

## CAROTAR, 2020: QUESTIONS & ANSWERS FOR IMPORTERS

As you may already know, the [Customs \(Administration of Rules of Origin under Trade Agreements\) Rules, 2020 \(CAROTAR, 2020\)](#) has been notified subsequent to Finance Act, 2020 which inserted a new Section 28DA to the Customs Act, 1962 (**the Act**) specifying a procedure for claiming preferential rate of duty on goods imported under a free trade agreement (**FTA**). The CAROTAR, 2020 comes into force on September 21, 2020.

The following questions and answers are catered to provide comprehensive assistance to importers seeking to claim preferential tariff rate under India's FTAs in accordance with CAROTAR, 2020 structured to address concerns before, during and after importation.

### Questions concerning provisions of CAROTAR, 2020

#### 1. When does CAROTAR, 2020 apply?

CAROTAR, 2020 applies only when an importer is importing goods claiming preferential rate of duty in accordance with rules of origin (**ROO**) criteria and commitments specified under India's FTA. These include FTAs such as India-ASEAN FTA, India - Asia Pacific Trade Agreement (**APTA**), India-Japan Comprehensive Economic Partnership Agreement (**CEPA**), India-Korea CEPA, India-Malaysia Comprehensive Economic Cooperation Agreement (**CECA**), India-Singapore CECA and India – Thailand FTA. Please refer to this [link](#) for a full list and text of India's FTAs.

#### 2. What changes do Section 28DA of the Act and CAROTAR, 2020 bring in?

Prior to the implementation of Section 28DA and CAROTAR, 2020, importers could claim preferential tariff treatment by submitting a Certificate of Origin (**COO**) in the prescribed form at the time of importation.<sup>1</sup> Although, the customs authorities had the power to seek verification of the COO from the Issuing Authority of the exporting country in accordance with the provisions of the FTA, Section 28DA of the Act and CAROTAR, 2020 has implemented a detailed procedure for an importer to claim preferential rate of duty under India's FTAs. The key elements of the procedure incorporated by CAROTAR, 2020 are as follows:

- **Discretionary powers of customs authorities:** Customs authorities are provided discretionary powers to reject an importer's claim for preferential tariff treatment, if he has any reasons to believe that origin criteria as specified in the FTA has not been met. Further, customs authorities also have the power to deny an importer's claim for preferential tariff treatment in certain circumstances, without even conducting a verification from the Issuing Authorities of the exporting country (For further details refer to Q3).

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<sup>1</sup> Instruction no. 31/2016 – Customs, F. No. 20000/4/2011- IC (ICD), Central Board of Excise & Customs, Department of Revenue, Ministry of Finance, Government of India, 12 September 2016; *Bullion and Jewellers Association v. Union of India*, W.P.(C) 10538/2015 & CM APPL 26588/2015, para.12.

- **Maintenance of records by importers:** Importers are required to maintain records of basic minimum information specified in Form I of the CAROTAR, 2020 and provide such information to customs authorities, if requested.
- **Request for information from importers:** Customs authorities are also empowered to request for any details or documents from importers in addition to the records maintained to verify the authenticity of the preferential tariff treatment claim which if not provided within specified time would lead to denial of claim to the importer.
- **Declaration by importers when filing bill of entry:** The bill of entry format has been modified so that importers can make the necessary declarations and provide the requisite information pertaining to the COO (For more information refer to Q. 12).<sup>2</sup>

### 3. What powers do customs authorities have under CAROTAR, 2020?

Under the CAROTAR, 2020 customs authorities are empowered to do the following:

- Request information and supporting documents from the importer with regard to the claim for preferential tariff benefit during the course of customs clearance or thereafter.
- Request for verification of COO from Verification Authority of the exporting country, in accordance with the provisions of the FTA.
- Declare a COO as inapplicable and reject an importer's claim of preferential tariff treatment without requesting a verification from the Verification Authority of the exporting country in specified circumstances (detailed in Q4).
- Verify assessment of all subsequent bills of entry filed by an importer claiming preferential duty benefit in case (i) he has failed to provide requisite information and documents by the due date i.e. within 10 days of asking of information, or (ii) where it is established that the importer has failed to exercise reasonable care to ensure the accuracy and truthfulness of the information furnished. The said system of compulsory verification would be discontinued only once the importer demonstrates that reasonable care is being taken to maintain adequate records.
- The Principal Commissioner of Customs or the Commissioner of Customs can reject an importers' claim for preferential treatment without verification for the reasons to be recorded in writing, if:
  - The importer relinquishes the claim for preferential treatment; or
  - The information and documents furnished by the importer and available on record provide sufficient evidence to prove that goods do not meet the origin criteria prescribed in the respective ROO.
- Without verification, the Principal Commissioner of Customs or the Commissioner of Customs can reject the claim of preferential duty benefit, after recording reasons in writing, on identical goods imported from the same exporter or producer by any importer where it has been determined by the customs authorities that the criteria of ROO is not met by the exporter or producer. The claim could be restored prospectively if demonstrated by submitting information and details that the exporter or producer have undertaken necessary modifications to meet the ROO criteria.

