

India to Introduce “Beneficial Owner” Concept in Customs Law

On 1 February, 2017, India’s Finance Minister Arun Jaitley introduced the Finance Bill, 2017 (the “Bill”). The Bill adds the concept of “beneficial owner” to the Customs Act, 1962, stating that “beneficial owner means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported”.

More critically, the Bill amends the definitions of “importer” and “exporter” to include “beneficial

owner”. These changes will be effective upon the passing of the Bill through Parliament which should happen in early April 2017.

The table below highlights some of the changes introduced under the Finance Bill, 2017, and the relevant definitions and sections of the Customs Act that will be impacted.

SUBJECT MATTER	CURRENT DEFINITION	PROPOSED CHANGES
<i>Beneficial Owner</i>	There is no concept of Beneficial Owner in the existing customs legislation.	Definition of Beneficial Owner proposed to be inserted as Section 2(3A) of the Customs Act, 1962 (“the Customs Act”): <i>“beneficial owner” means any person on whose behalf the goods are being imported or exported or who exercises effective control over the goods being imported or exported</i>
<i>Exporter</i>	Exporter is defined under Section 2(20) of the Customs Act as: <i>“exporter”, in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner or any person holding himself out to be the exporter</i>	Definition of “exporter” is proposed to be expanded to include Beneficial Owner; the definition is proposed to be amended as under: <i>“exporter”, in relation to any goods at any time between their entry for export and the time when they are exported, includes any owner, <u>beneficial owner</u> or any person holding himself out to be the exporter</i>

SUBJECT MATTER	CURRENT DEFINITION	PROPOSED CHANGES
Importer	Importer is defined under Section 2(26) of the Customs Act as: <i>“importer”, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer</i>	Scope of the definition of “importer”, is proposed to be expanded to include Beneficial Owner; the definition is proposed to be amended as under: <i>“importer”, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, <u>beneficial owner</u> or any person holding himself out to be the importer</i>
Import	<i>With its grammatical variations and cognate expressions, means bringing into India from a place outside India</i>	No Change
Imported goods	<i>Means any goods bought into India from a place outside India but does not include goods which have been cleared for home consumption.</i>	No Change
India	<i>Includes the territorial waters of India</i>	No Change
Indian Customs Waters	<i>Means the waters extending into the sea up to the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976) and includes any bay, gulf, harbour, creek or tidal river</i>	No Change
Clearance of Goods for Home Consumption	Section 47 (1) of the Customs Act - <i>(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.</i>	No Change

A number of provisions under the Customs Act will potentially be affected by the introduction of the new “Beneficial Owner” concept, including a few highlighted in the table above. As such, its impact has to be analysed in the context of usage in the various sections of the Customs Act.

Amended Definition of “Importer” under Customs Law

The Customs Act links the charge of duty on goods

imported into India – under Section 12 of the Act – to the person liable for the payment of customs duty. The primary charge of duty under Section 12 is on the goods imported into India while the duty liability lies with the “importer”, “exporter”, “agent”, “person chargeable to duty”, “person in whose custody the goods have been found”, etc.

Based on the Finance Bill, the definition of “importer” under Section 2 of the Customs Act will be amended to read “...in relation to any goods at any

time between their importation and the time when they are cleared for home consumption, includes any owner, **beneficial owner** or any person holding himself out to be the importer.”

Why The Change?

In India, companies have a unique importer exporter code (IEC) which they use when undertaking import/export activities. However, Customs investigations and enforcement actions have revealed the practice of conduit entities “loaning out” their IECs to shelter or protect perpetrators of non-compliance, including cases of wrongful drawback claims by the exporters and mis-declarations in order to save on duty payable at the time of import, where the ultimate beneficiary is, in many cases, not the IEC holder. From a customs enforcement perspective, duty recovery or enforcing accountability under the Customs Act becomes a challenge if the IEC holder is only a conduit entity, especially in cases of planned tax avoidance and tax fraud.

The government has indicated that they are introducing the term “Beneficial Owner” as an anti-avoidance measure against the practice of IEC lending and other similar cases. The amendments introduced under the Finance Bill are thus an attempt by the authorities to bolster the legal basis when pursuing investigations of tax fraud and duty avoidance, and hold the “beneficial owner” accountable even if the IEC used for the purpose of import or export is not held by the actual beneficial owner.

An Appropriate Solution or an Overreach?

While it is certainly the right of any government to institute measures to charge and collect applicable duty/tax and guard against duty/tax avoidance and non-compliance, it is equally important to ensure that such measures do not compromise or infringe on the fundamental rights of businesses.

Based on the changes introduced by the Finance Bill and the corresponding amendments to the Customs Act, there are concerns if the objective factors for determining “beneficial owner” and/or the exceptions to the usage of the term are not clearly stipulated. As it currently stands, we can already expect challenges on the interpretation and application of the amendments in certain circumstances, such as:

- In case of goods imported into India but whose ownership lies with a company established and owned outside India, for example leasing of capital equipment. In applying the beneficial ownership concept, this could lead to the possibility of a foreign company being made liable to duty under the Customs Act. In such an instance, the Customs Act could be said to take on an extraterritorial nature, which would go against the principal of geographical tax jurisdiction in the levying of customs duties. Such an extraterritorial application would not be equitable or fair to legitimate trade. As such, clarity is needed to identify “beneficial owner” as an entity or a person inside India.
- In case of online (e-commerce) purchases by individuals in India where the goods are imported via courier. In applying the beneficial ownership concept, the purchaser (individual) in India could be held accountable for any oversight by the courier company or the e-commerce platform/vendor. Thus, further clarification is needed to deal with such situations.

A Different Definition of “Importer” under Foreign Trade Policy

The Foreign Trade Policy of India (FTP) defines the terms “importer” and “exporter” very differently from the Customs Act. Under the FTP, “importer” means a person who imports or intends to import and holds an IEC number, unless otherwise specifically exempted; and “exporter” means a person who exports or intends to export and holds an IEC number, unless otherwise specifically exempted.

Currently, the FTP does not recognise the concept of beneficial ownership. It is uncertain at this point in time whether the relevant authorities will align the FTP definitions of importer and exporter to incorporate the references to “beneficial owner” as provided under the Finance Bill. However, if the government does so, this will mean breaking away from decades of divergence in the definitions of importer and exporter under the Customs Act and FTP. It will also have wider implications as the beneficial owner may possibly also then be eligible for incentives and entitlements under the FTP in relation to the goods being imported or exported.

For more information about the topics raised in this Trade Alert, please contact the Author or your Regional Contact below:

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