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

Date of decision: 23.10.2018

+ W.P.(C) 7787/2018, CM APPL. 29867-29868/2018, CM APPL.
31815/2018

PT INDAH KIAT PULP & PAPER TBK Petitioner

Through: Mr. Balbir Singh, Sr. Advocate with Mr.
Jitendra Singh, Ms. Monica Benjamin, Mr. Akshay
Soni, Advs. & Mr. Jinendra Singhvi, Consultant.

versus

UNION OF INDIA & ANR. Respondents

Through: Mr. Ashim Sood, CGSC with Ms. Payal
Chandra and Mr. Rhythm B., Advs. for R-1 & 2.
Ms. Reena Khair, Mr. Rajesh Sharma and Ms. Rita
Jha, Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J.(ORAL)

1. The petitioner's grievance is with respect to certain observations in the final disclosure statement, made under Rule 16 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter "Rules") by the Designated Authority (hereinafter "DA") on 20.07.2018.

2. Briefly, the facts are that anti-dumping duty investigation was initiated on the basis of complaints by the domestic industry through a public notice dated 02.11.2017, in respect of alleged dumping behaviour of importers of “Uncoated Copier Paper”, originating (or exported) from Indonesia, Thailand and Singapore. The essential facts with respect to the investigation are undisputed; the petitioner responded to public notices and had apparently made several disclosure statements in regard to the export of the subject goods to India. The petitioner group comprises of three entities i.e. M/s PT Indah Kiat Pulp & Paper Tbk, Indonesia, PT Pindo Delhi Pulp and Paper Mills, Indonesia and PT Pabrik Kertas Tiiwi Kimia Tbk, Indonesia (hereafter called as “APP Group”). It manufactures the subject goods. 60% of the goods so manufactured are directly exported to unrelated importers in India. The other 40% are apparently exported through a certain Singapore based trading company, whose transactions are financed by Chinese entities/investors.

3. By virtue of Section 9A of the Customs Tariff Act, 1975 and the Rules, the DA in the course of anti-dumping investigation, is required to consider and report in its final findings with respect to the margin of dumping based upon a determined export price. The impugned order was made prior to submission of final findings by the DA to the Government, in compliance of Rule 16 of the Rules. It contains certain observations which petitioner complains are detrimental to it. They are extracted as follows:

“Export price for M/s PT Indah Kiat Pulp & Paper Tbk, Indonesia, PT Pindo Delhi Pulp and Paper Mills, Indonesia and PT Pabrik Kertas Tiiwi Kimia Tbk, Indonesia ("APP Group")

40. From the response filed by producers/exporters in APP Group i.e. M/s PT Indah Kiat Pulp & Paper Tbk,(IK) PT Pindo Delhi Pulp and Paper Mills (PD) and PT Pabrik Kertas Tjiwi Kimia Tbk,(TK) Indonesia, Authority notes that all companies have exported the product under consideration to India directly as well through unrelated exporters during the POI. IK has exported *** MT having value of USD *** either directly or through unrelated exporters in China, Hong Kong and Singapore. Similarly, PD had exported*** MT having value USD *** and TK has exported *** MT having value USD *** respectively. As informed by the producer, the exporters in China and Hong Kong have sold the goods to M/s Leaconfield, Singapore, which is an unrelated exporter. The exports to India through these exporters is approximately 39% for IK, 43% for PD and 32% for TK. None of these unrelated exporters have filed the exporter questionnaire response and not cooperated with the Authority. Considering that the exports through these unrelated exporters is quite substantial, the Authority proposes to reject the response filed by APP Group and instead determine the export price on the basis of facts available.”

4. Mr. Balbir Singh, learned Senior Counsel for the petitioner argues firstly that the DA was aware of the relevant material with respect to the production cost. It was submitted that the record indicates that M/s Leaconfield, Singapore, is the only entity which sources the import transactions for the balance 40% which are shipped to M/s APP (India). It is submitted that the cost of the exported goods, can under no circumstances, be different given that the origin of the goods is Indonesia, in respect of

which the production costs are available at any given point of time. Learned senior counsel highlighted that as a result of the disclosures made, the Indian authorities had visited Indonesia, in particular the petitioner manufacturer's facilities to collect the relevant data. It was urged that besides the information so collected, there is voluminous documentary evidence available with the authorities – as indeed the DA, with respect to the instances of import transactions at the behest of Leaconfield. He relied upon the tabular format, which was apparently filled with respect to Leaconfield related transactions by APP, India and submitted that these were sufficient in the circumstances for the DA to have determined the margin of dumping if any with respect to the petitioner. It was next urged, that even if *arguendo*, the DA were to proceed on the assumption that Leaconfield did not respond, and was in some manner related to the petitioner, that *ipso facto* did not authorize the rejection of the petitioner's data that was otherwise available on the record with respect to the production of the subject goods in the Indonesian facility as well as the 60% direct exports. It was also emphasized that the DA had in the past, adopted a nuanced approach and had at times recommended differential margins of duty with respect to manufacturers/exporters whose production costs are known and traders whose costs may or may not be known or disclosed.

5. Learned counsel submitted that unless this Court intervenes at this stage, grave and serious prejudice would ensue because the Rule 16 disclosure statement, so far as it contains adverse observations, would place a seal of finality and the consequence in all likelihood would be adverse, as the petitioner would ultimately face residual anti-dumping duty which would

be considerably higher than what might be proposed in respect of other exporting/manufacturing entities.