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<sup>2</sup> [Circular no. 38/2020-Customs dated 21st August, 2020, para. 1.2](#)

#### 4. Under what circumstances can customs authorities reject an importer's claim of preferential tariff treatment, without verification of COO from Verification Authority of the exporting country?

Prior to requesting verification of the COO from Verification Authority of the exporting country in accordance with the FTA, customs authorities can reject an importer's claim of preferential tariff treatment in the following circumstances:

- The customs authority can reject an importers' claim for preferential treatment and declare the COO as 'INAPPLICABLE', if the COO:
  - Is incomplete and not in accordance with the format as prescribed by the ROO;
  - Has any alteration not authenticated by the Issuing Authority of the exporting country;
  - Is produced after its validity period has expired;
  - Is issued for an item which is not eligible for preferential tariff treatment under the FTA.
- The Principal Commissioner of Customs or the Commissioner of Customs can reject an importers' claim for preferential treatment for the reasons to be recorded in writing, if:
  - The importer relinquishes the claim for preferential treatment; or
  - The information and documents furnished by the importer and available on record provide sufficient evidence to prove that goods do not meet the origin criteria prescribed in the respective Rules of Origin.
- Where it is determined that imported goods originating from an exporter or producer do not meet the ROO criteria under the FTA, the Principal Commissioner of Customs or the Commissioner of Customs can reject identical goods imported from the same exporter or producer by informing the importer the reasons of rejection in writing including detail of the cases wherein it was established that the identical goods from the same exporter or producer did not satisfy the ROO criteria under the FTA.

### Questions facilitating importers to prepare for CAROTAR, 2020 prior to importation

#### 5. What records do importers have to maintain?

An importer is required to maintain the following records of documents/information (as indicated in Form I of CAROTAR, 2020) for every shipment for at least a period of 5 years from date of filing of bill of entry:

- The production process undertaken in country of origin with respect to production of the imported good and which of the originating criteria prescribed in the Rules of Origin (**ROO**) has been claimed i.e. Wholly Obtained (**WO**), Regional Value Content (**RVC**), Change in Tariff Head (**CTH**), Change in Tariff Sub-Head (**CTSH**), Change in Chapter (**CC**) etc.
- In case of goods with origin criteria WO, the importer must mention the process through which it is claimed to fall under this category.
- In case of goods with origin criteria other than WO, the manufacturing/processing undertaken in the country of origin must be ascertained by the importer viz. Description of the goods, Production Process, Originating Criterion. Also, the importer would be required to furnish information for each originating material or component used in production of good viz. (i) whether manufactured by producer of final goods; (ii) whether procured by producer locally from a third party and (iii) in case procured from third party, did producer of final goods seek confirmation and documentary proof of origin of these components. If origin of any of the components cannot be ascertained the same will be treated as non-originating.
- Additional details as regards applicability of other provisions of the ROO which is used to determine the origin criteria i.e. de minimis provision, accumulation/cumulative provision, Value content (% of local value content and components which constitute value addition), application of Change in Tariff Classification (**CTC**) rule,

process rule, whether COO has been issued retrospectively, whether the consignment has been shipped directly from country of origin.

Further the importer is also required to maintain all “supporting documents” which substantiate the above information. There is however no guidance on what all documents, and in what format, would be acceptable as “supporting documents”. Thus, these need to be maintained in terms of the best estimate of the importer.

The importer is also required to exercise “reasonable care” to ensure the accuracy and truthfulness of the documents/information. Again, the parameters to decide whether the importer has taken “reasonable care” or not, has not been prescribed.

#### **6. Apart from ‘basic minimum information’ prescribed under Form I, what other documents details should an importer maintain or collect from the exporter?**

The following documents/details may also be relevant for an importer to maintain and/or collect from the exporter:

- An entire set of documents and details submitted by the exporter to the Issuing Authority while obtaining COO.
- Certification by an independent auditor as regards the veracity of list of raw materials and processes involved in manufacture of goods; and
- Certification by an independent auditor that due process has been followed by exporter while obtaining COO from Issuing Authority.

