*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 12th March, 2015
Judgment Delivered on: 18th March, 2015

+ WP(C) 744/2015 & CM Nos. 1319/2015, 2662/2015

SANDISK INTERNATIONAL LTD. .....Petitioner

versus

THE DESIGNATED AUTHORITY & ORS. ....Respondents

<u>Advocates who appeared in this case:</u>

For the Petitioner:	Mr Balbir Singh, Mr V.Lakshmikumaran, Mr Bhargav Mansatta, Mr Atul Gupta, Mr T.D. Satish, Mr Angad Sadhu and Mr Rupinder Simhar, Advocates.
For the Respondents:	Mr Vivek Goyal, Advocate for respondent Nos.1 to 4, Mr Sandeep Sethi, Sr Advocate with Mr Rajesh Sharma, Advocate for respondent Nos.5 & 6.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

<u>JUDGMENT</u>

<u>SANJEEV SACHDEVA, J</u>

1. The petitioner, a Company established in Ireland has impugned the final findings dated 19.12.2014 issued by the Designated Authority (DA). The subject goods in respect of which the final findings have been rendered are "USB Flash Drives."

2. The Designated Authority initiated an Anti-dumping Duty investigation on the said goods on 21.06.2013 on an application of the Storage Media Products Manufacturers and Marketers Welfare Association (respondent No.5) on behalf of the domestic producer M/s Moser Baer India Ltd.

3. The sole grievance raised by the petitioner is that the Designated Authority has relied upon the transactions-wise imports data as new evidence at the fag-end of the investigation without supplying a copy thereof and providing a reasonable period of time to the parties to review and comment upon the new evidence. It is contended that failure to supply the data amounts to denial of a hearing and, as such, the final findings rendered are liable to be quashed.

4. As per the petitioner, the respondent No.5 in its application seeking initiation of inquiry had relied upon the transaction-by-transaction import statistics sourced from M/s. Cybex Exim Solutions (P.) Ltd. which collects data from custom authorities and the said import statistics was raw data and in substantial quantity included data with regard to non-subject goods and, as such, was liable to be rejected/ignored by the competent authority.

5. As per the petitioner, the data furnished by the respondent No. 5 was ultimately rejected and for the first time, at the fag-end of the investigative proceedings, the petitioner came to know on receipt of

the disclosure statement on the evening of 05.12.2014 that the Designated Authority had relied on the transactions-by-transactions imports statistics obtained by him from the Directorate General of Commercial Intelligence and Statistics (respondent No.4). It is contended that the respondent No.4 makes available to the public the imports statistics in excel format after removing the importers/exporters name, address and IEC etc. which is kept confidential.

6. It is submitted that the petitioner immediately on 08.12.2014 requested the Designated Authority for supplying the new evidence relied upon in the disclosure statement i.e. the data sourced by the Designated Authority from the respondent No.4 after deleting the columns containing the confidential data of the importers/exporters. The petitioner also sought the disclosure of the methodology which was used by the Designated Authority to arrive at a final figure of the volume and value of imports. The Designated Authority in response stated that it was not obligatory on the part of the Authority to provide relied upon transaction-wise import data to the interested parties. The petitioner once again on 09.12.2014 requested the Designated Authority to furnish the said evidence to enable the petitioner to file a reply to the same but the same was not supplied.

7. It is contended by the petitioner that the non-supply of the said data/evidence relied upon by the Designated Authority violated the

principles of natural justice and curtailed the rights of the petitioner to defend/oppose the imposition of the Anti-Dumping Duty and also amounted to a denial of an opportunity to effectively participate in the investigation.

