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

Judgment reserved on: 22.03.2018

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Judgment delivered on: 31.05.2018

+ **W.P. (C) 4810/2014**

FORECH INDIA LTD.

..... Petitioner

versus

THE DESIGNATED AUTHORITY & ORS.

.... Respondents

+ **W.P. (C) 4886/2014**

KUMHO PETROCHEMICAL CO. LIMITED

..... Petitioner

versus

THE DESIGNATED AUTHORITY & ORS.

..... Respondent

+ **W.P. (C) 1749/2017, CM APPL.7796/2017**

KUMHO PETROCHEMICAL CO. LTD.

..... Petitioner

versus

THE DESIGNATED AUTHORITY & ORS.

..... Respondents

Advocates appeared in this case:

For the petitioners: Mr. S. Seetharaman with Mr. Ankur Sharma and Mr. Dharpan Bhuyan, Advocates.

For the Respondents: Mr. Sandeep Sethi, Sr. Advocate with Ms. Reena Khair, Mr. Rajesh Sharma, Ms. Rita Jha and Ms. Shreya Dahiya.
Mr. Anil Soni, CGSC with Mr. Naginder Benipal, Advocate in W.P. (C) 4810 & 4886/2014.
Mr. Kirtiman Singh, CGSC with Mr. Prateek Dhanda and Mr. Waize Ali Noor, Advocates for respondents in W.P.(C) 1749/2017.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

1. The Government of India had imposed Anti-Dumping Duty on imports of rubber chemicals known as PX-13 (6PPD) originating in or exported from China PR and Korea PR for a period of five years. The levy expired on 04.05.2013. Four days prior thereto on 30.04.2013 Sunset Review proceedings were initiated by the respondents, on a petition by the Domestic Industry, which had contended that continuation of Anti-Dumping Duty for a further period of five years would be necessary. As of 05.05.2013 there was no levy of Anti-Dumping Duty in force dated 05/07/2013. After a gap of 60 days from the date of expiry of the levy, the Central Government by Customs Notification No. 17/2013 retrospectively revived the Anti-Dumping Duty with effect from 05.05.2013 and extended it till 04.05.2014. The Sunset Review concluded with the declaration of the Final Findings on 29.04.2014. According to the petitioners, since the Final Findings were published in the Official Gazette only on 28.07.2014, the latter date would be reckoned as its notified date. The Anti-Dumping Duty levied during the Sunset Review period ended on 04.05.2014. By Customs Notification no. 35/2014 dated 24.07.2014, the Government of India re-imposed the Anti-Dumping Duty for another term of five years. There was a gap of 80 days or a levy-free period between the expiry of Anti-Dumping Duty which was applicable during the Sunset Review period, and a fresh levy as a result of Final Findings. The petitioner has challenged: i) the extension of Anti-Dumping Duty for the one year pending

the Sunset Review, as well as ii) for the five years pursuant to the Sunset Review determination.

2. The petitioners contend that in view of the decision of this Court in ***Kumho Petrochemicals Co. Ltd. vs Union of India 2014 (306) ELT 3 (Del)*** the notification for extension of Anti-Dumping Duty for another year on the conclusion of the Sunset Review, can be done within the period of five years, the said duty cannot be extended after such expiry. The petitioner relies upon the terms of section 9A(5) of the Customs Tariff Act, 1975 (in short, the “Act”) and Rules 18 and 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1975 (in short, the “Rules”). They contend that India’s commitment under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (hereinafter referred to as the “Implementation Agreement”) is sacrosanct and domestic law i.e. the aforesaid Act and Rules have been adopted in the light of the International Treaty Obligation, hence, the Rules would have to be interpreted in harmony with the Treaty language so as to give effect to the government’s commitments in the Treaty¹. Article 11 of the aforesaid Implementation Agreement makes provision for Duration and Review of Anti-Dumping Duties and Price Undertakings. Article 11(4) thereof lays down the time limit for a Sunset Review. It reads as under:

“.. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review...”

3. Section 9A(5) of the Act reads as under:

¹ Commissioner of Customs vs G.M. Exports (2016) 1 SCC 91.

“ 9A. Anti-dumping duty on dumped articles.-

... ..

... ..

5. The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the 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:

Provided further 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... ..”.

