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

% **Date of Decision : 6th February, 2019**

\+ **W.P.(C) 8848/2018, CM Nos.34010-11/2018 & 38147/2018**

SAINT GOBAIN INDIA PVT. LIMITED ..... Petitioner
Through: Mr. Balbir Singh Senior Advocate with Mr. Jitendra Singh, Mr. Akshay Soni, Ms. Monica Benjamin, Advocates

versus

UNION OF INDIA ..... Respondent
Through: Mr. Ashim Sood, CGSC and Mr. Rhythm B., Advocate

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)

1. The instant writ petition is filed by the Saint Gobain India Pvt. Ltd. (hereafter referred as "petitioner") seeking for *mandamus* directing the Revenue/ respondent who through its officers is seeking to levy anti-dumping duty for clearances made after 02.07.2018 without any authority of law through Customs Notification 33/2017-Customs (ADD) dated 30.06.2017 issued under Section 9A(5) extending duty imposed under Customs Notification 34/2012-Customs (ADD) dated 03.07.2012 (hereafter referred as "Notification") by one year till 02.07.2018 in terms of maximum period prescribed therein.

2. The petitioner firm regularly imports soda ash for its plants from several countries. The soda ash, originating in, or exported from, China, EU, Kenya, Iran, Pakistan, Ukraine and United Sates and imported into India is classifiable under Heading 283620 of the first schedule of the Customs Tariff Act, 1975 (hereafter referred as "Act"), besides basic customs duty, it also attracts anti-dumping duty in terms of Section 9A of the Act.

3. In the present case, the respondent had imposed anti-dumping duty vide the Notification dated 03.07.2012 for a period of 5 years from the date of the Notification on the imports of soda ash originating in or exported from China, PR, EU, Kenya, Pakistan, Iran, Ukraine and USA. Further, on 21.12.2016, the respondent vide Customs Notification No. 55/2016-Customs (Add) rescinded Customs Notification No.34/2012 -Customs dated 03.07.2012 but kept the same in abeyance as per directions of the Gujarat High Court in SCA No.16426 of 2016 and connected matters dated 13.12.2016. Subsequently, on 16.06.2017, the designated authority had initiated sunset review. Further, the said duties under the Notification dated 03.07.2012 were extended by the respondent in the meantime for a period of one year in terms of Section 9A(5) vide Customs Notification 33/2017 dated 30.06.2017 till 02.07.2018. The relevant part is extracted herein below:

> *".... 3. Subject to the final decision of the Hon'ble High Court of Gujarat in Special Civil Applications No. 16426 of 2016 and 16428 of 2016, this notification, unless revoked earlier shall remain in force up to and inclusive of the 2nd July, 2018"*

4. Further, the designated authority terminated the sunset review and issued separate findings for mid- term review. Thereafter, the Notification no. 50/2017- Customs (ADD) dated 18.10.2017 was issued wherein levy of ADD continued beyond the expiry period until the final outcome of the order of the High Court of Gujarat. The High Court of Gujarat on 11.06.2018 disposed of all applications in the subject matter and remitted the matter back to the Designated Authority. In the meantime, the DGAD rendered the final findings vide proceedings F.No.7/5/2017- DGAD dated 14.12.2018 concluding that the continuation of anti-dumping duty is not warranted and accordingly, did not recommend the extension of the anti-dumping duty on import of soda ash from the respective countries.

5. The petitioner till 02.07.2018 was paying all duties of customs including anti-dumping duty on soda ash when imported from countries that were subject to duty viz. China, PR, EU, Kenya, Pakistan, Iran, Ukraine and USA. Duties were paid also for the warehoused consignments as and when they were cleared from the warehouse. However, despite the settled position of law, the Respondents sought to levy anti-dumping duty for clearances made after 02.07.2018. Vide letters dated 05.07.2018 and 20.08.2018, the petitioner brought to the notice of the Commissioner, ICD, PPG and the Deputy Commissioner, Hazira Port about the demand being made.

6. The petitioners vide its petition urged that the respondent cannot levy duties that have lapsed on 02.07.2018. It is undisputed that the original imposition was by way of Notification dated 03.07.2012 that was valid only till 02.07.2017. The said imposition was extended

through second proviso to Section 9A(5) of the Customs Tariff Act, 1975 through Customs Notification 33/2017 dated 30.06.2017 by one year till 02.07.2018 in terms of maximum period prescribed therein. No notification extending duties till date has been issued.

7. Further, the petitioner urged that no fresh levy can be now imposed and the said demand or collection of duty is also contrary to law declared by this court in Writ Petition No.4810/2014 in the case of ***Forech India Ltd. v. The Designated Authority & Ors***. The relevant portion of the judgment of this court dated 31.05.2018 in the said case is extracted herein below:

> *"20. 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. it 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.