8. Learned counsel for the petitioner contended that the competent authority, to determine whether there was any dumping or any injury on account of the said dumping to the domestic industry, had to first determine the non-injurious price and the margin thereof. It is contended that the Designated Authority while furnishing the information to the petitioner did not disclose the non-injurious price as determined by the Designated Authority thereby denying an opportunity to the petitioner to represent/show the incorrectness of the said determination which amounted to a denial of an adequate opportunity of effective hearing. Learned counsel referred to the final findings to demonstrate the prejudice caused to the petitioner on account of non supply of the relevant data. He drew our attention to the following tables as extracted in the Final Findings:-

> "**<u>Price Undercutting</u>**
>
> 128. Price undercutting has been assessed by comparing the export price with the domestic selling price in India of the subject goods, during the period of investigation. It would be seen that the landed price of imports is lower than the selling price of the domestic industry for almost all storage

capacities of USB flash drives, thus resulting in overall price undercutting.

Subject Countries

Particulars	Unit	2009-10	2010-11	2011-12	POI (Jan to Dec, 2012)
Landed Value	Rs./NO	358.40	317.20	255.17	231.24
Net Sales realization*	Rs./NO	***	***	***	***
Price Undercutting	Rs./NO	***	***	***	***
Price Undercutting	%	***	***	***	***
Price Undercutting	% Range	20-30	40-50	40-50	40-50

China PR

Particulars	Unit	2009-10	2010-11	2011-12	POI (Jan to Dec, 2012)
Landed Value	Rs./NO	352.35	315.28	253.44	234.46
Net Sales realization*	Rs./NO	***	***	***	***
Price Undercutting	Rs./NO	***	***	***	***
Price Undercutting	%	***	***	***	***
Price Undercutting	% Range	20-30	40-50	40-50	40-50

Taiwan

Particulars	Unit	2009-10	2010-11	2011-12	POI (Jan to Dec, 2012)
Landed Value	Rs./NO	372.25	319.38	257.43	226.66
Net Sales realization*	Rs./NO	***	***	***	***
Price Undercutting	Rs./NO	***	***	***	***
Price Undercutting	%	***	***	***	***
Price Undercutting	% Range	20-30	35-45	45-55	40-50

Note:- *Weighted average Net Sales Realizations have been determined based on the import volumes of all grades/GBs from the relevant subject country.

It is noted from the above table that imports from the subject countries individually as well as cumulatively is undercutting the prices of domestic industry.

Price Underselling

129. Authority notes that the price underselling is an important indicator of assessment of injury. Non injurious price has been worked out and compared. with the landed value of the subject goods to arrive at the extent of price underselling. The non-injurious price has been determined considering the cost of production of the domestic industry for the product under consideration during the POI, in accordance with Annexure III of the Anti-dumping Rules. The analysis shows that the landed value of subject imports was below the non-injurious price as can be seen from the table below. The GB-wise Non Injurious Price (NIP) are given below in table-1. The NIP for other grades/types of subject goods has been determined on the basis of average NIP of the GBs given in the, table-1 below, based on the principles of conservative approach. The GB-wise landed value is given below in Table-2(a) &2(b) for China PR and Chinese Taipei respectively.

Table-1

Grade/Type	NIP Rs/Pc
NAND Based	
1 GB	***
2 GB	***
4 GB	***
8 GB	***
16 GB	***
32 GB	***
64 GB	***

COB Based	
4 GB	***
8 GB	***

Table-2(a)

<u>Landed Value – China PR</u>

Grade/Type	Landed Value Rs/Pc
NAND Based	
1 GB	***
2 GB	***
4 GB	***
8 GB	***
16 GB	***
32 GB	***
64 GB	***
Others	***
COB Based	
2GB	***
4 GB	***
8 GB	***
16 GB	***
32 GB	***

Table-2(b)

<u>Landed Value – Chinese Taipei</u>

Grade/Type	Landed Value Rs/Pc
NAND Based	
1 GB	***
2 GB	***
4 GB	***
8 GB	***
16 GB	***
32 GB	***

64 GB	***
Others	***
COB Based	
2GB	***
4 GB	***
8 GB	***
16 GB	***
32 GB	***
64 GB	***

The weighted average analysis of NIP and Landed Value, based on the GB wise NIP and Landed Value mentioned in the Table 1 and Table 2(a) & 2(b) above, the Authority notes that the landed value of imports of the subject goods, originating in or exported from the subject countries, was below the non-injurious price of the domestic industry as can be seen in the table below. The Authority further notes that imports from the subject countries individually as well as cumulatively is having underselling effect on the prices of domestic industry.