4. Section 23 of the Rules reads as under:

“ 23.Review.-

(1) The designated authority shall, from time to time, review the need for the continued imposition of the anti-dumping duty and shall, if it is satisfied on the basis of information received by it that there is no justification for the continued imposition of such duty recommend to the Central Government for its withdrawal.

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

(3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review.....”

5. What is to be seen from the above is that a Sunset Review has to be concluded within one year from the date of its initiation. Under second proviso of section 9A(5) of the Act, the levy of Anti-Dumping Duty can be allowed to

continue to remain in force for a period not exceeding one year, pending the outcome of the Sunset Review. The petitioners contend that on the outer limit, the Anti-Dumping Duty can be for a period of six years i.e. the original five years plus one more year, provided the Sunset Review is initiated during the period of initial five years and the extension in the sixth year is made prior to the expiry of the five years levy. The petitioners relied upon ***Kumho Petrochemicals*** (supra) which inter alia, held:

“...24. This court holds that the petitioners' submission that a notification under Section 9A (1) issued after review is in the nature of temporary legislation, is merited. A statute is ordinarily perpetual, in the sense that no time is fixed for its duration. In that sense Section 9A is perpetual. However, that provision is merely enabling; it authorizes a levy of anti-dumping duty upon proof of injury, and upon fulfilment of other conditions. Once notified, the levy has effect - in terms of the notification and Section 9A (5) for five years. That levy is consequently, temporary as the duration is finite. In these circumstances, Section 6 of the General Clauses Act, which provides that notifications, bye-laws etc. validly made under a repealed law can continue to be in force, would have no application. This position was clarified by the Supreme Court in District Mining Officer and others v. Tata Iron and Steel Co. & Anr. AIR 2001 SC 3134, where the question as to what is a "temporary statute", was examined and it was observed that:

"19..... A Statute can be said to be either perpetual or temporary. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal which may be express or implied. But a Statute is temporary when its duration is only for a specified time and such a Statute expires on the expiry of the specified time, unless it is repealed earlierAdmittedly, to a temporary Statute, the provisions of Section 6 of the General Clauses Act, 1897 will have no applicationA temporary Statute even in the absence of a saving provision like Section 6 of the General Clauses Act may not be construed dead for all purposes and the effect of expiry is essentially one of

the construction of the Act....."

25. In the light of the above position, this Court holds that what follows is that the levy of anti-dumping duty ended on 01-01-2014, with the lapse of the original notification. The second proviso to Section 9A (5) precluded the Central Government from continuing the levy beyond that period or date, except to the extent its conditions were fulfilled, i.e. if the levy of the duty were to have been notified before such date. In such cases, the power under the second proviso to Section 9A(5), after expiry of the date of the original notification, is unavailable. The notification in the present case states that:

"3. Notwithstanding anything contained in paragraph 2, this notification shall remain in force upto and inclusive of the 1st day of January, 2015, with respect to anti-dumping duty on Acrylonitrile Butadiene Rubber originating in, or exported from Korea RP, unless revoked earlier".

Neither does Section 9A (1) nor Section 9A (5) permit the extension of anti-dumping duty once the main period of five years lapses, as held earlier. The Central Government is not arguing that it had the benefit of Section 21 of the General Clauses Act- for the simple reason that extension or amendment of an earlier notification can be only after following the procedure adopted while issuing the main notification. In the present case, the amendment is retrospective, as it were, and made effective from 2009. It was in fact made after the lapse of the first period...".

6. The petitioners argue that Customs Notification No. 17/2013 purporting to extend the levy of Anti-Dumping Duty retrospectively from 05.05.2013 to 04.05.2014 is without any authority of law because such a levy could have been made only till 04.05.2013 i.e. there should have been a continuity of the duty for it to be extended. Once the original levy expired on 05.05.2013, it could not be revived and extended retrospectively. The parent notification was Notification no. 133/08 – Customs dated 12.12.2008. Para 2 of the said

Notification fixed the date of its expiry by specifying the date from which Anti-Dumping Duty came into force. The relevant part reads as follows:

“... The anti-dumping duty imposed under this notification shall be levied with effect from the date of imposition of the provisional antidumping duty, that is, the 5th May, 2008, and shall be payable in Indian currency...”