#### **7. How can the importer maintain such information?**

As is predictable, the information which is required to be maintained and submitted (upon request) by the importer, needs to flow from the exporter/producer. Therefore, it is essential that the importer request for co-operation from the exporter/producer to provide such details in an accurate and timely manner.

To ensure such cooperation, the importer can consider incorporating clauses in its contract with the exporter/producer that imposes obligations upon the party to share such information in the appropriate format and in a timely manner.

Further, in the event the exporter/producer has concerns regarding confidential nature of the details/documents shared, the importer may consider addressing the same through a non-disclosure agreement or incorporating non-disclosure clauses in their contracts.

#### **8. How often should the importer collect such details from the exporter?**

The COO is issued in relation to every consignment (i.e. all goods covered under a single bill of lading/airway bill). Therefore, importers are recommended to obtain details from exporter/producer in a format which has been certified as authentic from the exporter/producer for every consignment entering India.

#### **9. What are certain important considerations for importer while collating data from exporters?**

- The completeness of information provided should be ensured – For example, information may be provided only of raw materials, and not of process percentage.
- The details from exporter/producer should be obtained in a format which has been certified as authentic from the exporter/producer.
- In the event the information provided is not in English, translation of the same should be provided by the foreign exporter/producer.
- Collation of other details as applicable to the FTA - e.g. HS code details in cases where this is a requirement. For example, 2 details of minimum specific operations, in case this is applicable as per the provisions of the FTA.
- Collation of entire document trail, especially in case of complicated transaction structure, for instance, where there is third party invoicing.



- Collation of other declarations given by exporter to the exporting country while obtaining COO e.g. - declarations given as regards the accuracy of the process.

#### 10. What steps can the importer consider to ensure compliance with the record keeping requirements of CAROTAR, 2020?

- Importers should consider implementing a recurring systematic and institutional procedure for obtaining details from exporters in relation to every consignment imported on which preferential treatment under FTA claim is made. This will ensure the relevant information is automatically recorded and updated.
- Obtain an undertaking from the exporters before arrival of each consignment that the origin criteria has been met and there is no change in the information/data shared with the importer on the basis of which the COO is obtained.
- Obtain a health check report from the exporters of an independent agency (from exporting country) at regular intervals in terms of the documents/information/data shared with the importer certifying that the criteria of ROO has been met
- Importer can consider simplifying transactional structures so that it is easier to justify compliance of origin conditions (which becomes essential since FTA claims are bound to be subject to incremental scrutiny under the new regime). For e.g. APTA does not clearly allow for third party invoicing, hence it would be preferable to have a direct agreement with manufacturer located in APTA country.

#### 11. What possible contractual amendments may be considered by the importer to safeguard their interests?

Importers may consider incorporating following clauses into their contracts to safeguard their interests:

- Clauses obligating an exporter to share all details, specified as “basic minimum information” and other supporting details along with all supporting evidence, prior to importation of goods for each consignment.
- Clauses mandating the exporter to inform the importer in case of any modification of any details that may impact the claim of preferential tariff treatment.
- Comprehensive clauses seeking indemnification from the exporter in case the FTA claim is disallowed in India on account of rejection of COO.

### Questions concerning CAROTAR, 2020 during the process of importation

#### 12. How can an importer claim preferential rate of duty under India’s FTAs in accordance with CAROTAR, 2020?

An importer claiming preferential tariff treatment for the import of goods under India’s FTAs is required to provide the following information at the time of filing of bill of entry:

- A declaration in the bill of entry that the goods qualify as originating goods for preferential rate of duty under the relevant FTA;
- Indicate in the bill of entry the respective tariff notification against each item on which preferential rate of duty is claimed;
- Produce COO covering each item on which preferential rate of duty is claimed; and
- Enter the following details of the COO in the bill of entry:
  - COO reference number;
  - Date of issuance of COO;
  - Originating criteria;
  - Indicate if accumulation/cumulation is applied;
  - Indicate if the COO is issued by a third country (back-to-back); and



- Indicate if goods have been transported directly from country of origin.

Please see [link](#) to the updated Bill of Entry format for your reference.

### 13. When can customs authorities request for information from the importer? How is an importer supposed to comply?

- Customs authorities can request for information and supporting documents at any time during the course of customs clearance or thereafter (e.g. during subsequent investigations or post-clearance audit).
- An importer is required to furnish the relevant information within 10 working days from the date of such information or documents being sought.

