

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

Reserved on: 10.09.2018
Pronounced on: 27.03.2019

+ **W.P.(C) 8089/2017**

EVEREADY INDUSTRIES INDIA LTD. Petitioner
Through : Sh. Basava Prabhu Patil, Sr. Advocate
with Ms. Reena Khair, Sh. Rajesh Sharma, Ms.
Rita Jha, Ms. Shreya Dahiya and Sh. Geeta Ahuja,
Advocates.

versus

UNION OF INDIA AND ANR. Respondents
Through : Sh. Anurag Ahluwalia, CGSC with Sh.
Abhigyan Siddhant, Advocate, for Respondent
Nos. 1 and 2.
Sh. Arshad Hidaytullah, Sr. Advocate with Sh.
Jitendra Singh, Ms. Shailu Kher Hidaytullah and
Sh. Anshuman Sahni, Advocates, for Respondent
No.3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The writ petitioner (hereafter “Eveready”) questions the decision of the second respondent (the Designated Authority hereafter “DA”) in a notification dated 27.09.2016 (“Impugned Final Findings”), recommending against the imposition of anti-dumping duties on imports of AA Dry Cell Batteries (the “subject goods” hereafter), originating in or exported from the

People's Republic of China and Vietnam (hereafter variously "subject country", and "subject countries").

2. Eveready is a domestic manufacturer of the subject goods and a member of the domestic industry on whose behalf the application for initiation of anti-dumping investigations was filed. The first respondent (Union Department of Revenue, Ministry of Finance hereafter "the Union" or "the Central Government"), determines whether or not to accept the recommendations of the DA. The Central Government may, within three months of the date of publication of final findings by the Designated Authority, impose by notification in the Official Gazette, anti-dumping duty on the goods originating in or exported from the countries in respect of which suspected dumping activities are confirmed by the DA. The latter (DA) carries out anti-dumping investigations and recommends whether or not to impose anti-dumping duties to the Central Government. It has, in the present case, issued the impugned final findings. The third respondent is Godrej & Boyce Mfg. Co. Ltd (hereafter "Godrej") an interested party in the anti-dumping investigations, who was impleaded in the present proceedings through C.M. No. 39592 of 2017.

Brief Facts

3. The facts, in brief, are that in 2015, the Association of Indian Dry Cell Manufacturers filed an application for initiation of anti-dumping investigation of imports of the subject goods, originating in or exported from the subject countries. This Application was filed before the DA, for and on behalf of the domestic industry comprising of Eveready, M/s. Panasonic Energy India Ltd., and Nippo Batteries Company Ltd. On 20.10.2015, the

DA, on a *prima facie* determination that sufficient evidence of dumping of the Subject Goods existed, issued an initiation notification in terms of Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“Rules”) to determine the existence, degree and effect of the alleged dumping. 01.04.2014 to 31.03.2015 was chosen as the period of investigation. Copies of the initiation notification were sent to the Embassies of the subject countries in India, known exporters, importers and other interested parties. Barring Godrej none of the exporters/producers or importers filed questionnaire responses or any submissions during the course of the investigation. On 03.02.2016, all interested parties were invited to present their views in a public hearing, in accordance with Rule 6(6) of the Rules. However, none of the interested parties, except members of the domestic industry, attended the public hearing.

4. On 18.08.2016, DA issued to interested parties a Disclosure Statement which, *inter alia*, contained the essential facts of the investigation, inviting comments on the same. The Petitioner argues since the essential facts disclosed in the disclosure statement clearly established dumping, injury and causal link, it merely reiterated its earlier submission and asked for a confirmation of the essential facts and reasoning disclosed. Thereafter, on 27.09.2016, DA issued the impugned final findings which recommended against the imposition of anti-dumping duty, concluding as follows:

"Having initiated and conducted the present investigation into dumping, injury and causal link in terms of the Anti dumping Rules, the Authority is of the view that the dumped imports have not caused material injury to the domestic industry in view of

the facts that the domestic industry has realized much higher selling price as compared to their non-injurious price and also the landed price of the subject goods from the subject countries and earned huge profits. Having concluded as above, the Authority is of the view that imposition of antidumping duty, on the imports of the subject goods, originating in or exported from the subject countries, is not required."

5. Following this, no Gazette Notification imposing anti-dumping duty was issued by the Union.

6. On 01.11.2016, the Petitioner filed a representation before Respondent No. 1. However, the Union, in its reply to an RTI application dated 23.12.2016, stated that:

"In the instant case the DGAD has not recommended imposition of Anti-Dumping duty on imports of AA Dry Cell Batteries originating in or exported from China PR and Vietnam. As there is no further action lying at our end the final findings of the DGAD are put up for perusal and information please."

7. The Petitioner then challenged the impugned final findings before the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi ("CESTAT" or "Appellate Tribunal"), under Section 9C of the Customs Tariff Act, 1975 ("Customs Tariff Act"). The Appellate Tribunal, by Order dated 20.07.2017("Impugned Order"), dismissed the appeal, stating that:

"... there is no determination of ADD levy by notification as published in the official gazette by the Central Government under Rule 18 and, as such, the appeals under Section 9C in the present case are not maintainable."