7. The precise date of expiry of the duty was further re-affirmed by Customs Notification No. 92/2011 dated 20.09.2011, which was issued after conclusion of the Mid-Term Review. The said notification inter alia, reads:

“... The anti-dumping duty imposed under this notification shall be effective from the date of publication of this notification in the Official Gazette and up to and inclusive of 4th May, 2013 and will be paid in Indian currency...”

8. Therefore, on 5th May 2013 when there was no Anti-Dumping Duty, there was nothing to extend under section 9A(5) of the Act. The purported exercise of extension of duty under section 9A(5) of the Act was a hollow exercise. A duty cannot be extended when none existed on the date of extension. The duty purported to be extended had already died in law and the dead levy could not be revived by the impugned Notification no. 17/2013. In support of this contention, the petitioners have relied upon the following judgments for the proposition that, an extension can be granted only before the expiry of the term of an existing right, authority or levy.

(i) ***Babu Verghese & Ors. vs Bar Council of Kerala & Ors. AIR 1999 SC 1281;***

(ii) ***Nippon Steel Corporation vs Union of India (2011) 46 PTC 122 (Del);***

(iii) ***Tarsem Kumar vs Collector of Central Excise, Chandigarh AIR 1972 P&H 444;***

(iv) *Vazir Glass Works vs. Maharashtra General Kamgar Union & Ors. AIR 1996 SC 1282*; and

(v) *Ambalikarthikeyan vs Collector of Customs & Central Excise 2000 (125) ELT 50*, which held:

“.... No question of extension of time can arise after the time has expired. When the time expires, the person from whose possession the goods were seized, gets the right for the return of the goods. The extension can only be before that right accrues...”

9. In view of the aforesaid, it is argued that the Customs Notification No. 17/2013 should be treated as non-est, in the face of the record, and should be set aside because it sought to extend a duty which did not exist in the first place and otherwise sought to revive one, which is not permissible under section 9A(5) of the Act. The petitioners relied upon the judgment in *Nazir Ahmed vs King Emperor AIR 1936 PC 253*, where the Privy Council held that: *“where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all”*. It is argued that once the levy of duty under Notification no. 17/2013 becomes non-est, the subsequent levy, purportedly imposed after 80 days of completion of the Sunset Review period, too would be without any authority of law, since that too did not have the continuity between the original levy with the extended levy under the Sunset Review and the purported further levy for five years in terms of the Final Findings in the Sunset Review.

10. The respondents have argued that the petition for Sunset Review was filed in January, 2013 with the Period of Investigation (POI) being October, 2011 till September, 2012. Subsequently on 09.04.2013, the applicant had filed revised application with POI as January, 2012 to December, 2012.

Nevertheless, this was deemed to be filed within time. The Final Findings held that only the updated petition i.e. seeking a change in the POI was filed later. It was argued that if the petition is received within less than three months time, before date of expiry of the duty, the decision whether to consider the same lies with respondent no.1 i.e. the Designated Authority. It is for him to take a decision as to whether or not to entertain such a petition. It is contended that sometimes when the “investigating team” of the DGAD is unable to examine the petition, or the petition may not contain all the necessary information required for the initiation of the Sunset Review or it may require supplementary or additional information to decide the merits of the case, and the Domestic Industry is given opportunity to respond to such requirements. It is argued that, the officers handling the case, typically handle a number of other assignments simultaneously, therefore, they may not be able to immediately attend to an application from the Domestic Industry. Thus, the three months time has been prescribed while taking in consideration all such exigencies. It is contended that the petition was received within the prescribed time, after the required updates and the Designated Authority accepted the petition, and after analysing the information, he came to the conclusion that a case was made out for initiation of a Sunset Review. Hence, the time went beyond the time limit fixed in the Trade Notice but the Designated Authority has the discretion to allow it. It is further argued that neither the Act nor the Rules have provided the three months time period as condition precedent for initiation of Sunset Review initiation.

11. The Petitioners contend that before a decision to extend the Anti-Dumping Duty, the Government of India is required to undertake an elaborate investigation and at least come to a *prima facie* view on the basis of

information furnished in the Sunset Review application that such extension is a matter of course but it is not a matter of right for the Domestic Industry, to be extended such protection. Rule 23(1B) requires the Designated Authority to consider the petition received for review and extension of Anti-Dumping Duty within a reasonable period of time prior to the expiry of that period. It is argued that such a reasonable period is for consideration of the application and process the same for the Sunset Review. The period has been prescribed through Trade Notice No. 2/2011 dated 06.06.2011 which stipulates that the Sunset Review should be filed 90 days prior to the date of expiry of the Anti-Dumping Duty. It is argued that the Domestic Industry had sought initiation of Sunset Review in January 2013 with POI of October, 2011 to September, 2012. Subsequently, on 09.04.2013 the applicant had filed a revised application with POI as January, 2012 to December, 2012; therefore, the respondent no.1 felt that the application was filed within 90 days before expiry of the Anti-Dumping Duty on 04.05.2013.

