is Prohibited

Prohibited

Restricted - No License from DGFT for authorized Banks/Dealers



## FTP- Chapter 2



- Para 2.01- Export & Imports – Free – Unless regulated
- Para 2.02 – Indian Trade Classification -Harmonized System (ITC-HS)
- Para 2.04 – DGFT may specify procedures for –importer/exporter Licensing/Regional Authority (RA) – for implementing FTDR Act – orders/rules made thereunder – and FTP – such procedure/amendments be published by way of Public Notice
- Para 2.07 – DGFT may through a Notification impose Prohibition/Restriction (categories (a) to (q)- 17) (a) export of food stuff/essential products –critical shortage (e) imports to promote particular industry (g) protection of public moral/order (i) import or export of gold/silver

# FTDR Act 1992



- Two years prior to signing of GAT 1994 FTDR brought into force from 7<sup>th</sup> August 1992
- Sec.3 – reflects Art XI of GATT 1994 – there shall not be any provision or restrictions other than duty/taxes/other charges by contracting party
- Sec.3 – FTDR

Sec.3 (1) The Central Government may, by Order published in the Official Gazette, make provision for the **development and regulation of foreign trade** by **facilitating imports and increasing exports**.

Sec. 3 (2) – CG may make provision for Prohibiting/restricting/regulating – import/export of goods/services/technology

Sec. 3 (3) – such goods deemed to be prohibited under Sec. 11 of CA 1962

# FTDR Act 1992 & SEZ Act 2005



- Sec.5 – CG may formulate and announce FTP

Proviso to Sec. 5 – CG may announce policy in respect of SEZ with such exceptions/medication/adaptation

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## **SEZ Act 2005**

- Sec. 2 (m) Export means – supplies from DTA to SEZ/Developer – Unit/Developer to another Unit/Developer in same SEZ or different
- Sec 2 (o) -Import means – receiving goods/services by Unit/Developer from another Unit/Developer in same SEZ or different
- Sec.26 – Exemptions, concessions, drawback or other benefits

# FTP-FTDR 1992- FTDR Rules 1993



- FTDR 1992 – Administered by Ministry of Commerce - Foreign Trade (Regulation) Rules 1993
- Sec.19- FTDR Act – power to make rules
- Foreign Trade (Regulation)Rules 1993
  - Application for licence/certificate/scrip bestowing fiscal benefits – Fee for same
  - Conditions and refusal to grant licence
  - Suspension & Cancellation of licence/scrip/instrument (Sec.19(2) (e )
  - Power to enter premises for search and seizure (Sec.19 (2) (f) )

# SEZ Act 2005 – SEZ Rules 2006



- Sec. 2 (m) Export means – supplies from DTA to SEZ/Developer – Unit/Developer to another Unit/Developer in same SEZ or different Sec 2 (o) -Import means – receiving goods/services by Unit/Developer from another Unit/Developer in same SEZ or different
- Sec.26 – Exemptions, concessions, drawback or other benefits
- Sec.55- Power to make rules
- Special Economic Zone Rules 2006 –
  - Area of land requirement of SEZ
  - Infrastructure requirement
  - Notification of identified area
  - Import and procurement
  - Procedure for Export
  - Sales in DTA

# Customs Act 1962 – Rules



## **Sec,156- General power to make rules – rules consistent with the Act**

- ❖ Sec. 156 (2) (a) – manner of determining transaction value of imported/exported goods u/s 14 (1)
- ❖ Sec. 156 (2) (b) – due date of payment of deferred payment of duties, taxes & other charges u/s 47 and Sec.51 – Deferred Payment of Import Duty Rules 2016 – Sec,47 (1) and Sec. 156
- ❖ Sec. 156 (2) (h) amount of compounding fee and manner of compounding u/s 137 (3)

## **Sec,157- General power to make Regulations – regulations consistent with the Act**

- Sec. 157 (ai) manner of relinquishing title to goods, abandoning goods, as per Sec. 26A (1) (d)
- Sec. 157 (aa) form and manner of filing application for refund u/s 27

# Customs Act 1962 – Rules



- Sec, 157 (c) conditions for manufacturing & warehousing under Sec.65 – Manufacture and other operations in Warehouse Regulations 2019 – Sec.157 r/w Sec. 65
- Sec, 157 (g) form and manner of application for advance ruling - Authority for Advance Ruling Procedure Regulation 2005 – Sec.28M of Customs Act,
- Sec. 157 (ja) – manner of maintaining electronic duty credit ledger, making payment, transfer of duty credit from one person to another