8. The Petitioner thus filed the present petition, claiming that the impugned final findings be quashed and the matter, remanded back for fresh decision to DA. On 20.09.2018, however, a Division Bench of the Delhi High Court, in *Jindal Polyfilm Ltd. v. Designated Authority & Anr.*, W.P (C) No. 8202/2017, appears to have expansively interpreted the scope of appeal under Section 9C of the Customs Tariff Act. Placing reliance on this judgment, the Petitioner has now filed an application under Section 151 of the Civil Procedure Code, 1908, praying that the CESTAT's Impugned Order be set aside and the matter be remitted back before the Appellate Tribunal.

9. It is argued on behalf of the petitioner, by learned senior counsel Mr. Basavaprabhu Patil that the DA recorded a positive disclosure statement and contradictory to it, rendered negative final findings in complete departure. He relies on Rule 16 of Anti-Dumping Rules to say that the DA has to inform all interested parties of the essential facts under consideration which would form the basis for its decision. The Disclosure Statement is issued before notifying the final findings and is almost a decision of the Designated Authority with regard to various essential facts and parameters involved in deciding the issues before it. It is submitted that in the present case the disclosure statement had clearly concluded that the domestic industry had suffered material injury as a result of dumped imports in the Country. The DA, however, in the final findings concluded that the domestic industry did not suffer material injury. The DA gave different conclusions in disclosure statement and final finding. It is relevant to note in this regard that these different conclusions drawn by Designated Authority after issuance of

Disclosure Statement are without any change whatsoever in the underlined factual position.

10. It is argued that the vital conclusions in the disclosure statement were that :

- i) Imports of the product under consideration from the subject countries were low until 2013-14 in view of the anti-dumping duty in place on subject goods from China PR. However, with the cessation of the anti-dumping duty in May 2013, the imports increased significantly in the current Period of Investigation and caused injury to the domestic industry as established from the detailed analysis in the disclosure statement.
- ii) Demand for the product under consideration has increased during the POI. However, despite increase in demand, the share of the domestic industry in the domestic market has substantially declined while the share of the imports from the subject country has significantly increased. (para 43)
- iii) Capacity utilization of the domestic industry over the injury period declined despite increase in demand, in the face of increase in imports from the subject countries. Production of the domestic industry has increased up to 2013-14, but declined in the POI, whereas demand during the same period has increased significantly. (para 48)
- iv) Inventory level of the domestic industry has increased. (para 58)
- v) Presence of dumped imports has resulted in decline in capacity utilization, production and sales, despite increase in demand. (para 79)

vi) Imports are undercutting the prices of the domestic industry. Import price is much lower than the level of cost of production of the domestic industry preventing increase in selling price of the domestic industry. (para 50)

vii) Domestic industry has suffered significant price underselling during the investigation period on account of imports of the subject goods from the subject countries. (para 53)

11. It is submitted that on the other hand, crucial and contradictory conclusions in the final findings in respect of material injury are opposite to what was reflected in the disclosure statement

- a. There is dumping of the product concerned from China PR and Vietnam.
- b. Such dumping margin and injury margin are positive with positive undercutting.
- c. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position.
- d. Net sales realization of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore, no price impact on the domestic industry was noticeable.
- e. Though a huge volume of subject goods entered the Indian market during the POI; there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales

realization is much more than the landed value, and profit position is phenomenal.

- f. Consequently, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still make huge profits, the huge volume of imports may not cause much injury to the domestic industry.

12. It is also submitted that there is complete contradiction in the conclusions of the DA between the final findings and the previous disclosure statement. Besides, there were new facts in the final findings, not shown in the disclosure statement. These were that the DA for the first time made following statements in the final findings. (a) Despite demand in the domestic market more than its capacity, it neither increased its production in line with demand, nor increased its sales in the domestic market matching with its production. This indicates that the domestic industry is not willing to sell its goods in the domestic market despite getting a better price than the landed price from the subject countries. Or it may be due to lack of wide spread marketing network by the domestic industry. (b) the DA noted that the landed price of imports is below the selling price of the domestic industry, resulting in price undercutting. This may be due to the fact that majority of the imports from the subject countries, especially from China, are low value products. (c) The threat of injury was not substantiated by information provided by the domestic industry pertaining to the injury period and the POI of the present investigation. (d) Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE

position. (e) The landed value of imports is lower than the selling price of the domestic industry. Therefore, Indian price cannot be interpreted as attractive for exports by the subject countries. (f) Net sales realization of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore there was no price impact on the domestic industry. (g) Since the domestic industry is able to sell at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry. (h) The level of inventory with the domestic industry has increased during the POI. This is the situation despite getting a higher price vis-a-vis the imports and increasing demand. Perhaps, the domestic industry should focus more on expanding and strengthening its sales network to penetrate more in to the rural areas. (i) The domestic industry failed to place sufficient evidence to establish that increased imports would adversely impact them.