12. The respondents refer to their own decisions in which the 90 day period was diluted; such as the case of “duplicate iron pipes” and “pre-sensitised offset printing plates”. It contends that:

“..... The trade notice merely informs the parties concerned, that it is reasonable if the petition is filed 3 months period to the expiry. It does not mean that if the petition is filed with less than three months, the Respondent no.1 would be duty bound to reject such petition merely on grounds of delay. Therefore, in this regard in the present case, dumping from Korea continues in much bigger proportion. Further, the domestic industry is suffering significant material injury. Therefore, the domestic industry in any case could have filed a fresh petition. The injury being suffered by the domestic industry is considered sympathetically, as against the time limits prescribed under

the rules. Should the present petition be rejected on such procedural grounds, the injury to the domestic industry would aggravate and therefore rejection of the present petition on procedural grounds would defeat the very purpose for which anti dumping law has been enacted containing legal provisions for extension of anti dumping duty in order to protect the domestic industry...”

13. The import of the aforesaid statement in the counter affidavit filed by respondent no.1 is that it tries to bring in elements for disregarding the Government's own Trade Notice No. 2/2011 which had fixed a specific time limit for filing a Sunset Review petition. The aforesaid reasons for taking a lenient view with respect to the Domestic Industry are not envisaged in the Trade Notice and cannot be read as a part of the latter. Special concession or sympathetic consideration for the Domestic Industry for any party, by an adjudicating authority could lend to suspicion of bias. Sympathy is an abysmal pit in adjudicatory proceedings, cannot become the basis for decision making. Sympathy is like an 'abysmal pit' in adjudicatory proceedings; it cannot be a permissible basis for decision making. For aforesaid process to be perceived to be as a fair process leading to the decision must appear to be transparent. Wherever discretionary power exists in an authority, it must be exercised judiciously and must be based on cogent reasons.

14. If the strict timelines specified in the Statute or in the respondents' Trade Notice is to be tinkered with or is stretchable, then the sympathetic, accommodative and lenient view would also be accepted by all parties including the exporters. Leniency and sympathy of this nature would lend to chaos and the mockery of the requirement to adhere to the timelines, which is an overriding feature of the Anti-Dumping Duty regime. The Sunset Review is not simply an application by the Domestic Industry seeking continuance of

the levy for a further period of five years. It is a petition to be supported by corroborative data showing the dynamics of trade of the product concerned vis-à-vis, local production, imports of goods, demand, supply, size of the industry, its projected growth, profitability, injury etc, to prove that the continuance of the Anti-Dumping Duty would be necessary. Such application, complete in all respects is to be filed at least 90 days before the expiry of the levy. The 90 days are meant basically for the Designated Authority to assess the data, to conclude and form a prima facie view as to whether continuance of the duty would be necessary. If such an opinion is formed, and the Sunset Review is initiated, then the duty is extendable for another period of only 12 months from the date on which the Anti-Dumping Duty is scheduled to come to an end. The Sunset Review is an extensive exercise seeking data from all parties concerned and verification of the same and grant of hearing to the parties, publication of final findings, etc. It is in this regard that the timeline of 90 days in terms of Trade Notice would have to be strictly adhered to unless otherwise modified. It does not provide any leeway to the Designated Authority to extend the three month period.

