Deloitte.

Tax Alert | Delivering clarity

4 November 2019

World Trade Organization recommends withdrawal of export benefits provided under various export related schemes by India

World Trade Organization recommends withdrawal of Indian export benefits pursuant to complaint filed by United States

The World Trade Organization (WTO) released a report on 31 October 2019 in relation to the export related measures provided by India. A panel was constituted on 17 May 2018 as a complaint filed by the United States in March 2018, with regard to certain alleged export subsidy measures provided by India, which remained unresolved.

India provides certain benefits and exemption from duties and taxes under the following schemes:

- Export Oriented Units (EOU) Scheme and Sector-Specific Schemes, including the Electronics Hardware Technology Parks (EHTP) Scheme and the Bio-Technology Parks (BTP) Scheme (the EOU / EHTP / BTP Schemes);
- Merchandise Exports from India Scheme (MEIS);
- Export Promotion Capital Goods (EPCG) Scheme;
- Special Economic Zones (SEZ) Scheme; and
- Duty-Free Imports for Exporters Scheme (DFIS)

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) addresses multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidised imports. As per the complaint filed by the United States, India was not complying with the articles of the SCM Agreement.

The key findings and recommendations of the WTO panel are as under:

- The SCM Agreement provides that subsidies that are contingent upon export performance conditions shall not be granted by member countries of WTO.
- However, the said prohibition does not apply to:
  - Least developed countries designated by the United Nations which are members of WTO; or
  - Specified developing countries (including India) whose Gross National Product (GNP) per capita does not exceed $1000 per annum. In case the same exceeds $1000 per annum, provisions of SCM Agreement shall be applicable and the prohibition shall not be valid for a period of eight years from the date of entry into force of the WTO Agreement
- India's GNP per capita exceeded $1000 per annum from the year 2017 and accordingly, India was of the view that the subsidies could be provided from 2017 for a period of eight years. However, the United States contended that the said period was effective from 1 January 1995.
- The WTO panel has concluded that the eight-year transition period was applicable from 1 January 1995 and not from 2017, as contended by India.
- With respect to the benefits provided in the above mentioned schemes, the WTO panel examined the Foreign Trade Policy 2015-20 (FTP), Handbook of Procedures 2015-20 (HBP) and

relevant public notices, the SEZ Act and Rules and other legislations in relation to the conditions provided for availment of benefits.

- The WTO panel observed as under:
  - **EOU / EHTP / BTP**

    It was observed that in order to avail the benefits under this scheme, a unit was required to undertake to export the entire production and export more than the import to achieve positive net foreign exchange.

    It was concluded that the exemptions from customs duties on import under the EOU / EHTP / BTP Schemes are subsidies contingent upon export performance and inconsistent with the articles of the SCM Agreement. It was also recommended that India should withdraw the exemption within 120 days of the adoption of the report.
  - **MEIS**

    The WTO panel observed that the entitlement of MEIS was subject to export of notified goods to notified markets. Further, the rate of entitlement was dependent upon the product exported and the country to which it was exported.

    It was concluded that the duty credit scrips awarded under MEIS are subsidies contingent upon export performance and inconsistent with the articles of the SCM Agreement and should be withdrawn within 120 days of the adoption of the report.
  - **EPCG Scheme**

    The WTO panel examined the FTP and HBP in relation to the EPCG Scheme and observed that the participants were required to fulfil certain export obligations for availment of the benefits under the said scheme.

    It was concluded that the exemptions from customs duties on import under the EPCG Scheme are contingent upon fulfilment of export obligation and should be withdrawn within 120 days of the adoption of the report.
  - **SEZ Scheme**

    The SEZ law provides that Letter of Approval granted to a unit required export of goods or services from SEZ area. Further, net foreign exchange was also required to be maintained for availing the benefits.

    The WTO panel observed that compliance of the above conditions tantamount to subsidies being contingent on export and exemptions from customs duties on import and export, the exemption from integrated goods and services tax on import and deductions from taxable income should be withdrawn within 180 days of the adoption of the report.
  - **DFIS**

    Certain import duty exemptions were available in the said scheme if the participants had exports in prior periods. Further, the value of exports determined the amount of duty-free entitlements.

    The WTO panel concluded that the duty exemption was contingent upon the performance of export obligations and thereby, violative of the articles of the SCN Agreement. It was also recommended that certain specified conditions in Notification No. 50/2017 – Customs dated 30 June 2017 should be withdrawn within 90 days from the date of adoption of the report.

Our comments

The Ministry of Commerce had already started reviewing the export schemes to be compliant with WTO policies. Recent specific announcements around withdrawal and supersession of the MEIS scheme with the Remission of Duties or Taxes on Export Product Scheme specifically reconfirmed this.

The SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes provides an option to appeal against the ruling to an appellate body. Accordingly, India may prefer to appeal against the WTO panel's report.

Companies availing export benefits under the above schemes should monitor developments with regard to changes that may be made by the government.