13. It is argued that the Designated Authority found in the disclosure statement that there was significant increase in import posing threat of injury (ii) Price attractiveness of Indian Market. It is likely that the subject countries' import shall further aggressively target and take over the entire Indian demand in a nearly foreseeable future (iii) excess production capacities in subject countries based on the earlier finding to prove that China does have a much larger manufacturing base for the subject goods as compared to India and generate huge production and exportable surplus capable of overtaking the entire Indian market. (iv) Export orientation of producers and exporters in subject countries based on the earlier finding that Chinese economy is well-known for its export orientation. Considering the

demand in India and the import trends during the POI vis-a-vis earlier years, especially after the revocation of the earlier duties, further spurt in exports at dumped prices cannot be ruled out. (v) Inventories had increased with domestic industry in alarming proportions during the POI despite increase in demand in the domestic market. However, Designated Authority discarded its earlier conclusion on threat of material injury and held that no substantiated information was provided by the domestic industry pertaining to the injury period and the POI of the present investigation. The Domestic industry was kept in dark while relying on earlier finding which, rather prove its case of the domestic industry. The domestic industry was never asked to provide information pertaining to injury period and the POI of the present investigation. The DA should have sought such information or would have disclosed this fact in the disclosure statement.

14. It is further pointed out that the DA concluded erroneously that the domestic industry made huge profits. The findings concluded that despite dumping, *"huge amount of profit is made by the domestic industry with significantly high ROCE position."* The petitioners rely on a table to show that the return on investments earned by the domestic industry over the POI to say that the DA granted 22% return on capital employed for the purpose of determination of NIP and Designated Authority has repeatedly held that this 22% return on capital employed represents reasonable return. The factual basis for stating that the domestic industry has earned huge profits, is contested and it is submitted that the ROI of the domestic industry is below 22%. On one hand the DA considered consistently in more than 500 investigations that 22% return on capital employed is reasonable and is

required to be considered in order to determine NIP of the domestic industry, the DA has determined NIP considering 22% return on capital employed, on the other hand, the DA has now held that the domestic industry had earned huge profits.

15. Learned counsel states that the DA in a large number of investigations held that the comparison of NIP with NSR is irrelevant. The DA consistently held that the purpose of NIP determination is limited to the determination of injury margin and the mere fact that the NSR is above NIP is of no relevance. The DA even argued this position before CESTAT in the matter of All India Glass Manufacturers Federation v Union of India/Designated Authority, in support of the final findings notified by the Designated Authority in that case wherein the Designated Authority recommended imposition of anti-dumping duties despite the fact that the NIP was below NSR. CESTAT, by its final order dated 06.09.2016 held that there is no legal provision to mandate the DA to compare NIP (non injurious price) with NSR (net sales realization) in order to determine the price effect and upheld the final finding. However, DA now in paragraph 64 of the final finding held *as under*:

“Net sales realization of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry.”

16. It is urged that Paragraph (ii) of Annexure-11 of Anti-dumping Rules provides that when examining the volume of dumped imports, the said authority shall consider whether there has been a significant increase in the dumped imports, whether in absolute terms or relative to production or consumption in India. With regard to the effect of the dumped imports on

prices as referred to in sub-rule (2) of rule 18 the designated authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of like product in India, or whether the effect of such imports is otherwise to depress prices to a significant degree prevent price increase which otherwise would have occurred, to a significant degree.

17. It is submitted that three elements have been provided in the relevant provision to examine price effect (i) price undercutting (ii) price depression and (iii) price suppression. There is no requirement that all these parameters should individually show price effect. Even one element is sufficient to prove price effect. Further and in any case, NIP comparison with NSR has not been prescribed as a parameter under Annexure-11. In fact, this comparison cannot be relevant for the simple reasons that (a) Indian Rules are consistent with WTO Agreement, (b) NIP determination is peculiar to only India, whereas the WTO provision exists in all WTO member countries practicing this law. If other Investigating Authorities are making determination without NIP law, it is only because NIP comparison with NSR is entirely immaterial. More importantly, the final findings is contradictory on this account because DA at one place found price effect, and held otherwise at other place. Relevant part of the final findings are as follows:

“Para 53 - From the above information, the Authority notes that the landed price of imports (including basic customs duty) is below the selling price of the domestic industry, resulting in price undercutting. This may be due to the fact that majority of the imports from the subject countries, especially from China, are low valve products.

54. It is noted that the price underselling effect of the dumped imports from China PR is significant. This may be again due to the fact that majority of the imports from the subject countries, especially from China, are low value products... ”

18. It is argued that the DA failed to consider its own position taken in another case and its own arguments before the Tribunal, that too just few days before the decision in that case. This is a clear case of contradictory and discriminatory approach. The Designated Authority ignored its past established precedents where it held that NIP being below NSR does not imply that there is no justification in imposition of anti-dumping duties.