6. Learned counsel for the DA and the domestic manufacturer/exporters resisted these proceedings. It was pointed out by both the counsels that this Court should not intervene at the present stage, given that the petitioner has appellate remedies at a later stage, if and when the occasion so arises. Learned counsel here stated that the disclosure statement is only a step in aid of the final findings, which may or may not contain any adverse recommendations with respect to petitioner, or it may or may not recommend a higher duty as it now apprehends. It was submitted that furthermore, even such findings though final from the point of view of the DA are recommendatory as far as the Union is concerned because it may choose to implement it wholly or in part depending on the circumstances. It is in the event of notification of the anti-dumping duty that the real prejudice, if any, accrues in which event the petitioner would have an appellate remedy. In other words, it was submitted that the present proceedings are premature and the Court ought not to interdict the DA's disclosure statement in any manner whatsoever.

7. It was also urged on behalf of the domestic manufacturers, that the non-disclosure with respect to the selling cost to the Singapore based trading concerns, in fact significantly affects a value chain of the imports. Learned counsel here emphasized that the diversion of 40% goods, through imports, at gross cost basis (CIF price) cannot be worked backwards in any meaningful manner to arrive at a manufacturing or ex-factory sale price, from the manufacturers' point of view, to determine whether in reality

concession or concessions of any kind are offered to such committed purchasers/importers into India. On account of a gap in such information, in the past, DAs have treated the response of manufacturers or exporters to be generally unresponsive and recommended higher rates of duty. It was submitted that in these circumstances any interdiction with the anti dumping proceedings, which are underway and in accordance with the Rules, would be counter-productive and would amount to indicating this Court's opinion on the merits of the entire controversy which is pending before the DA.

8. Rules 16 of the 1995 Rules reads as follows :

“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”.

9. Explanation (b) of Section 9A(1) defines export price as meaning the price of the article exported from a country or territory and in cases where there is no export price or where the export prices are unreliable because of association or a compensatory arrangement between the exporter and importer or a third party, the authority (DA) – is empowered to construct or deduce the export price; *“on the basis of the price at which the imported articles are first resold to an independent buyer or if an article is not resold to an independent buyer or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under Sub-Section (6)”*. The primary mandate therefore, is that the DA is to determine, firstly the margin of dumping and also deduce the export price from the available data. The petitioner's objection to the impugned order is

that the 40% of its production, imported into India through a Singapore trading entity (apparently funded by Chinese financiers) are not related transactions. Its emphasis is upon its admitted capacity of production and the ex-factory price the facts relating to which, it says was, gathered by the Indian authorities upon inspection. The complaint of the Indian manufacturers, on the other hand is that in the absence of full details with respect to the sale price, ex-factory, at which the goods were sold to the Singapore trading concerns, and then imported into India, the entire picture would not be revealed. It is based largely on the latter argument that the DA appears to have concluded that the petitioner's data cannot be analyzed, and taken into consideration for arriving at its export price and if at all the margin of dumping.

10. Undoubtedly, this Court while exercising judicial review jurisdiction, in on-going quasi judicial or statutory proceedings, has to be nuanced and circumspect. It cannot, *per se*, express its opinion on the merits of the dispute. At the same time, the course of action advocated on behalf of the DA and the complainants cannot be entirely accepted. If the record discloses a basic flaw or irregular approach by the DA in the proceedings, the Court under Article 226 is not helpless. In such case, to ask the aggrieved party to await the final decision and then appeal, would negate and undermine this Court's authority to fashion an appropriate remedy having regard to the circumstances of each case. It cannot be gainsaid that the Rule 16 conclusions in one sense binds the parties – which includes complainant as well as the exporters, nevertheless the Court is of the opinion, that the petitioner's argument that the data available on record,

regarding the cost of production [having regard to its capacity, as well as the data with respect to imports into India, at the behest of APP (on account of Leaconfield)] are relevant and can be looked into. The adequacy or otherwise of the data relating to the 40% exports of Leaconfield, to APP (India) is something that this Court cannot and ought not to dwell upon at length.

11. In these circumstances, this Court is of the opinion that the petitioner's grievance can be best addressed by affording it an opportunity of making, what according to it, are relevant submissions, in writing to the Designated Authority with respect to the disclosure statement, especially Paragraph 40 thereof. These written submissions should highlight, whether the data available on the record is sufficient to determine the petitioner's export price, having regard to the import data with respect to Leaconfield, as well as its own import data, based upon the direct 60% export made to India. Any other relevant arguments in this regard may also be highlighted before the DA. The respondent-complainant should also be given the opportunity to make its submissions, in reply to the submissions on behalf of the petitioner. The entire process should be completed as fast as possible within five days, and the final findings should be rendered by the DA. The features and aspects highlighted by the petitioner, in light of the complainant's response, should be appropriately dealt with in the reasoning contained in the final findings.

12. The timeline which is indicated by this Court is tentative; in the event that the time to conclude the proceedings and render final findings is

extended, under the proviso to Rule 17 of the Rules, it is open to the Designated Authority to extend the time suitably.

13. All rights and contentions of the parties are reserved; it is clarified that this Court has not expressed its findings on the merits of the disclosure statements in any manner whatsoever. The writ petition is disposed of in the above terms.

Order *dasti* under signatures of the Court Master.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

OCTOBER 23, 2018/akv



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