15. The application of the Domestic Industry, filed in January, 2013 (oddly the date is not specified) fixing the Period of Investigation (POI) from October, 2011 to September, 2012, is the starting point of any complaint. It is the data collected for this period, that is worked upon to show that the Domestic Industry continued to be injured by the dumped imported goods or it posed a threat of injury, if the Anti-Dumping Duty was not continued. The Domestic Industry had thought it fit to base its case on the data relating to this period. But in the amended petition dated 09.04.2013, the entire basis of its application had been recast. The POI was changed from January 2012 to

December, 2012. In effect, it was a new application. Such a change would be only on two grounds: (i) either the original application lacked substance; or (ii) it was replete with such errors that it could not be entertained for initiation of a Sunset Review. If the Domestic Industry was confident of its case for initiation of a Review on the basis of the data for the period October, 2011 to September, 2017, it would not have changed the POI unless an impression was given to it that its petition made out no case for initiation of Review. That being the position, it would mean that the Designated Authority did not form a prima facie view that Anti-Dumping Duty needed to be extended for another year from the expiry of the first five year period. If the entire basis of calculation was changed on 09.04.2013, it would be in effect a new application and could not be treated as an application in terms of Trade Notice. It cannot be the case that the Domestic Industry be permitted to trawl and process data for the previous period of levy and keep revising its petition till it is sure that the petition meets the approval of the Designated Authority. The data first filed should be with confidence and change of this substratum, if any, should be filed only within the time specified in the Trade Notice. Hence, for this reason itself, it ought to have been rejected and there could be no initiation of the Sunset Review.

16. The questions that arise for determination are: (i) whether with the initiation of Sunset Review before expiry of the five year levy, there is an automatic extension of Anti-Dumping Duty for the Sunset Review period; (ii) would a separate notification be required extending the levy of Anti-Dumping Duty before expiry of the original five year period, and iii) would a notification of levy of anti-dumping duty for another five years after the expiry of the Sunset-Review Period be valid?

17. Trade Notice 2/2011 issued by the respondents reads as under:

“..... Trade Notice No.2/2011

1. Attention of the Trade and Industry is invited to Section 9A of the Customs Tariff Act, 1975 as amended and to Rule 23 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 framed thereunder, as amended.

2. In the above connection, it is informed that vide Notification No. 15/2011-Customs (N.T) dated 1st March, 2011 read with the corrigendum dated 6th April, 2011 the sub-rule (1) of Rule 23 has been substituted by the following:-

(I) Any anti-dumping duty imposed under the provision of section 9A of the Act, shall remain in force, so long as and to the extent necessary, to counteract dumping, which is causing injury.

(IA) The designated authority shall review the need for the continued imposition of any anti-dumping duty, where warranted, on its own initiative or upon request by any interested party who submits positive information substantiating the need for such review, and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty and upon such review, the designated authority shall recommend to the Central Government for its withdrawal, where it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur, if the said anti-dumping duty is removed or varied and is therefore no longer warranted.

(IB) Notwithstanding anything contained in sub-rule (I) or (IA), any definitive anti-dumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a

conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.

3. It has been decided that reasonable period of time for the purpose of sub-rule 23(IB) shall be 90 days prior to the date of expiry of the anti-dumping duty.

4. In view of the above, all previous instructions and Trade Notices issued by the Directorate with regard to SSR stand superseded....”

18. In other words, the Government itself was desirous that the Sunset Review exercise should be completed before the expiry of the first five year levy and in any case, the extension of levy should be completed within one year after the first five years as required under the duty regime. It requires the Domestic Industry to file the Sunset Review petition before the expiry of the period for which the Anti-Dumping Duty is in existence. No such application is to be entertained by the Designated Authority if it is filed in less than 90 days of expiry of the levy. The Designated Authority enjoins upon itself the timelines for examining the petition to check its deficiencies and errors, and also accord reasonable time within which time the errors can be cured. Upon receipt of the application, it is to be examined in 15 days and deficiencies, if any, are to be removed in five working days from date of such communication to the applicant. If, the petition is found in order, the Sunset Review initiation or its rejection is to be communicated within 45 days. It is only in cases of administrative exigencies, and not because of compulsions of the petitioners or any other party, that the timelines can be stretched. In the present case, the

application was effectively filed on 09.04.2013 about 28 days before expiry of the Anti-Dumping Duty. The same could not have been entertained. It is not as if the Sunset Review was initiated by the Designated Authority on his own initiative. If that were so, then the 90 days duration would not strictly apply. But since it was on a petition by the Domestic Industry, there could be no concession in the timelines, least of all a sympathetic concession. The reasons and the grounds for sympathetic consideration staked in the respondents' affidavit cannot be a ground for extension of the time schedules, in the realm of international trade regime. The transparency that envisaged the statute must be respected. The Act, the Rules and the Implementing Agreement sanction a legal regime for protective measures but not for protectionism.