19. It is argued that this court has the power and jurisdiction to intervene and correct the impugned findings, considering that the DA acts in a quasi-judicial capacity. In the event the court were to hold that the DA overstepped the bounds of law, or rendered perverse findings, Article 226 is an effective remedy. The petitioners relied on several judgments, to say that the DA performs quasi-judicial functions though its recommendations are not binding on the UOI.

20. It is argued on behalf of the Central Government that this court should not entertain the writ petition. Learned counsel relied on the final findings of the DA and urged that the scheme of the Rules governing conduct of the proceeding, obliged that authority to hear the parties, and issue a disclosure statement. However, *post* disclosure statement, there is scope for a further hearing by the parties; the DA is bound by law, within the time prescribed, to report its final findings which are in the form of recommendations. These recommendations are not binding upon the Central Government; it has the widest range of choices to accept them, or impose duty according to its

discretion, which may be limited in terms of time, or any other consideration.

21. It is submitted that though the DA's proceeding is quasi-judicial, its findings are not; it is only when those findings are acted upon, that the duty imposed becomes the occasion for a challenge. On the merits, it is urged that the DA considered all the relevant factors and applied the rules framed in this regard under the Customs Tariff Act, to conclude that though there was dumping, there was no injurious effect. The respondent also stated that according to the DA's report, the domestic industry had not utilized its capacities, despite increase in demand. It was lastly urged that a disclosure statement does not in any manner create a vested right that the final findings should be according to what is disclosed; even that statement is not appealable inasmuch as it is a step, an aid in the final process of decision making.

Findings of the Designated Authority

22. The relevant extracts of the DA's findings in this case are extracted below:

“...The Authority notes that demand for the product under consideration has marginally increased during the POI as compared to the base year. While the domestic industry holds significant share in the market throughout the injury period including the POI, the rest of the suppliers including the subject countries contribute to the market minimally. From the aforesaid data, the only concern appear to be the increase of the market share of the subject countries from 1.23% in the base year to 12.87% in the POI, whereas the market share of the domestic industry has declined from 89.87% during the base year to 82.97% during the POI. But, this trend needs to be

analyzed with reference to the production capacity of the domestic industry and their actual production during the injury period including the POI. As per the information given in the relevant Para of this finding, the domestic industry has increased its production capacity throughout the injury period. It increased its production capacity from 2150400 thousand pcs in the base year to 2418400 thousand pcs in the POI. But, despite demand in the domestic market more than its capacity, it neither increased its production in line with demand, nor increased its sales in the domestic market matching with its production. This indicates that the domestic industry is not willing to sale its goods in the domestic market despite getting a better price than the landed price from the subject countries. Or, it may be due to lack of widespread marketing network by the domestic industry.

Particulars	UOM	2011-12	2012-13	2013-14	POI
Installed capacity	'000 Pcs	21,50,400	23,09,400	24,18,400	24,18,400
Trend	Indexed	100	107	112	112
Production	'000 Pcs	18,12,289	18,70,943	18,92,327	18,49,807
Trend	Indexed	100	103	104	102
Capacity Utilization	%	84.28%	81.01%	78.25%	76.49%
Trend	Indexed	100	96	93	91
Domestic Sales	'000 Pcs	17,89,225	17,78,384	18,27,803	17,82,890
Trend	Indexed	100	99	102	100
Demand	'000 Pcs	20,79,040	20,21,551	20,13,593	21,79,064
Trend	Indexed	100	97	97	105

Import Volume and Market Share:

46. With regard to volume of the dumped imports, the Authority is required to consider whether there has been a significant increase in dumped imports either in absolute terms or relative to production or consumption in India. Annexure II(ii) of the anti-dumping rules provides as under:

“While examining the volume of dumped imports, the said authority shall consider whether there has been significant increase in the dumped imports either in

absolute terms or relative in production or consumption in India.”

47. *The import volumes for the injury period, considering the transaction wise data is as under:*