Sec.158 – All Rules and Regulations made under this Act shall be published in Official Gazette

Sec.159 – Rule, notifications and orders to be placed before Parliament

- ❑ Every Rule, Regulation, order issued u/s 25(2) (other than strategic, secret, individual or personal nature) to be laid before each House of Parliament while in Session – if modification is suggested to be carried out

# Rules under Customs Act 1962



- Baggage Rules 2016 – Sec.79 of CA 62 – Sec. 79(1) Proper Officer **subject to any rules made thereunder**
- Customs & Central Excise Duties Drawback Rules 2017 – Sec. 75 of CA 62 – Sec.75 (2) – **CG may make rules** for carrying out provisions of Sec. 75(1)
- Customs Baggage Declaration **Regulation** 2013 – Sec. 81 (a) – **Board to make Regulations** for declaring contents of any baggage
- Customs Brokers Licensing **Regulations** 2018 – Sec. 146 (2) - **Board may make Regulations**
- Warehoused goods (Removal) **Regulations** 2016 – Sec.157 r/w Sec 60(2) – goods deposited in warehouse **as may be prescribed** & Sec. 67 – removal subject to **conditions as may be prescribed**
- Re Export of Imported Goods (Drawback & Customs Duties) Rules 1995 – Sec.74(3) of CA 1962- CG **may make Rules**



# Rules under Customs Act, 1962



- Customs (Advance Rulings) Rules 2002 – Sec 156 read with Sec. 28 H (1) – as may be prescribed-
- Customs Import of Goods At Concessional Rate of Duty Rules 2017 – Sec 156
- Customs Settlement of Cases Rules 2007 – Sec. 156
- Customs Valuation Determination of Value of Imported Goods Rules 2007 – Sec. 156 read with Sec.14
- Customs Valuation Determination of Value of Export Goods Rules 2007 – Sec. 156 read with Sec.14
- Project Import Regulations 1986 – Sec 157

# Delegated Legislation – case laws



- “..The legal domain of fiscal statutes often witnesses exercises of imposition of or lifting of prohibition, granting of or withdrawal of exemptions in the form of notifications and other devices of delegated legislation” **Agri Trade India Services Vs UOI (2006 (204) E.L.T. 161 (Del.)**
- For a fiscal statute factors such as impact on society, economic consequence, administrative convenience change from time to time – impossible for legislature to follow the factors – hence delegated to executive (**Hira Lal Rattan Lal Vs State of UP (1973 (2) SCR 502)**)
- It is true power to fix tax rate is legislative power – but legislature can lay down policy to delegate such power to executive (**Sita Ram Bishambar Dayal Vs State of UO (1972 (2) SCR 141)**)
- Art 265 – laws include rules and regulations provided they are authorized by statute – if discretion allowed to executive to fix a rate with wide range of gap between minimum & maximum – will amount to excessive delegation **Pandit Banarsi Das Bhanot Vs State of M.P (AIR 1968 SC 909)**
- Subordinate legislation can be questioned if contrary to parent statute – or some other statute – subordinate legislation must yield to plenary legislation – can be questioned on arbitrariness (**Indian Express Newspapers Vs UOI (1986 (159) ITR 856)**)

# Delegated Legislation



- Sec. 25 of CA 62 delegates power to CG to grant exemption either absolutely or with conditions – Sec 159 says such notification to be laid before Parliament which may amend or reject them- ultimate law making power with legislature – delegation as legislature not always in Session – practical necessity – Sec.159 Protects executive action – delegated legislation comes into force after publication in Gazette - **Bombay Conductors & Electricals VS GOI 1983 (3) TMI 157 - DELHI HIGH COURT**

## **Promissory Estoppel**

- Exemption from tax cannot be claimed by pressing doctrine of promissory estoppel against legislature – there can be no estoppel against statute – power under Sec.25 to be exercised in public interest – govt can grant exemption at one moment - withdraw in another moment – imposition and exemption of tax are positive kinds **Bombay Conductors & Electricals VS GOI 1983 (3) TMI 157 - DELHI HIGH COURT**

