

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

% Judgment delivered on: 16.02.2016

+ W.P.(C) 6805/2015 & CM 12449/2015

PTA USERS ASSOCIATION & ORS Petitioners

versus

UNION OF INDIA & ORS Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Atul Gupta, Mr T.D. Satish and Mr V. Lakshmikumaran
For the Respondent Nos. 1 & 2 : Mr Sanjay Jain, ASG with Mr Ashish Dholakia and Mr Shraddha Bhargava
For the Respondent No. 3 : Mr Sandeep Sethi, Sr Advocate with Ms Reena Khair and Mr Rajesh Sharma
For the Respondent No. 4 : Mr Balbir Singh with Ms Reena Khair and Mr Rajesh Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. We have heard the learned counsel for the parties. This petition was filed challenging the notification No. 23/2015-Cus (ADD) dated 27.05.2015 whereby anti-dumping duty has been imposed on Purified Terephthalic Acid (PTA) on imports from Thailand and Korea. This was pursuant to the final finding dated 07.04.2015 rendered by the designated authority under the Customs Tariff Act, 1975.

2. Several issues were sought to be raised in the petition. However,

the issues can be bifurcated into two categories. One which deals with the merits of the matter and the other which deals with the aspect of retrospectivity of the imposition of the anti-dumping duty.

3. Insofar as the first aspect is concerned, we feel that the petitioners ought to have filed an appeal under Section 9C of the Customs Tariff Act, 1975. But as they were pursuing this writ petition, we are granting liberty to them to prefer an appeal against the final findings and the notification on merits. We are granting liberty to the petitioners to file the appeal within two weeks and the respondents have stated fairly that they shall not raise the issue of limitation. In case the appeal is filed within the said period of two weeks, we expect that the Custom Excise & Service Tax Appellate Tribunal (CESTAT) shall dispose of the same expeditiously and preferably within six months.

4. Insofar as the second aspect of retrospectivity is concerned, we find that the impugned notification imposes anti dumping duty for a period of five years from the date of imposition of the provisional anti-dumping duty, that is, 25.07.2014, and directs that the same shall be payable in Indian Currency. It is pertinent to note that in the present case provisional duty was imposed on 25.07.2014 and the same could not extend beyond six months, that is, 24.01.2015. The notification has been issued on 27.05.2015, therefore, there is a gap between 25.01.2015 and

26.05.2015. One of the issues raised was that the Central Government could not have levied the anti dumping duty retrospectively and that in case it did so, the provisions of Rule 20(2)(a) would be *ultra vires* the Customs Tariff Act, 1975 which does not speak of retrospectivity. We need not labour on this aspect any further inasmuch as the Supreme Court in the case of **Commissioner of Customs, Bangalore v. G.M. Exports; 2015 (324) ELT 209 (SC)** has clarified the position with regard to Rule 20 and, particularly, Rule 20(2)(a) of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. The Supreme Court observed as under:-

“34. This brings us to Rule 20, the correct construction of which is determinative of the question raised in these appeals. The first thing to notice about Rule 20 is, as its marginal note states, that it is concerned only with the date of commencement of duty. Once this is appreciated, it becomes clear that its focus is only on when anti-dumping duties are to commence. In Sub-rule (1), it speaks of anti-dumping duties levied Under Rule 13 and Rule 19, and states that they shall take effect only prospectively, i.e. from the date of publication in the official gazette. It is clear that Rule 19 is a mistake made by the draftsman of the Rules. Rule 18 is obviously referred to. Thus, Under Sub-rule (1), the provisional anti-dumping duty takes effect on and from the date of its publication in the official gazette. Same is the case with the final anti-dumping duty levied Under Rule 18.

35. Sub-rule (2) is in two parts. Sub-clause (a) deals with the date of commencement of an anti-dumping duty, having due regard to a provisional duty that has been levied, whereas Sub-clause (b) specifically deals with duty to be retrospectively imposed, that is a retrospective imposition prior to the imposition of a provisional duty. It will immediately be noticed that the subject matter of Sub-clause

(a) does not purport to be the imposition of an anti-dumping duty with retrospective effect. This is because it seeks to give effect to Clause 10.2 of the WTO Agreement. As has been argued by learned Counsel on both sides, the key to the understanding of the import of Sub-clause (a) is the expression "where a provisional duty has been levied...." Obviously, the word "levied" has to be read as levied in accordance with Rule 13 which, as its marginal note indicates, provides for the "levy" of provisional duty. Once this is clear and the word "levied" is to be understood as levied Under Rule 13, the second proviso of Rule 13 gets attracted, and under this proviso such levy cannot be for a period exceeding 6 months (on facts in these cases, such period has not in fact been extended beyond 6 months). Thus, it is clear that all that Sub-rule (2)(a) does is to enable the levy of a final anti-dumping duty from the date of imposition of a provisional duty so as to convert the provisional measure into a final measure, or so as to take within its ken the provisional anti-dumping duty already imposed. This aspect is succinctly put by "A Handbook on Anti-Dumping Investigations" by Judith Czako, Johann Human and Jorge Miranda. The learned authors state:

“L. RETROACTIVE COLLECTION OF DEFINITIVE DUTIES

The normal rule for application of definitive duties, set out in Article 10.1 of the AD Agreement, is that duties shall only be collected on imports made ("entered for consumption") after the effective date of the final determination. Articles 10.2 and 10.6 establish two exceptions to this general rule, providing for the retroactive collection of definitive duties (that is, for the collection of definitive duties before the effective date of the final determination) in two situations:

- The first such situation involves the collection of definitive duties for the period during which provisional measures were applied (and for all practical purposes "converts" the provisional measure into a definitive measure); and
- The other involves the collection of definitive duties up to 90 days prior to the date of application of provisional measures, although no definitive duties can be collected on imports that took place before initiation.”