<i>Particulars</i>	<i>UOM</i>	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>POI</i>
<i>Import Volume</i>					
<i>China</i>	<i>'000 Pcs</i>	<i>20,132</i>	<i>35,918</i>	<i>41,643</i>	<i>194,407</i>
<i>Trend</i>	<i>Indexed</i>	<i>100</i>	<i>178</i>	<i>207</i>	<i>966</i>
<i>Vietnam</i>	<i>'000 Pcs</i>	<i>5,500</i>	<i>7,004</i>	<i>5,913</i>	<i>83,420</i>
<i>Trend</i>	<i>Indexed</i>	<i>100</i>	<i>127</i>	<i>108</i>	<i>1,517</i>
<i>Subject countries</i>	<i>'000 Pcs</i>	<i>25,632</i>	<i>42,922</i>	<i>47,555</i>	<i>277,826</i>
<i>Trend</i>	<i>Indexed</i>	<i>100</i>	<i>167</i>	<i>186</i>	<i>1,084</i>
<i>Other countries</i>	<i>'000 Pcs</i>	<i>94,315</i>	<i>33,342</i>	<i>10,930</i>	<i>843</i>
<i>Trend</i>	<i>Indexed</i>	<i>100</i>	<i>35</i>	<i>12</i>	<i>1</i>
<i>Total imports</i>	<i>'000 Pcs</i>	<i>119,947</i>	<i>76,263</i>	<i>58,486</i>	<i>278,670</i>
<i>Trend</i>	<i>Indexed</i>	<i>100</i>	<i>64</i>	<i>49</i>	<i>232</i>
<i>Market Share</i>					
<i>China</i>	<i>%</i>	<i>16.78</i>	<i>47.10</i>	<i>71.20</i>	<i>69.76</i>
<i>Vietnam</i>	<i>%</i>	<i>4.59</i>	<i>9.18</i>	<i>10.11</i>	<i>29.93</i>
<i>Subject Countries</i>	<i>%</i>	<i>21.37</i>	<i>56.28</i>	<i>81.31</i>	<i>99.70</i>
<i>Other Countries</i>	<i>%</i>	<i>78.63</i>	<i>43.72</i>	<i>18.69</i>	<i>0.30</i>
<i>Total</i>	<i>%</i>	<i>100.00</i>	<i>100.00</i>	<i>100.00</i>	<i>100.00</i>

Capacity, Production, Capacity, utilization and Sales Volume

50. As noted from the table below, there is an enhancement of capacity of the domestic industry in the period 2012-13 and 2013-14 in line with increase in demand, put during POI, the domestic industry abstained from increasing its capacity further despite increasing demand. Production of the domestic industry has increased up to 2013-14, but declined in the POI, whereas demand during the same period has increased significantly. This is the situation despite the domestic industry realising a better price than the landed price.

<i>Particulars</i>	<i>UOM</i>	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>POI</i>
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<i>Installed capacity</i>	<i>000 Pcs</i>	21,50,400	23,09,400	24,18,400	24,18,400
<i>Trend</i>	<i>Indexed</i>	100	107	112	112
<i>Production</i>	<i>000 Pcs</i>	18,12,289	18,70,943	18,92,327	18,49,807
<i>Trend</i>	<i>Indexed</i>	100	103	104	102
<i>Capacity Utilization</i>	<i>%</i>	84.28%	81.01%	78.25%	76.49%
<i>Trend</i>	<i>Indexed</i>	100	96	93	91
<i>Domestic Sales</i>	<i>000 Pcs</i>	17,89,225	17,78,384	18,27,803	17,82,890
<i>Trend</i>	<i>Indexed</i>	100	99	102	100
<i>Demand</i>	<i>000 Pcs</i>	20,79,040	20,21,551	20,13,593	21,79,064
<i>Trend</i>	<i>Indexed</i>	100	97	97	105

PRICE EFFECT

Price effect of dumped imports and impact on domestic industry

51. The impact on the prices of the domestic industry on account of imports of the subject goods from the subject country have been examined with reference to price undercutting, price underselling, price suppression and price depression. For the purpose of this analysis, the cost of production, net sales realization (NSR) and the non-injurious price (NIP) of the domestic industry have been compared with landed value of imports from the subject country. A comparison for subject goods during the period of investigation was made between the landed value of the dumped imports and the domestic selling price in the domestic market. In determining the net sales realization of the domestic industry, taxes, rebates, discounts and commission incurred by the domestic industry have been adjusted. The price underselling is an important indicator of assessment of injury; thus, the Authority has worked out a non-injurious price and compared the same with the landed value of imports to arrive at the extent of price underselling. The non-injurious price has been evaluated for the domestic industry in terms of Annexure Ill of the Anti-Dumping Rules. The position is as follows:

Price Undercutting

52. Price undercutting has been assessed by comparing the landed value with the domestic selling price in India of the subject goods during the injury period as follows:

Particulars	Unit	2011-12	2012-13	2013-14	POI
China PR					
Landed price of imports	Rs./'000Pcs	2,869	3,012	1,115	1,007
Net Sales Realisation	Rs./'000Pcs	***	***	***	***
Price Undercutting	Rs./'000Pcs	***	***	***	***
Price Undercutting	%	***	***	***	***
Price Undercutting	% Range	10-20	5-10	210-220	310-320
Vietnam					
Landed price of imports	Rs./'000Pcs	2,305	2,396	2,770	2,739
Net Sales Realisation	Rs./'000Pcs	***	***	***	***
Price Undercutting	Rs./'000Pcs	***	***	***	***
Price Undercutting	%	***	***	***	***
Price Undercutting	% Range	30-40	30-40	20-30	50-60
Subject countries as a whole					
Landed price of imports	Rs./'000Pcs	2,606	2,912	1,321	1,527
Net Sales Realisation	Rs./'000Pcs	***	***	***	***
Price Undercutting	Rs./'000Pcs	***	***	***	***

Magnitude of dumping

61. The Authority notes that the dumping margin of the imports from subject countries is more than de-minimus and substantial.