# Constitutional aspects



- ✓ Separation of power between legislative & executive forms basic structure of Constitution – any attempt by executive to legislate without authority of law colourable device - would be violative of Art 246 – power given to Parliament and State Legislature under Art 246 - (**Alstom India Ltd Vs UOI (2014 (301) E.L.T. 446 (Guj.)**)
- ✓ Art 14 – reasonable classification – not arbitrary or evasive – legislature enjoy wider latitude in classification of objects/persons/things for taxation purpose – inherent complexity of fiscal adjustment **UOI Vs NITDIP Textile Processors (2011 (273) E.L.T. 321 (S.C.)**
- ✓ Art 14- presumption in favor of constitutionality – principle that legislature understands and appreciates needs of people & discrimination only on adequate grounds - Petitioner to prove transgression of constitutional principles - **R.K. Garg v. Union of India, (1981) 4 SCC 675**
- ✓ When a substantive unreasonableness is to be found in a taxing statute/notification- to be declared unconstitutional – court may not go into hardship to tax payer if fair procedure is adopted **UOI Vs N. S Rathnam & Sons (2015 (322) E.L.T. 353 (S.C.)**

# Constitutional aspects



## **Art 265**

- ❖ No Tax can be levied or collected except by authority of law – only by authority of law and not by executive order – public finance & taxation prerogative of legislature – even in hands of executive power retains the true character of legislature **(Bombay Conductors & Electricals VS GOI 1983 (3) TMI 157 – Delhi HC)**
- ❖ No tax shall be levied or collected except by authority of law – tax collected without authority is to be refunded **CST Vs Auriaya Chamber of Commerce (1986 (25) E.L.T. 867 (S.C.))**
- ❖ No tax means every type of tax – Art 366 (28) tax includes any tax or impost whether general/local/special and ‘tax’ shall be construed accordingly – includes every kind of tax direct or indirect will fall within ambit of Art 265 **Mafatlal Industries Vs UOI (1997 (89) E.L.T. 247 (S.C.))**

# Constitutional Aspects



- ❖ ‘authority of law’ means that tax proposed to be levied must be within the legislative competence of legislature imposing the tax (**Kunnathat VS state of Kerala AIR 1961 SC 552**)
- ❖ State has no authority to retain the tax collected without authority of law. Art 265 enjoins that no tax shall be levied or collected except by authority of law ( **CST Vs Auriyaya Chamber of commerce 1986 (25) ELT 867 SC**)
- ❖ No tax shall mean every type of tax – will include any tax – general, local or special- every kind of tax direct or indirect will come under the ambit of Art **265 (Mafatlal Ind Vs UOI 1997 (89) ELT 247 SC)**
- ❖ The HC while rejecting demand of customs duty upon export clearance to SEZ units – held that levy as well as collection of tax must be sanctioned by law – no one can be taxed by implication (**Tirupati Udyog Vs UOI 2011 (272) ELT 209 AP**)

# Customs Act – case laws



- ❑ Amendment to Rule 9 of Customs Valuation Rules prescribing 1% FOB Value as cost of loading/unloading/handling – to enable authorities apply uniform rate – contrary to Ssec.14 & GATT - justifiable only if charges not known - **WIPRO Vs ACC (2015 (319) E.L.T. 177 (S.C.))**
- ❑ Court cannot direct State to issue exemption notification u/s 25 as power is vested with Govt – but court is not prevented from judicially reviewing a notification **Gurcharan Singh VS MOF (2021 (49) G.S.T.L. 113 (Del.))**
- ❑ Demurrage which is a penalty is not included as part of cost by legislature (commission, royalty, cost of transportation etc included) - explanation to sub-rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is declared *ultra vires* the Constitution/Section 14 of the Customs Act, 1962 **Tata Steel Ltd VS UOI (2019 (370) E.L.T. 100 (Ori.))**
- ❑ As the circulars (6/2008, 10/2021 & 18/2013) under challenge seek to impose an additional restriction for grant of refund of the SAD under Notification No. 102/2007-Customs, they are *ultra vires* of the Act and cannot be legally sustained. – Circulars denying refund of SAD paid by using DEPB scrip are invalid **Allen Diesels India Vs UOI (2016 (334) E.L.T. 624 (Del.))**