36. On a correct reading of the said sub-rule, therefore, the final anti-dumping duty only incorporates the provisional anti-dumping duty

within itself, but in the manner provided by Rule 13. Thus, it is clear that such incorporation can only be the period upto which the provisional duty can be levied and not beyond. Thus understood, it is clear that both literally, and in keeping with the object sought to be achieved-that is the making of laws in conformity with the WTO Agreement, there can be no levy of anti-dumping duty in the "gap" or interregnum period between the lapse of the provisional duty and the imposition of the final duty. Such interpretation makes it clear that Clause 10.2 of the WTO Agreement is reproduced in the same sense though not in the same form in Sub-rule (2)(a). The same result therefore as is envisaged in Clause 10.2 is achieved by the said construction-that is anti-dumping duty may be levied retroactively for the period for which provisional measures have been applied. The said construction is in consonance with the principles already laid down earlier in this judgment in that the WTO Agreement is intended to be applied by the various signatory nations in a uniform manner. This can only be done by construing the language of Section 9A read with the Rules in the same sense as that of the WTO Agreement.

37. At this juncture, it is interesting to note that a number of member countries of the WTO agreement have opted for the Rule by which anti-dumping duty is levied to the full extent of the margin of dumping. Such nations like Argentina, Mexico and USA therefore have, under the WTO Agreement, only a period of 4 months extendable upto a maximum period of 6 months (instead of 6 months and 9 months respectively) so far as the life span of a provisional duty is concerned. Most of Europe and the rest of the world have opted to impose duties upto the margin of dumping depending upon the extent of injury caused to their domestic industry. Interestingly, the European Community Council Regulation No. 1225 of 2009 dated 30.11.2009 on protection against dumped imports from countries not members of the European Community has this to say:

“Article 9

Termination without measures; imposition of definitive duties

4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its

submission by the Commission. Where provisional duties are in force, a proposal for definitive action shall be submitted no later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.”

38. It will be seen from this that an inflexible rule is laid down that would ensure that no "gap" or intervening period occurs between the expiry of the provisional duty and the imposition of the final duty, inasmuch as a proposal to levy final duty has to be submitted no later than one month before the expiry of a provisional duty.

39. However, interestingly enough, in the United States Manual dealing with anti-dumping duties, the following is the statement of law:

“Therefore, a period of time, known sometimes as the "gap period," may exist between the expiration of the end of the provisional measures, even if extended, and the publication of the ITC's final determination (the starting of definitive duties) where the DOC cannot require CBP to collect cash deposits, bonds, or other securities. (The gap period begins the day after the end of the 4-or 6-month period, and ends the day before the ITC's final determination is published). The DOC normally administers this problem in one of two ways. We either send instructions to CBP towards the beginning of the gap period, instructing them to stop collecting cash deposits or bonds, or we wait until the order has been published, then instruct CBP to liquidate all entries during the gap period without regard to antidumping duties.”

40. We are heartened to note that one other signatory nation has taken the stand that no duty can be collected during the "gap period".

41. Viewed slightly differently, the suggested construction by revenue would render Rule 2(a) ultra vires Section 9A. It has already been seen that Sub-section (2) and Sub-section (6) of Section 9A do not authorize the imposition of a duty with retrospective effect, in contrast with Sub-section (3) thereof. Any duty levied by a final duty notification during the interregnum period would necessarily amount to a retrospective levy of duty for the reason that such period is not

covered by the provisional duty notification, being beyond 6 months. This would therefore render Sub-rule (2)(a) *ultra vires* Section 9A. A construction which is both in consonance with international law and treaty obligations, which Article 51(c) of the Constitution states as a directive principle of State policy; and with the application of the doctrine of harmonious construction is to be preferred to a narrow doctrinaire meaning which would lead to the Rule being read in such a manner that it is *ultra vires* the parent statute.”

5. It is evident from the above extract that in order to avoid the provisions of Rule 20(2)(a) being rendered *ultra vires* Section 9A of the said Act, the Supreme Court has clearly held that no duty can be collected during the ‘Gap Period’. Therefore, the second point with regard to retrospectivity which was raised by the learned counsel for the petitioners stands answered by the decision of the Supreme Court in **G.M. Exports** (*supra*). To this limited extent concerning the said ‘gap period’ we declare that no anti dumping duty can be levied and collected during the ‘gap period’.

6. The writ petition stands disposed of with the above directions and liberty granted to the petitioners.

BADAR DURREZ AHMED, J

FEBRUARY 16, 2016
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SANJEEV SACHDEVA, J