Growth

62. The Authority notes that the domestic industry has shown negative growth in terms of production and sales. However, profit has shown significant improvement.

<i>Growth</i>	<i>UOM</i>	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>	<i>POI</i>
<i>Production</i>	%	-	3.24	1.14	-2.25
<i>Domestic Sales</i>	%	-	-0.61	2.78	-2.46
<i>Selling Price</i>	%	-	3.43	9.85	18.29
<i>Cost of Sales</i>	%	-	3.32	2.53	9.62
<i>Profit/Loss</i>	%	-	0.09	235.29	238.54

Conclusion on Injury

64. Having regard to the contentions raised, information provided and submissions made by the interested parties and facts available before the Authority as recorded in this finding and on the basis of the above analysis of the state of dumping and consequent injury, the Authority concludes that:

- i. There is dumping of the product concerned from China PR and Vietnam.
- ii. Both dumping margin and injury margin are positive with positive undercutting.
- iii. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position.
- iv. Net sales realisation of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry.

- v. *Although huge volume of subject goods have entered Indian market during the POI, there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales realization is much more than the landed value and profit position is phenomenal.*
- vi. *Therefore, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry.*
- vii. *Therefore, the 'Authority concludes that the domestic industry did not suffer material injury during the POI.*

H. THREAT OF MATERIAL INJURY

65. *The Authority examined whether the imports are threatening material injury to the domestic industry. Rules provide as follows with regard to threat of material injury-*

A determination of a threat of (vii) material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the designated authority shall consider, inter alia, such factors as:

- (a) *significant rate of increase of dumped imports into India indicating the likelihood of substantially increased importation;*
- (b) *sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to*

Indian markets, taking into account the availability of other export markets to absorb any additional exports;

- (c) *whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and*
- (d) *inventories of the article being investigated.*

b) **Excess Production Capacities in the subject country:-**

68. *On the basis of information provided by the domestic industry, in the earlier sunset review final findings issued on 20th May, 2013, at Para 66, the Authority had held as follows:*

"66. The domestic industry in its submissions has claimed that the producers in China are having significant surplus capacities as compared to the demand of subject goods in the domestic market. Domestic industry submitted that there are over 100 producers of Dry Cell Batteries in China. However, the below table data for 20 major producers of subject goods for which data is available. As per information furnished by the Domestic Industry, around 47.12% of the production represents the share of production of AA batteries (subject goods). Based on the same the table below shows the production, consumption and exports of the product under consideration:

<i>SN</i>	<i>Particular</i>	<i>2009</i>	<i>2010</i>
<i>1</i>	<i>Installed Capacity in Million Pcs</i>	<i>18,090</i>	<i>18,090</i>
<i>2</i>	<i>Subject goods volume (AA share of Total Capacity is 47.12%) in Million Pcs</i>	<i>8,524</i>	<i>8,524</i>
<i>3</i>	<i>Production in China in Million Pcs</i>	<i>5,527</i>	<i>6,435</i>
<i>4</i>	<i>Global Export in Million Pcs</i>	<i>2,545</i>	<i>2,846</i>
<i>5</i>	<i>Consumption in China in Million Pcs (5- 4)</i>	<i>2,982</i>	<i>3,589</i>
<i>6</i>	<i>Unutilised Capacity in Million Pcs</i>	<i>2,997</i>	<i>2,089</i>

	(2- 3)		
7	<i>Surplus as % of Production</i>	54%	32%
8	<i>Surplus as % of Domestic Demand</i>	101%	58%
9	<i>Surplus as % of Global Export</i>	118%	73%
10	<i>Freely disposable production capacity (unutilized capacity + current exports) in Million Pcs</i>	8,072	9,281
11	<i>Indian Demand (Annualised POI) in Million Pcs</i>	1,793	1,793
12	<i>Freely disposable production capacity as % of Indian Demand</i>	450%	518%

J. Post Disclosure Comments

76. *Post disclosure, none of the interested parties made any submission/comment.*

77. *The following post disclosure comments/submissions have been made by the domestic industry:*

- i. The non-injurious price (NIP) determined by the authority is too low and inadequate to protect the domestic industry.*
- ii. While determining NIP, the authority should consider the actual raw materials and utilities consumption.*
- iii. It is inappropriate to ignore the actual production and adopt any other production basis for determination of NIP.*
- iv. The domestic industry is offering product of different varieties and types with different price ranges. Similarly, the Chinese batteries are also being sold in the market at different price ranges. Therefore, the prices of the domestic industry are quite comparable with the retail prices of Chinese batteries.*
- v. The traders are cornering the entire profit on account of dumped Chinese batteries and the consumers obtain the*

batteries at the same price as offered by the domestic industry.