19. The Supreme Court by judgment dated 09.06.2017 in ***Union of India & Anr. vs Kumho Petrochemicals*** (Civil Appeal Nos. 8309-9310/2017) held:

“..... 30) From the scheme of Section 9A of the Act, it becomes clear that 12 (1999) 3 SCC 422 13 (1971) 2 SCC 54 though the Notification for anti-dumping duty is valid for a maximum period of five years, the said period can be extended further with the issuance of fresh notification. For this purpose, it is necessary to initiate the review exercise before the expiry of the original notification, which review is commonly known as ‘sunset review’. There may be situations where the sunset review is undertaken but the review exercise is not complete before the expiry of the period of original notification. It is because of the reason that the exercise of sunset review also demands complete procedure to be followed, in consonance with the principles of natural justice that was followed while imposing the anti-dumping duty in the first instance. To put it otherwise, this exercise contemplates hearing the views of all stakeholders by giving them adequate opportunity in this behalf and thereafter arriving at a conclusion that the continuation of the anti-dumping duty is

justified, otherwise injury to the domestic industry is likely to continue or reoccur, if the said anti-dumping duty is removed or varied. Since this exercise is likely to take some time and may go beyond the period stipulated in the original notification imposing anti-dumping duty, in order to ensure that there is no vacuum in the interregnum, second proviso to sub-section (5) of Section 9A of the Act empowers the Central Government to continue the anti-dumping duty for a further period not exceeding one year, pending the outcome of such a review. The question, however, is as to whether this extension to fill the void that may be created during the pendency of the sunset review is exercised is automatic, once the decision is taken to have sunset review of the anti-dumping duty or the continuation of such an anti-dumping duty has to be by a proper notification. As noted above, the High Court has held that second proviso is only an enabling provision and, therefore, power vested in the Central Government under the said proviso has to be specifically exercised, without which the anti-dumping duty cannot continue to remain in force with the lapse of original notification.

31) After giving due consideration to the arguments advanced by the learned counsel for the parties, we are inclined to agree with the High Court that proviso to sub-section (5) of Section 9A of the Act is an enabling provision. That is very clear from the language of the said provision itself. Sub-section (5) of Section 9A gives maximum life of five years to the imposition of anti-dumping duty by issuing a particular notification. Of course, this can be extended by issuing fresh notification. However, the words 'unless revoked earlier' in sub-section (5) clearly indicate that the period of five years can be curtailed by revoking the imposition of anti-dumping duty earlier. Of course, provision for review is there, as mentioned above, and the Central Government may extend the period if after undertaking the review it forms an opinion that continuation of such an anti-dumping duty is necessary in public interest. When such a notification is issued after review, period of imposition gets extended by another five years. That is the effect of first proviso to sub-section (5) of Section 9A.

However, what we intend to emphasise here is that even as per sub-section (5) it is not necessary that in all cases anti-dumping duty shall be imposed for a full period of five years as it can be revoked earlier. Likewise, when a review is initiated but final conclusion is not arrived at and the period of five years stipulated in the original notification expires in the meantime, as per second proviso 'the anti-dumping duty may continue to remain in force'. However, it cannot be said that the duty would automatically get continued after the expiry of five years simply because review exercise is initiated before the expiry of the aforesaid period. It cannot be denied, which was not even disputed before us, that issuance of a notification is necessary for extending the period of anti-dumping duty. Reason is simple. There no duty or tax can be imposed without the authority of 'law'. Here, such a law has to be in the form of an appropriate notification and in the absence thereof the duty, which is in the form of a tax, cannot be extracted as, otherwise, it would violate the provisions of Article 265 of the Constitution of India. As a fortiori, it becomes apparent that the Government is to exercise its power to issue a requisite notification. In this hue, the expression 'may' in the second proviso to sub-section (5) has to be read as enabling power which gives discretion to the Central Government to determine as to whether to exercise such a power or not. It, thus, becomes an enabling provision.