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23 .... 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, the 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. 3512014. It is illegal and, accordingly, set aside ...... "

8. In the present case, vide CM No.38147/2018, the applicant complained that despite lapse of the anti-dumping duty on 02.07.2018 by reason of Customs Notification 33/2017, dated 30.06.2017, issued under Section 9A (5) of the Customs Tariff Act, 1975, such duty has been demanded in respect of consignments imported after the said date. Subsequently, vide order dated 17.09.2018, this court restrained the respondent and all authorities, including customs authorities from collecting any anti-dumping duty in respect of import of the item at Entry No.283620.

9. Mr. Balbir Singh, ld. Senior Counsel for the petitioner submitted that the primary issue here is whether, in spite of the fact that the right conferred through the Notification dated 03.07.2012 expired on 02.07.2018, the respondents are still entitled to collect anti-dumping duty from the petitioner in respect of import of soda ash from the respective countries.

10. Further, the ld. Senior Counsel for the petitioner relied on the case of ***Varahi Chemicals v. The Commissioner of Customs, Chennai Commissionerate – II and Ors.*** (**W.P. No. 30628 of 2018 and W.M.P. No. 35714 of 2018),** wherein the High Court of Madras allowed the writ petition and held that the respondents cannot prevail upon the petitioner to protect the interest of the Revenue towards the anti-dumping duty in the absence of any statutory right available at the relevant time for levying and collecting such duty. The relevant portion of the judgment is extracted hereunder:

"6. There is no dispute to the fact that the anti-dumping duty was imposed in pursuant to the Notification issued as stated supra. It is also not in dispute that the right to collect such anti-dumping duty got expired on 02.07.2018. Even otherwise, as it is admitted by the respondents in the counter affidavit that the DGAD has already passed an order on 14.12.2018 holding that the continuation of anti-dumping duty is not warranted and thus, he is not recommending for the extension of the anti-dumping duty on import of subject matter from the subject countries. It is an admitted case of the respondents that as on date, no notification is in force empowering the collection of ADD. On the other hand, it is a matter of fact such power conferred on the authorities through issuance of relevant notification ceased to exist after 02.07.2018. Hence, I am of the view that there is no justification on the part of the respondents in seeking for any interim protection for releasing the goods without collecting the anti-dumping duty on the reason that the order passed by DGAD dated 14.12.2018 is an appealable order. Needless to say that the respondents cannot insist upon the petitioner to protect the interest of the Revenue towards the anti-dumping duty in the absence of any statutory right available as on today for levying & collecting such duty. On the other hand, it is an admitted fact that such right has already ceased to exist on 02.07.2018, which right was also not recommended to continue by the DGAD by proceedings dated 14.12.2018.

7. Under such circumstances, the petitioner is entitled to succeed in this writ petition. Accordingly, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed."

11. The learned standing counsel for the respondents, Mr. Ashim Sood could not dispute that the provisions of the Customs Tariff Act could not enable the collection of duty in this case after 02.07.2018. Further, the decision in *Varahi* (supra) was also not contested.

12. The above discussion shows that that the original imposition in the present case was by way of the Notification dated 03.07.2012 and was valid till 02.07.2017. The levy was extended in the exercise of power under second proviso to Section 9A(5) of the Act through Customs Notification 33/2017 dated 30.06.2017 by a year till 02.07.2018. No notification extending duties can now be issued in terms of the settled law. Further, the law on the issue raised in the present petition is well settled by this court in Writ Petition No. 4810/2014, ***Forech India Ltd. Vs. Designated Authority &Ors*****., 2018 (361) ELT 671** vide its judgment dated 31.05.2018 by holding that second notification imposing anti-dumping duty for a period of five years cannot be sustained because it has to be issued within the period of first five years or in the extended one-year period. It has been specifically held that the moment the levy comes to an end or there is break in its continuance, it cannot be revived in the sunset review exercise. Thus, no notification with retrospective or prospective effect can now be issued by the Respondent herein even if the sunset review is decided in favour of the applicant domestic producers in terms of the settled legal position that there cannot be a gap between expiry of original duties or extension of one year thereof under second proviso to Section 9A(5) and extension of period of such imposition by 5 years under first proviso to Section 9A(5) of the Customs Tariff Act, 1975.

Clearly, as a result of the above discussion, the petition has to succeed; the respondents are hereby restrained and enjoined from collecting any duties under Notification No. 34/2012 – Customs

(ADD) dated 03.07.2012 read with subsequent Notification No.33/2017 – Customs (ADD) dated 03.06.2017, on or after 02.07.2018. Any amounts collected or obligations imposed on the basis of those notifications are declared to be without authority of law. The petitioner is discharged from such obligations and is entitled to the refund of any amounts collected after 02.07.2018.

The writ petition is allowed, in the above terms.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

FEBRUARY 06, 2019
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