### 14. What type of documents/details are likely to raise red flags for the customs department?

- Bill of Material/cost structure where all components have identical values.
- Bill of material/cost structure not depicting all details of production e.g. details of processes undertaken in the country of origin and the profit margin not provided (if direct method of computing regional value addition is adopted)
- Originating processes depicted to be only 'minimal operations or processes' (e.g. simple packaging operations, washing, painting, affixing of marks etc)
- Non-synchronization and incoherence between different transactional documents - e.g. while COO certifies country of origin as China, the purchase order or invoice depicts the country of origin to be Vietnam.

### 15. How can an importer ensure that the confidentiality of the exporter's documents will be protected?

- Importers can consider seeking clarification from the customs authorities on the issue of confidentiality.
- Importers should label each document containing sensitive information as "CONFIDENTIAL".

### 16. What happens if an importer fails to provide the information requested by the customs authorities?

Where the importer fails to provide requisite information and documents within 10 working days of the information being sought or where the information and documents received from the importer is considered to be insufficient by the customs authorities to conclude that the origin criteria prescribed in the respective FTA have been met, the customs officer shall forward a verification proposal to the Director (ICD), CBIC for taking up verification of origin with the exporting country.

Further, the Risk Management Centre of Customs (RMCC) through written communication is informed that an importer has failed to provide necessary documentation and all subsequent import consignments of the importer will be subjected to compulsory assessment of all bills of entry in accordance with Rule 8 of CAROTAR, 2020.

### 17. What is the verification process?

Under India's FTAs, the relevant authority of the importing country can request for verification of the COO from the corresponding authority in the exporting country i.e. Verification Authority. Accordingly, the CAROTAR, 2020 provides that Indian customs authorities can request for such verification during the course of customs clearance or thereafter, where:

- There is a doubt regarding genuineness or authenticity of the COO; or
- There is reason to believe that the country of origin criterion stated in the COO has not been met or the claim of preferential rate of duty made by importer is invalid; or
- Verification is being undertaken on random basis, as a measure of due diligence to verify whether the goods meet the origin criteria as claimed.

The Verification Authority of the exporting country must respond to the request of the Indian customs authority, within the timeline specified under the FTA or within 60 days in the event no timelines are specified in the FTA. The





claim of preferential rate of duty will be denied in case the Verification Authority fails to respond as per the specified timelines, or if the Verification Authority does not provide the requested information or if the information provided by the Verification Authority proves that the goods do not meet the origin criteria as per ROO.

#### 18. When can a verification process be requested?

Although a verification can be requested by customs authorities at any point of time during the course of customs clearance or thereafter. CAROTAR, 2020 specifies that customs authorities should first request information from the importer in case of any doubt regarding the ROO criteria, and if the documents furnished by the importer fails to establish that the goods comply with the ROO criteria then customs authorities can request for a verification from the Verification Authority of the exporting country.

#### 19. What happens to the goods during the process of verification?

On initiation of verification process, the preferential tariff treatment of such goods may be suspended till conclusion of the verification. However, importer may be allowed to provisionally assess and clear the goods on payment of security amount equal to the difference between the duty provisionally assessed under Section 18 of the Act and the preferential duty claimed.

The form of payment of the security has not been clarified in the CAROTAR, 2020 and the importer may consider requesting customs authorities to accept security in the form of a provisional duty bond or a bank guarantee.

### Question concerning way forward in case of rejection of claim for preferential tariff under CAROTAR, 2020

#### 20. What possible remedies are available to the importer in case of rejection of the preferential tariff benefit by the custom authorities?

In the event, the rejection of preferential tariff benefit is by an officer below the rank of the Principal Commissioner of Customs or the Commissioner of Customs importer may appeal to the Commissioner (Appeals) within sixty days from the issuance of the decision in accordance with Section 128 and 128A of the Act.

In case of an order passed by the Principal Commissioner of Customs or the Commissioner of Customs rejecting the claim for preferential tariff benefit the importer may file an appeal before the Appellate Tribunal under Section 129A of the Act within three months from the date of the order.

Further, based on the facts and circumstance of the case, an importer may also approach the High Court by filing a writ petition under Article 226 of the Constitution of India.

It will be interesting to see if any importers challenge the provisions of CAROTAR, 2020 on grounds such as (i) inconsistencies with the letter and spirit of the provisions of the FTA, (ii) imposition of onerous requirements on importers with respect to COO (which is an obligation on part of exporters) and (iii) lack of clarity in the CAROTAR, 2020 regarding COOs that will be granted preferential treatment.

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