32) We are conscious of the fact that once sunset review is initiated, such initiation takes place only after a substantiated application/request is filed by the indigenous industry which is examined and a prima facie view is formed by the Central Government to the effect that such a review is necessitated as withdrawal of anti-dumping duty or cessation thereof may be prejudicial to the indigenous industry. Once such an opinion is formed and the sunset review is initiated, in all likelihood the Central Government would make use of second proviso and issue notification for continuing the said anti-dumping duty. At the same time, it cannot be said that without any overt act on the part of the Central Government, there is an automatic continuation. The learned counsel for respondent

rightfully pointed out that the legislature has consciously used the expression 'may' and 'shall' at different places in the same Section, i.e. Section 9A of the Act. In such a scenario, it has to be presumed that different expressions were consciously chosen by the Legislature to be used, and it clearly understood the implications thereof, therefore, when the word 'may' is used in the same Section in contradistinction to the word 'shall' at other places in that very Section, it is difficult to interpret the word 'may' as 'shall'. Therefore, it is difficult to read the word 'may' as 'shall'. Our conclusion gets strengthened when we keep in mind following additional factors:

33) The anti-dumping duty may continue, pending the outcome of the review, for a further period not exceeding one year. Thus, maximum period of one year is prescribed for this purpose which implies that the period can be lesser as well. The Government is, thus, to necessarily form an opinion as to for how much period it wants to continue the anti-dumping duty pending outcome of such a review. Moreover, since the maximum period is one year, if the review exercise is not completed within one year, the effect of that would be that after the lapse of one year there would not be any anti-dumping duty even if the review is pending. In that eventuality, it is only after the review exercise is complete and the Central Government forms the opinion that the cessation of such a duty is likely to lead to continuation or recurrence of dumping and injury, it would issue a notification extending the period of imposition of duty. Therefore, there may be a situation where even when the power is exercised under second proviso and duty period extended by full one year, the review exercise could not be completed within that period. In that situation, vacuum shall still be created in the interregnum beyond the period of one year and till the review exercise is complete and fresh notification is issued. This situation belies the argument that extension under second proviso is to be treated as automatic to avoid the hiatus or vacuum in between....

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39) India is a signatory to the Marrakesh Agreement establishing the World Trade Organization in 1994. Pursuant to this, it has implemented the Agreement on Implementation of Article VI of the GATT 1994 referred to as the Anti-dumping Agreement (ADA), which is one of the Agreements that forms part of the WTO treaty. In terms of Article 18.4 of the ADA, each Member country is required to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the ADA. As a consequence, Sections 9A, Section 9AA, Section 9B and Section 9C of the Act were enacted.

40) Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty. Even otherwise, Notification dated January 23, 2014 amends the earlier Notification dated January 02, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated January 02, 2009 itself had lapsed on the expiry of five years, i.e. on January 01, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated January 02, 2009. The High Court, thus, rightly remarked that Notification dated January 02, 2009 was in the nature of temporary legislation and could not be amended after it lapsed.....”

20. Applying the said principle to the facts of the present case, it is seen that the Notification no. 17/2013 issued 60 days after the expiry of the levy of Anti-Dumping Duty under the first five year period, would be non-est because it sought to extend a levy which had lapsed on 04.05.2013. The second proviso to section 9A(5) of the Act is an enabling provision granting the Central Government the authority to continue Anti-Dumping Duty pending the outcome of the Sunset Review for a further period not exceeding one year.

The essential requirements for such continuation are: (i) the Sunset Review ought to have been initiated before the expiry of the five year period of levy of Anti-Dumping Duty; (ii) the inquiry has not concluded within the said period; (iii) a prima facie view is formed by the Government that continuance of the Anti-Dumping Duty would be necessary, and (iv) such extended period would not exceed one year from the date on which the first five years expires. The phrase “may continue to remain in force”, assumes that there is a levy which exists and its continuance i.e. its carrying forward - without a break in its existence, is necessary. The moment the levy comes to an end or there is a break in its continuance, it cannot be revived in the Sunset Review exercise. Extending the levy is like stretching the fabric of the levy to cover the extended period for another year. In the present case, the original levy came to an end on 04.05.2013. The levy had a limited life and unless fresh life was infused in it before its predetermined expiry date, it could not be deemed to have been extended. Infusion of fresh life into the levy for a period of one year requires a fresh notification, in addition to the notification for initiation of the Sunset Review. That not being so, in the present case the levy under impugned Notification is without authority, hence it has to be and is set aside.