- vi. *Petitioners request the authority to recommend benchmark form of duties in the present case since the product was earlier attracting benchmark form of duty. Moreover, while the he imports have been reported at significantly different prices, costs of production do not have significant variations. Therefore, it would be appropriate to have benchmark form of duty.*
- vii. *The duty should be imposed in terms of US\$.*

RECOMMENDATIONS

79. *The Authority notes that the investigation was initiated and notified to all interested parties and adequate opportunity was given to the exporters, importers and other interested parties to provide positive information on the aspect of dumping, injury and causal link. Having initiated and conducted the present investigation into dumping, injury and causal link in terms of the Antidumping Rules, the Authority is of the view that the dumped imports have not caused material injury to the domestic industry in view of the facts that the domestic industry has realized much higher selling price as compared to their non-injurious price and also the landed price of the subject goods from the subject countries and earned huge profits. Having concluded as above, the Authority is of the view that imposition of anti-dumping duty, on the imports of the subject goods, originating in or exported from the subject countries, is not required.”*

Relevant Provisions

23. The relevant provisions of the Customs Tariff Act, 1975 are extracted below:

“Section 9A. Anti- dumping duty on dumped articles. — (1)
Where any article is exported by an exporter or producer from

any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

(5) The antidumping 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 antidumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

Section 9C. Appeal. — *(1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal)."*

Relevant provisions of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

“4. Duties of the designated authority. - (1) It shall be the duty of the designated authority in accordance with these rules:

...

- (d) *to recommend the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, and the date of commencement of such duty; and..*

.....

.....

10. Determination of normal value, export price and margin of dumping. - An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules.

11. Determination of injury. -(1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) *The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.*

(3) *The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-*

- (i) *there is a concentration of dumped imports into an isolated market, and*
- (ii) *the dumped articles are causing injury to the producers of all or almost all of the production within such market.*

12. Preliminary findings. - (1) *The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries, it shall also record a further finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. It will also contain:-*

- (i) *the names of the suppliers, or when this is impracticable, the supplying countries involved;*
- (ii) *a description of the article 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.*

(2) *The designated authority shall issue a public notice recording its preliminary findings.*

.....

.....

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 :

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.

18. Levy of duty. - *(1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.*

(2) In cases where the designated authority has selected percentage of the volume of the exports from a particular country, as referred to sub-rule (3) of rule 17, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed -

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,*
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value/ the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined:*

Provided that the Central Government shall disregard for the purpose of this sub-rule any zero margin, margins which are less than 2 per cent expressed as the percentage of export price and margins established in the circumstances detailed in sub-rule (8) of rule 6. The Central Government shall apply individual duties to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation as referred to in the second proviso to sub-rule (3) of rule 17.

(3) Notwithstanding anything contained in sub-rule (1), where a domestic industry has been interpreted according to the proviso to sub-clause (b) of rule 2, a duty shall be levied only after the exporters have been given opportunity to cease exporting at dumped prices to the area concerned or otherwise give an undertaking pursuant to rule 15 and such undertaking has not been promptly given and in such cases duty shall not be levied only on the articles of specific producers which supply the area in question.

(4) If the final finding of the designated authority is negative that is contrary to the evidence on whose basis the investigation was initiated, the Central Government shall, within forty-five days of the publication of final findings by the designated authority under rule 17, withdraw the provisional duty imposed, if any.”

24. It is also necessary at this stage to notice and extract the relevant provisions of the General Agreement on Tariffs and Trade, 1994, to which India is a signatory:

“Article 6

.....

6.9 *The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.*

6.10 *The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.*

.....

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Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 *An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.*

11.2 *The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.⁽²¹⁾ Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping,*

whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3. Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their 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 that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.” (emphasis added)

Analysis and Conclusion

25. The issue arising for consideration in the present case is whether the Designated Authority's negative Final findings recommending no anti dumping duty on the ground of it not being in accord with the disclosure statement published by it, can in the circumstances of this case, be interfered with in judicial review.

26. Supreme Court judgments, and several decisions of High Courts, have clarified that the Designated Authority is only an investigating authority whose findings are recommendatory in nature. It is only when the recommendation is followed by a notification imposing anti dumping duty that a *lis* arises; this appears to be clear from the three judge decision in *Tata Chemicals v Union of India* 2008 (17) SCC 180. No doubt, every DA adopts and is duty bound to adopt (in consonance with GATT provisions as well as

the rules) a quasi-judicial procedure, whereby opportunity is granted to the concerned parties and those likely to be affected, culminating in reasoned final findings. This aspect has been highlighted by the Supreme Court in *Automotive Tyre Manufacturers Association v. the Designated Authority & Ors* (2011) 2 SCC 258. The Supreme Court held that the DA 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.

27. Rule 10 of the said Rules prescribes 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. The court also held that the DA is obliged to adhere to the Rules while

conducting investigations and is duty bound to follow the principles of natural justice in the exercise of power conferred on it; the DA also has to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter.

