
ADMINISTRATION OF RULES OF ORIGIN OF FREE TRADE AGREEMENTS UNDER DOMESTIC LAW

1. Background on Free Trade Agreements (FTAs)

Free Trade Agreements (FTAs) are multilateral international treaties which provide for reduced Exim tariffs to encourage cross-border trade between signatory countries. FTAs function as self-sufficient provisions of law, including rules of origin, in respect of the matters governed by them.

The Finance Act, 2020 introduced certain key changes in domestic law by introduction of Chapter VAA in the Customs Act, 1962 for administration of rules of origin under FTAs.

This is in the backdrop of wide spread belief that most of India's FTAs with ASEAN and SAARC blocs are wrongfully utilized by exporters in neighbouring, non-signatory countries to route products through signatory nations with little to no value addition, so as to circumvent higher tariff rates.

The changes to the statute are effective from **27.03.2020**.

2. Overview of Changes

- Chapter VAA is introduced in the Customs Act, 1962 to provide for the procedure to claim and regulate preferential rate of duty under any trade agreements. Section 28DA of the Customs Act, 1962 **imposes on the importer a responsibility to exercise reasonable care as regards the country of origin criteria, notwithstanding the submission of a certificate of origin.**
- The Customs officer may **requisition necessary information in respect of the import goods, their producer, country of origin, value additions, etc. from the importer to verify the claim** for preferential tariff rates. Upon receipt thereof, the claim may be disallowed or further investigated, as under.
- The Customs officer is to be granted **powers to temporarily suspend preferential tariff treatment to goods** where he has reason to believe that the country of origin criteria has not been met and undertake further verification thereof under the trade agreement.
- Upon such suspension, the goods may be released by the officer subject to **furnishing of security amount equal to the difference between provisionally assessed duty and preferential duty claimed** or alternately, if so required by the Commissioner, deposit such amount in the electronic cash ledger under section 51A.
- Thereafter, the **Customs officer shall approach the Issuing Authority for further clarifications** from the Authority/exporter/producer in respect of such claim, which may be ultimately allowed or denied on the basis of the information received by the officer.
- Any request for verification of the claim by the officer must be sent within 5 years from the date of claim of preferential rate of duty by the importer. **Claim for preferential rate of duty may be ultimately disallowed on the basis of verification undertaken by the officer in respect of the goods in question or identical goods from the same producer or exporter.**

VA Comments

- The **increased responsibility to ‘exercise reasonable care’** imposed on the importer would operate over and above the requirement of merely furnishing a Certificate of Origin. The manner of interpretation of this requirement in practice remains to be seen.
- The **additional provisions made under Chapter VAA would exacerbate tedious procedures** already in place for claim of preferential tariff by importers. Adequate risk management systems will have to be put into place to satisfy customs officials regarding the ‘exercise of reasonable care’ by the importer. This framework will inevitably raise the cost of compliance for importers utilizing the FTAs.
- Existing provisions for verification of origin of goods under FTAs are enforceable in their own right and creation of domestic law conflicting with such provisions would be untenable and **may be interpreted as violative of the doctrines of ‘good faith’ and *pacta sunt servanda* under the Vienna Convention on the Law of Treaties and under customary international treaty law at large.** Although domestic anti-abuse laws have been academically seen as an exception to this, creating additional restrictions, which may defeat the attractiveness of benefits under FTAs, may be viewed as a direct conflict with the object of free trade espoused by the treaties. Nonetheless, such domestic laws have been introduced in respect of various international treaty structures within other sovereign jurisdictions.
- Furthermore, **procedures for requisition of information by the proper officer** from either the importer or the Issuing Authority are to be provided by way of rules, a function which is **left to the hands of the executive.** Being concerned with international agreements entered into by India, this could be arguably viewed as an excessive delegation of power by amendment of the statute and may be open to challenge on this count.

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