Particulars	Unit	China	Taiwan	Subject Countries
Non-injurious price**	Rs./No.	***	***	***
Landed Price (POI)	Rs./No.	234.46	226.66	231.24
Price underselling	Rs./No.	***	***	***
Underselling	%	***	***	***
Underselling	% Range	75-85	80-90	80-90

Note:- *Weighted average Non-injurious price have been determined based on the import volumes of all grades/GBs from the relevant subject country.

9. Learned counsel for the petitioner further contended that throughout the course of investigation spread over a period of 17

months, the investigation had continued on the basis of the data furnished by the respondent No.5, which data was rejected by the Designated Authority at the very last minute and the data sourced by the Designated Authority from the respondent No.4 was introduced in the investigation, for the first time, by virtue of the disclosure statement dated 05.12.2014, much after the hearing was over. The data introduced at the fag end of the investigation was neither furnished to the petitioner nor was an opportunity granted to the petitioner to verify or to comment on the reliability or admissibility of the said data.

10. Learned counsel for the petitioner relied on the decision of the Supreme Court in ***Automotive Tyre Manufacturers Association vs. the Designated Authority & Others:*** **(2011) 2 SCC 258** to contend that the DA exercises quasi judicial function and is to act judicially and there is a duty cast upon the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter.

11. Learned counsel for the petitioner also relied on the decision of the Supreme Court in ***Reliance Industries Ltd. vs. Designated Authority:*** **2006(202) ELT 23 (SC) : (2006) 10 SCC 368** to contend that unless there was a claim for confidentiality and the DA opined on it, the data used by DA could not be kept back from the interested party. He submitted that the non confidential information had to be

supplied and non supply of the same prejudiced the petitioner and the finding thus rendered were vitiated and were liable to be set aside

12. Learned Senior Counsel for the respondents, per contra, contended that the petition was premature inasmuch as the Final Findings were recommendatory in nature and the Central Government had still to form an opinion whether to accept or not to accept the Final Findings. He contended that, in case the Central Government decided to accept the Final Findings, it was open to the petitioner to file an appeal before the appropriate forum.

13. Learned Senior Counsel for the respondent further contended that the data furnished by the respondent No.4 to the competent authority was confidential data with the respondent No.4 and, as such, could not be shared with the petitioner. He further contended that the petitioner itself had supplied incomplete data by scoring out/omitting various information in the same.

14. Learned Senior Counsel for the respondent alternatively contented that in case this court were to hold that there was violation of the principles of natural justice, then the matter could be remanded to the Designated Authority to cure the alleged defect. In support he referred to the following decisions:

(i) Sterlite Industries (India) Ltd. Versus Designated Authority 2003 (158) E.L.T. 673 (SC);

Tribunal Decisions

(ii) Kumho Petrochemicals Co. Ltd. Versus National Organic Chemical Industries Ltd. Final Order No. AD/A/54808-5-4810/2014-CU[DB dated 27/08/2014];

(iii) Fragrances Flavours Association of India versus Designated Authority [2011 (270) E.L.T. 733 (T)];

(iv) Huawei Tech. Co. Ltd .. Versus Designated Authority[2011 (273) E.L.T. 293 (Tri.- Del.)];

(v) Leather Cloth & Plastic Mfr. Association Versus Union of India 2012 (282) E.L.T. 438 (Tri. - Del.)

15. To examine the scope of the investigation in an inquiry, reference may be made to the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as the "Rules") with regard to the relevant principles governing investigation by the Designated Authority.