# Customs – Case laws



- Regulation 2(2) of the CPDA Regulations maximum payment of only 20% of differential duty in the case of a provisional assessment – BG for entire differential duty contrary to Regulation 2(2). – Circular directing Officer to get 100% BG even in respect of those B/Es provisionally assessed u/s 18 - It certainly is contrary to proviso (a) to Section 151A inasmuch as it dictates to how to complete a provisional assessment. **Bullion & Jewellers Assn Vs UOI (2016 (335) E.L.T. 639 (Del.)**
- Notfn.25/2010 Cus dt 27.2.2010 exempted goods (electrical energy) under HSN 27160000 –however it restricted application of the same from SEZ to DTA - Sec. 30(a) of SEZ Act customs duty levied as applicable to imports into India – electrical energy (27160000) from SEZ to DTA to be treated as imported goods and exempt – 16% duty cannot be charged u/s 25 (1) as it is not charging section - Notification No. 25/2010-Cus., dated 27-2-2010 is violative of provisions of Section 25(1) and arbitrary and liable to be quashed **Adani Power Ltd Vs UOI (2015 (330) E.L.T. 883 (Guj.)**
- Several court judgments allowed amendment of Shipping Bill – Sec.149 of CA 62 no time limit prescribed by rules or regulations – Circular cannot prescribe limitation – subordinate legislation cannot traverse beyond parent statute and impose restriction/limitation not found in Statute **Oriental Carbon & Chemicals VS UOI (2021 (377) E.L.T. 850 (Guj.)**



# FTP – Case Laws



- Section 5 of FTDR does not empower the Central Government to frame policy with retrospective effect. – neither CG nor DGFT would have the power to amend the Foreign Trade Policy or withdraw any export benefit with retrospective effect- The impugned circular inasmuch as it seeks to restrict the list of eligible items under entry 33 of Table 4 of Appendix 37D of the HBP (FPS Scheme) with retrospective effect is set aside. **Malik Trading Industries Vs UOI (2015 (320) E.L.T. 508 (Del.))**
- Notification No. 32/2015-2020, dated 30-8-2018 Peas classified under Exim Code 0713 10 00 is “Restricted” till 30-9-2018 – policy to protect domestic farmers – large number of farmers suicide – restriction not violative of Art 19 (6) of Constitution - **Sidhi Vinayak Vs UOI (2019 (369) E.L.T. 556 (M.P.))**
- Public Notice date 28<sup>th</sup> January 2004 alters the provision of EXIM Policy whether clarificatory or otherwise – DGFT has no power to exclude four items from purview of Policy – he has only procedural powers – Govt realizing that he has no power issued notfn dated 21<sup>st</sup> April 2004 under Sec.5 of FTDR - HELD - public notice dated January 28, 2004 issued by DGFT, so far it excludes the aforesaid four items, is *ultra vires* **DGFT Vs Kanak Exports (2015 (326) E.L.T. 26 (S.C.))**

# FTP – Case Laws



- ❑ Sec. 3 (1) FTDR not confined to prohibition/restriction – also extends to control of disposal of goods imported – goods can be totally prohibited – import can be allowed in limited quantify – import under licence – quantity amenable to orders of licensing authority – import of poppy seeds amended to avoid monopoly – not violative of Art 19 (1)(g) – reasonable restriction under Art 19 (6) - **M/s OM Traders Vs UOI 2018 (2) TMI 1199 - KARNATAKA HIGH COURT**
- ❑ DGFT only has power to lay down procedure as per Para 2.4 of FTP – it excludes ‘rule making power’ – Sec.19 powers cannot be delegated as expressly prohibited under Sec. 6 (3) – adopting Para 8.3.6 of HBP the Cex Duty Drawback Rules 1995 ultravires the FTDR Act - can be legislated by the Central Government only - **Alstom India Ltd Vs UOI (2014 (301) E.L.T. 446 (Guj.)**
- ❑ DGFT to confine only to issues (i) whether import of poppy seed from designated countries (ii) importer has certificate from competent authority as per requirement of Intl NCB (iii) whether import contract is registered prior to import – estopped from imposing any other condition ( drawal of lots/ one application/qty restriction ) which run contrary to Policies of CG & EXIM code - (**Green Globe Trading Vs UOI (2016 (338) E.L.T. 696 (Mad.)**)



**THANK YOU**

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