21. Likewise the second notification imposing Anti-Dumping Duty for a period of five years too cannot be sustained because it has to be issued within the period of first five years or in the extended one year period of Sunset Review in which the earlier existing duty has been extended. The first proviso of section 9A(5) of the Act stipulates that in a Sunset Review when the Central Government is of the opinion that cessation of such duty is likely to lead to continuation or recurrence of dumping or injury, it may extend the period of levy for a further period of five years. The degree of levy would be to the

extent necessary to offset the injury. In other words, there would have to be a duty in existence for it to be extended. In the present case there was cessation of duty on 05.05.2013 and again on 05.05.2014, therefore, there was no duty on two dates which could have been extended.

22. The protective regime of Anti-Dumping Duty is to provide a level playing field to the Domestic Industry from the injurious effects of dumped goods upon the Domestic Industry. Such protection is to be continued till such time that the Government deems it necessary (by assessing data every five years or in a Mid-Term Review) for enabling the Domestic Industry to compete against unfair international trade practices. The moment the protection comes to an end or is allowed to lapse, the hitherto protected Domestic Industry is exposed to the dynamic forces and full impact of unrestrained international trade. The nature and extent of the injury from dumped goods to the Domestic Industry, would be different and indeed to a greater degree in an unprotected regime vis-à-vis a regime of Anti-Dumping Duty levy. Such levy is imposed to the extent that it offsets the injury. The assessment in a Sunset Review of a market condition is under a protected regime. The moment the protection ends and free trade is permissible, the impact of free trade and the injury to the Domestic Industry would be of a different degree. There was cessation of levy for 60 days from 05.05.2013 and for 80 days from 05.05.2014. The Domestic Industry would subsequently have been subjected to the world of unhindered international trade without protection. Therefore, the nature of injury suffered in this period would have to be assessed for the correct levy of Anti-Dumping Duty. The assessment of injury in the protected environment of Sunset Review would not reflect true nature of injury as may have been suffered by the Domestic Industry when the

regime of levy was non-existent for 60 days and 80 days as mentioned above. Assuming that the injury assessed during the protected regime was of a lesser degree, a corresponding lesser percentage of duty would be imposed on the import of dumped goods. This levy, ostensibly a protection to the Domestic Industry, would not do justice to the Domestic Industry. Instead it would continue to insidiously injure and harm the Domestic Industry for a period of five years; This would be more disruptive to fair trade instead of being an ameliorative and corrective measure. For the unprotected period of 60 days and 80 days a fresh exercise may be warranted to assess the extent of injury to the Domestic Industry. In view of the aforesaid cessation of duty for two long phases, there could be no imposition of Anti-Dumping Duty for a further period of five years under the first proviso of Section 9A(5) of the Act.

23. The respondents argue that there is no delay in the Customs Notification No. 35/2014 dated 24.07.2014 as it was notified within the three months period provided under Rule 18A(1) of the Rules. The Court would note that under Rule 18A(1), the Central Government may within three months from the date of publication of the Final Findings impose Anti- Dumping Duty by Notification in the Official Gazette, however, this three month period is not a stand-alone authorization to the Government. It has to be harmoniously read with the strict timeline fixed in the statute under section 9A(5) of the Act. The Act embodies the commitment of the Government of India under Article 11(4) of the Implementation Agreement. The Rule cannot override the Act. The Act has fixed a period for completion of Sunset Review within one year from the date of expiry of the initial five year levy and it is in this one year period that the Government must form a view that the cessation of duty would lead to continuation or recurrence of dumping and injury. Therefore, it is only within this period that it may extend i.e. without breaking the continuity of the

previous duty or its modified version, for a further period of five years. The thread of the existing duty has to continue from the initial five year levy to the one year extended period of Sunset Review to the proposed five year period. There should be no break in between. However, in the present case, there are two breaks. Therefore, Rule 18(1) does not and cannot be read to lend any authority or power to the Central Government to issue Customs Notification No. 35/2014. It is illegal and, accordingly, set aside. The period of three months under Rule 18(1) can be read only in the case of original notification for Anti-Dumping Duty and not for the Sunset Review.

24. In view of the above, the petitions are allowed. Accordingly, Initiation Notification No. 15/1/2013 dated 30.04.2013, Final Finding dated 29.04.2013 and the Customs Notification Nos. 17/2013 and 35/2014 issued on 05.07.2013 and 24.07.2014 are set aside.

NAJMI WAZIRI, J.

S. RAVINDRA BHAT, J

May 31, 2018

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