> ***"5. Initiation of investigation. -*** *(1) Except as provided in sub-rule (4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry.*
>
> *(2) An application under sub-rule (1) shall be in the form as maybe specified by the designated authority and the application shall be supported by evidence of –*
>
> *(a) dumping*

(b) injury, where applicable, and

(c) where applicable, a causal link between such dumped imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless –

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry :

Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like article by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding –

(i) dumping,

(ii) injury, where applicable; and

(iii) where applicable, a casual link between such dumped imports and the alleged injury, to justify the initiation of an investigation.

Explanation. - For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent of the total production of the like *article produced by that portion of the domestic industry expressing either support for or opposition, as the case may be, to the application.*

(4) Notwithstanding anything contained in sub-rule (1) the designated authority may initiate an investigation suo moto if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation.

***6. Principles governing investigations.-** (1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate information on the following:-*

(i) the name of the exporting country or countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed; and

(vi) the time-limits allowed to interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to –

(i) the known exporters or to the concerned trade association where the number of exporters is large, and

(ii) the governments of the exporting countries :

Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefore in writing.

(4) The designated authority may issue a notice calling for any information, in such form as may be specified by it, from the exporters, foreign producers and other interested parties and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation : For the purpose of this sub-rule, the notice calling for information and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, injury where applicable, and causality.

(6) The designated authority may allow an interested party or its representative to present the information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented to it by one interested party to the other interested parties, participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

7. Confidential information- *(1) Notwithstanding anything contained in sub-rules (2), (3) and (7) of rule 6, sub-rule (2) of rule 12, sub-rule (4) of rule 15 and sub-rule (4) of rule 17, the copies of applications received under sub-rule (1) of rule 5, or any other information provided to the designated authority on a confidential basis by any party in the course of investigation, shall, upon the designated authority being satisfied as to its confidentiality, be treated as such by it and no such* *information shall be disclosed to any other party without specific authorization of the party providing such information.*

(2) The designated authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the designated authority a statement of reasons why summarisation is not possible.

(3) Notwithstanding anything contained in sub-rule (2), if the designated authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information.

8. Accuracy of the information. - *Except in cases referred to in sub-rule (8) of rule 6, the designated authority shall during the course of investigation satisfy itself as to the accuracy of the information supplied by the interested parties upon which its findings are based.*

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16. Disclosure of information. - *The designated authority shall, before giving its final findings, inform all interested parties of the essential facts under consideration which form the basis for its decision.*

17. Final findings. - *(1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article* *under investigation is being dumped in India and submit to the Central Government its final finding -*

(a) as to, -

> *(i) the export price, normal value and the margin of dumping of the said article;*
>
> *(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;*
>
> *(iii) a casual link, where applicable, between the dumped imports and injury;*
>
> *(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:*
>
> *Provided that the Central Government may, in its discretion in special circumstances extend further the aforesaid period of one year by six months:*
>
> *Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,*

(b) recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry.

(2) The final finding, if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information regarding-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) Considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(3) The designated authority shall determine an individual margin of dumping for each known exporter or producer concerned of the article under investigation:

Provided that in cases where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, and any selection, of exporters, producers, or types of articles, made under this proviso shall preferably be made in consultation with and with the consent of the exporters, producers or importers concerned :

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Provided further that the designated authority shall, determine an individual margin of dumping for any exporter or producer, though not selected initially, who submit necessary information in time, except where the number of exporters or producers are so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.

(4) The designated authority shall issue a public notice recording its final findings."

16. Rule 5 dealing with Initiation of investigation, stipulates that the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry. Sub rule (2) of Rule 5 lays down that the application under sub rule (1) shall be in the prescribed form and shall be supported by evidence of dumping, where applicable of injury and where applicable of a causal link between such dumped imports and alleged injury. Sub rule (3), besides stipulating the qualification pre-conditions for the domestic producers prior to seeking an investigation, lays down that the designated authority shall not initiate an investigation pursuant to an application made under sub rule (1) unless it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding dumping, where applicable injury and where applicable a casual link between such dumped imports and the alleged injury, to justify the initiation of an

investigation. The designated authority has also been empowered to initiate an investigation *suo moto* if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub rule (3).

17. Rule 6 stipulates that after the designated authority has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article it shall issue a public notice notifying its decision. The Public notice should inter alia, contain adequate information on, amongst other, the basis on which dumping is alleged in the application and a summary of the factors on which the allegation of injury is based. A copy of the public notice is to be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties. The designated authority is required to provide a copy of the application to the known exporters or to the concerned trade association where the number of exporters is large, and the governments of the exporting countries and also to any other interested party who makes a request therefore in writing. Under sub rule (4), the designated authority is empowered to call for any information from the exporters, foreign producers and other interested parties. Under sub rule (5), the designated authority shall also provide opportunity to the industrial

users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information relevant to the investigation regarding dumping, injury where applicable and causality. Under sub rule (6) the designated authority may allow an interested party or its representative to present the information relevant to the investigation orally provided that the same is subsequently reproduced in writing. Under sub rule (7), it is stipulated that the designated authority shall make available the evidence presented to it by one interested party to the other interested parties, participating in the investigation.

18. Rule 7 stipulates that where the copies of applications received under sub rule (1) of Rule 5, or any other information is provided to the designated authority on a confidential basis by any party in the course of investigation, the designated authority upon being satisfied as to its confidentiality, shall treat the same as such and no such information shall be disclosed to any other party without specific authorisation of the party providing such information. Under sub rule (2), the designated authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the designated authority a statement of reasons why summarisation is not possible. If the designated authority is satisfied that the request for confidentiality is not warranted or the supplier of

the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information.

19. Under Rule 8, **e**xcept in cases referred to in sub rule (8) of Rule 6, the designated authority shall during the course of investigation satisfy itself as to the accuracy of the information supplied by the interested parties upon which its findings are based.

20. Rule 16 mandates that before giving its final findings, the designated authority shall, inform all interested parties of the essential facts under consideration which form the basis for its decision.

21. Rule 17, dealing with final findings, stipulates that the designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit its final findings to the Central Government amongst others as to the export price, normal value and the margin of dumping of the said article and recommend the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry. The Central Government may in its discretion in special circumstances extend the aforesaid period of one year by six months. Under sub rule (2), the final finding, if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion and shall also contain information amongst others regarding the margins of dumping

established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value and the considerations relevant to the injury determination and the main reasons leading to the determination. Under sub rule (3) the designated authority is required to determine an individual margin of dumping for each known exporter or producer concerned of the article under investigation and where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

22. The scope and procedure for investigation and the evidence to considered by the designated authority as laid down by the said Rules clearly establishes that all the evidence and material being considered by the designated authority has to be shared with the interested parties so as to provide an effective opportunity of being heard. In case any evidence is being considered by the designated authority in respect of which confidentially has been claimed by the party supplying the evidence, then non confidential summary of the evidence has to be shared with the interested party. The designated authority also has to provide full explanation of the reasons for the methodology used in

the establishment and comparison of the export price and the normal value and the considerations relevant to the injury determination.

23. The Supreme Court in ***Reliance Industries Ltd.*** ***(Supra)*** held as under:-

"38. *We are of the opinion that the nature of the proceedings before the DA are quasi-judicial, and it is well settled that a quasi-judicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the Authority in that decision vide S.N. Mukherjee v. Union of India [(1990) 4 SCC 594 : 1990 SCC (Cri) 669 : 1991 SCC (L&S) 242 : (1991) 16 ATC 445].*

xxxxx xxxxx xxxxx xxxxx xxxxx

40. *In the present case, NIP computed by the DA was much lower than that computed by the appellant, and the reasons for such variance and detailed calculations were not disclosed by the DA to the appellant. No good reasons were given for reducing the cost price of electricity supplied by the appellant produced in its captive power plant. This was clearly illegal.*

xxxxx xxxxx xxxxx xxxxx xxxxx

44. *In this connection, this Court in Sterlite Industries (India) Ltd. v. Designated Authority [(2003) 158 ELT 673 : (2006) 10 SCC 386] observed thus: (SCC pp. 386-87, para 3)*

"3. In our view, it is not necessary for us to go into the merits of this matter as we propose to send the matter back to CEGAT after laying down certain

guidelines. From what has been argued before us, it appears that in pursuance of Rule 7 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Designated Authority is treating all material submitted to it as confidential merely on a party asking that it be treated confidential. In our view, that is not the purport of Rule 7. <u>Under Rule 7, the Designated Authority has to be satisfied as to the confidentiality of that material. Even if the material is confidential the Designated Authority has to ask the parties providing information, on confidential basis, to furnish a non-confidential summary thereof. If such a statement is not being furnished then that party should submit to the Designated Authority a statement of reasons why summarisation is not possible.</u> In any event, under Rule 7(3) the Designated Authority can come to the conclusion that confidentiality is not warranted and it may, in certain cases, disregard that information. It must be remembered that <u>not making relevant material available to the other side affects the other side as they get handicapped in filing an effective appeal. Therefore, confidentiality under Rule 7 is not something which must be automatically assumed.</u> Of course in such cases there is need for confidentiality as otherwise trade competitors would obtain confidential information, which they cannot otherwise get. But whether information supplied is required to be kept confidential has to be considered on a case-to-case basis. It is for the Designated Authority to decide whether a particular material is required to be kept confidential. Even where confidentiality is

> *required, it will always be open for the Appellate Authority, namely, CEGAT to look into the relevant files."*
>
> (underlining supplied)

24. In ***Reliance Industries case*** ***(Supra)***, the Supreme Court has laid down that the nature of the proceedings before the DA are quasi-judicial, and a quasi-judicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the Authority in that decision. Where reasons for variance and detailed calculations for computing the Non Injurious Price are not disclosed, it would be illegal. Under Rule 7, the Designated Authority has to be satisfied as to the confidentiality of that material. Even if the material is confidential the Designated Authority has to ask the parties providing information, on confidential basis, to furnish a non-confidential summary thereof. If such a statement is not being furnished then that party should submit to the Designated Authority a statement of reasons why summarisation is not possible. Not making relevant material available to the other side affects the other side as they get handicapped in filing an effective appeal. Therefore, confidentiality under Rule 7 is not something which must be automatically assumed.

25. The Supreme Court of India in ***Automotive Tyre Manufacturers Association*** ***(Supra)*** has laid down that the

Designated Authority exercises quasi-judicial functions and is bound to act judicially. The DA determines the rights and obligations of the "interested parties" by applying objective standards based on the material/information/evidence presented by the exporters, foreign producers and other "interested parties" by applying the procedure and principles laid down in the 1995 Rules. While determining the existence, degree and effect of the alleged dumping, the Designated Authority determines a "lis" between persons supporting the levy of duty and those opposing the said levy. Rule 10 of the said Rules lays down the criteria for the determination of the normal value, export price and margin of dumping, while Rule 11 deals with the determination of injury which according to Annexure II to the 1995 Rules is based on positive evidence and involves an objective examination of both: (*a*) the volume and the effect of the dumped imports on prices in the domestic market for like products; and (*b*) the consequent impact of these imports on domestic producers of such products. It is evident that the determination of injury is premised on an objective examination of the material submitted by the parties. Moreover, under Rule 6(7) of the 1995 Rules, the DA is required to make available the evidence presented to it by one party to other interested parties, participating in the investigation.

26. The Supreme Court further laid down that the DA is obliged to adhere to the Rules while conducting investigations and the duty of the Designated Authority to follow the principles of natural justice is

implicit in the exercise of power conferred on him under the said Rules and the Rules further impose a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. It has been held that a personal hearing enables the authority concerned to watch the demeanour of the witnesses, etc. and also clear up his doubts during the course of the arguments.

27. This court in ***Bharat Solvent & Chemical Corporation Versus Union of India & Others, W.P. (C) 401 of 2015*** by judgment dated 09.03.2015, following the decision of the Supreme Court in Automotive Tyre Manufactures Association held that the DA functions as a quasi-judicial authority and decides a "lis" between persons supporting the levy of duty and those opposing the levy. Furthermore, the DA is bound to follow the principles of natural justice and to give an opportunity of hearing to all interested parties, in fact, "*to all the parties, who have filed objections and adduced evidence*".

28. In the present case, the Designated Authority has disregarded the transaction-by-transaction import statistics submitted by the domestic industry alongwith the application seeking initiation and introduced fresh data and relied on the transactions-by-transactions imports statistics obtained by him from the respondent No.4 at the

very fag end of the investigation. The data was introduced after a period of seventeen months of initiation of investigation. Neither the copy of the said data relied upon by the Designated Authority nor the non confidential summary thereof was not supplied to the petitioners despite the same being demanded on the ground of confidentiality.

29. The hearing required to be provided to an interested party cannot be an empty formality. It has to be an effective hearing. Since the investigation and determination is based on positive evidence and involves an objective examination of both the volume and the effect of the dumped imports on prices in the domestic market for like products and the material submitted by the parties has to be objectively examined, the DA is required to make available the evidence presented to it by one party to other interested parties, participating in the investigation and also the evidence or the material sourced by the DA from other sources to the parties.

30. The Rules make it obligatory on the part of the Designated Authority to share all material with the interested parties subject to the confidentiality provisions. The Designated Authority has not only refused to supply the non confidential summary of the data sourced from respondent No. 4 but has also not disclosed the non injurious price of the subject goods as determined by him. Determination of the non-injurious price is a primary feature of the investigation conducted by the Designated Authority. Unless the data, being relied upon, is

shared with the interested parties, there cannot be an effective opportunity of a hearing. Non-sharing of information mandatorily required to be shared under the Rules vitiates the findings. Failure to supply the data (subject to the rules of confidentiality) has curtailed the rights of and amounted to denial of an opportunity of effective participation to the petitioner and violates the principles of natural justice. The Final Findings dated 19.12.2014 rendered in violation of the principles of natural justice are thus liable to be quashed.

31. There is no merit in the contention of the respondent that since, the Final Finding are only recommendatory in nature, the petition is premature. It is no longer res-integra that this court in exercise of powers under Article 226 of the Constitution of India is empowered to entertain a petition challenging the Final Findings even prior to the same being accepted by the central government more so in a case where the principles of natural justice have not been complied with.

32. Further contention raised that the petitioner itself had supplied data by scoring out of confidential information and thus could not raise a grievance with regard to the non supply of data to the petitioner also does not have any merit. The Designated Authority has accepted the claim of confidentiality of the petitioner and the said upholding of claim has not been challenged by the respondent domestic industry. If the Designated Authority is not satisfied with the claim of confidentiality by one of the parties, the Designated

Authority is empowered by the Rules to disregard and refuse to take into consideration the data furnished by that party but the Designated Authority cannot refuse to supply data furnished by others to the said party. The fact that the Rules prescribe that if the Designated Authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information, further emphasises the fact that for an investigation to comply with the principles of natural justice, it mandatorily entails sharing with the interested parties, the information/data being considered by the Designated Authority.

33. With regard to the alternative submission of the learned Senior Counsel for the respondent that the matter could be remanded to the Designated Authority for a post decisional hearing, we need to look at the various timelines prescribed by the Rules.

34. Sub section (5) of Section 9A of the Customs Tariff Act, 1975 lays down that the anti-dumping duty imposed under this section, unless revoked earlier, shall cease to have effect on expiry of five years from the date of such imposition. Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition

for a further period of five years and such further period shall commence from the date of order of such extension and further provided that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

35. Section 9 C of the Customs Tariff Act provided for an appeal against the order of determination or review thereof to the Customs, Excise and Gold Service Tax Appellate Tribunal. Sub section (3) lays down that the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

36. As noted hereinabove under Rule 17 it is mandatory on the Designated Authority to determine within one year from the date of initiation of an investigation, as to whether or not the article under investigation is being dumped in India and submit its Final Findings to the Central Government. The Central Government in special circumstances has been empowered to extend the aforesaid period of one year by six months. Provided that in cases where the Designated Authority has suspended the investigation on the acceptance of a price undertaking of the exporter of the article in question and subsequently

the investigation is resumed on the violation of the terms of the undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of one year.

37. Rule 18 also lays down a time limit for the central government to impose the anti dumping duty i.e. a period of three months of the date of the publication of the final findings by the Designated Authority.

38. Rule 23 mandates the Designated Authority to review from time to time the need for the continued imposition of the anti-dumping duty and lays down that any review initiated shall be concluded within a period of twelve months from the date of initiation of the review.

39. Reading of the Rules and the statutory provisions make it clear that the timelines have to be strictly followed and the investigation and the review as the case may be have to be completed within the respective statutory periods. In case the same are not completed with the respective statutory periods the proceedings would be vitiated. In the present case the investigation commenced on 21.06.2013. Under Rule 17, the period would have expired on 20.06.2014. The Central Government had the power to extend the said period by another six months i.e. till 20.12.2014. The Final Findings have been issued on 19.12.2014. Even the extended period of investigation is long over. The Rules make a solitary exception and that also in the case of the

investigation being suspended on the acceptance of a price undertaking by the exporter of the article in question. In view of the fact that the statutory period is over, the matter cannot be remanded to the Designated Authority for a fresh consideration.

40. The judgment of the Supreme Court in the case of ***Sterlite Industries (India) Ltd.*** ***(Supra)*** relied upon by the learned Senior Counsel for the respondents is not applicable in the facts of the present case as in the said case, the CEGAT had set aside the notification and the Supreme Court had remanded the matter to the CEGAT as the CEGAT had held in favour of the appellant (domestic industry) on the aspect of margin of dumping, injury suffered by domestic industry and causal connection between dumping and material injury but had quashed the notification on the ground that the designated authority had wrongly calculated the production capacity of the appellant. The Supreme Court after examining the records found that the conclusion of the CEGAT on the production capacity was incorrect. The Supreme Court in those circumstances held that it was the duty of the CEGAT to re-work the figures and decide what, if any, should be the anti dumping duty. The said judgment is clearly not applicable in the facts of the present case.

41. The judgments of the Tribunal relied upon by the respondents are also not applicable as the said judgments firstly are not binding upon us and secondly do not as a proposition of law consider or deal

with the principle that where the final findings are vitiated on account of violation of principles of natural justice, the matter has to be remanded for a reconsideration or a post decisional hearing. We have already held that the statutory periods have to be strictly complied with for completing the investigations and for the Central Government to impose the anti dumping duty and as the statutory period is over, the matter cannot be remanded to the Designated Authority for a fresh consideration.

42. In view of the above, we hold that the DA, in not providing the information/material considered by him, has violated the principles of natural justice and the same is fatal to the Final Findings rendered. Consequently, the Final Findings, having been rendered in violation of the principles of natural justice, stand vitiated and cannot be sustained. As a result, the impugned Final Findings are quashed. The writ petition is allowed to this extent. There shall be no order as to costs.

SANJEEV SACHDEVA, J.

MARCH 18, 2015 **BADAR DURREZ AHMED, J.**
st/HJ