28. A Division Bench of this Court, in *Deepak Fertilizers v. Designated Authority*, 2006 SCC OnLine Del 38, after noticing Rule 3 of the Rules further clarified that the Designated Authority only assists the Central Government in making its determination. According to Rule 4(1) (d) of the Rules, the duty of the Designated Authority is to recommend the amount of anti-dumping duty, which if levied, would remove the injury to the domestic industry. Section 9A of the Customs Tariff Act enables only the Central Government to impose anti-dumping duty. The Customs Tariff Act and the Rules thereunder thus make it clear that the Designated Authority's findings are mere recommendations intended to assist the Central Government. Reference, in this regard, may also be made to the CEGAT's decision in *Indian Spinners Association v. Designated Authority*, 2000 (119) ELT 299 (Tri. - Delhi).

29. The report of the Designated Authority is only a recommendation, it does not create any rights or liabilities and is therefore not binding on the Central Government. A bare reading of the Customs Tariff Act and its Rules reveals this. Section 9A(1) of the Customs Tariff Act, which empowers the Central Government to impose anti-dumping duty, reads as follows:

“Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into

India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.” (emphasis added)

30. Rule 18(1), describes the process in further detail:

*“18. (1) The Central Government **may**, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.7.” (emphasis added)*

31. The use of the word “may” and not “shall”, in both the Act as well as the Rules, sufficiently evidences the legislature’s intention to allow the Central Government to disagree with the Designated Authority’s recommendation.

32. In *Alembic Ltd. v. Union of India*, 2013 (291) ELT 327 (Guj.), for instance, the Central Government, after taking note of relevant factors, decided that it would not be in public interest to impose anti-dumping duty, despite the recommendations made by the Designated Authority. The Court was of the opinion that the Designated Authority, under Rule 3, acts for and on behalf of the Government, to determine the existence, degree and effect of any alleged dumping and that in that view of the matter, its findings with respect to such issues may not be open to question by the Central Government. However, the Court clarified, this did not mean that even the recommendations of the Designated Authority are binding on the Central Government. In explaining its *rationale*, the court reasoned as follows:

“We are conscious that DA had come to certain conclusions which were not disputed by the Central Government. Insofar as

factual findings are concerned, such findings were perhaps not even open to challenge by the Central Government.

...

However, in the present case, we are of the opinion that the Central Government has taken into consideration various factors and come to the conclusion that it is not in public interest to impose Anti-dumping duty. Such factors are additional and besides those taken into account by DA for recommending Anti-dumping duty. As noted earlier, task of DA is limited of ascertainment of various factors such as factum of dumping if at all, ascertainment of extent of dumping, injury to the domestic market and amount of dumping duty [that] in his opinion would eliminate injury. These are issues which necessarily would be governed by material that may be brought on record and ascertainment of relevant factors on basis of facts presented. DA while examining these issues would not be involved in ascertaining other consequences of imposition or otherwise of Anti-dumping duty. It is necessarily the task of the Central Government to ascertain such factors and to come to conclusion whether despite such recommendations, Anti-dumping duty should be imposed or not."

33. This court is conscious of the separate roles that the Designated Authority and the Central Government perform in deciding whether or not to impose anti-dumping duty. The Central Government is restricted from imposing anti-dumping duty in certain circumstances. One such circumstance is outlined in Section 9B (1)(b)(ii) of the Act. Section 9B(1)(b)(ii) prevents the Central Government from levying anti-dumping duty on any article imported into India from a member of the World Trade Organisation (WTO) or from a most favoured nation, unless a determination has been made that import of such article causes or threatens material injury to any established industry in India. The relevant portion of Section 9B is extracted below for ready reference:

“Section 9B. No levy under section 9 or section 9A in certain cases. — (1) Notwithstanding anything contained in section 9 or section 9A, -

...

(b) the Central Government shall not levy any countervailing duty or antidumping duty –

...

(ii) under sub-section (1) of each of these sections, on the import into India of any article from a member country of the World Trade Organisation or from a country with whom Government of India has a most favoured nation agreement (hereinafter referred as a specified country), unless in accordance with the rules made under sub-section (2) of this section, a determination has been made that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India;”

34. The Andhra Pradesh High Court, in *Vuppalamritha Magnetic Components Limited v. Union of India* 2010 (256) ELT 487 (A.P.), has interpreted this section as requiring the Central Government to decide regarding material injury. The Designated Authority is not made mention of. The Central Government is thus found to be at liberty to impose anti-dumping duty, even in the absence of a positive finding by the Designated Authority.

35. The combined effect of the statutory provisions contained in the Act and the rules shows that the DA - under Rule 3 of *acts for and on behalf of the Government while carrying out the investigation to determine the existence, degree and effect of the alleged dumping*. In that view of the matter, the findings of the designated authority with respect to such issues

may not be open to question by the Central Government. In the opinion of this court, when it is not open to the Central Government to question the final findings recorded by the designated authority – on account of a negative recommendation to it by the statutorily designated expert body, not to exercise the sovereign power of imposing tax, the body of individuals and entities who are likely to be affected (and were issued notice of a possible adverse report, such as foreign exporters and domestic importers of such products from foreign origin) the standard of review, under Article 226 has to be of a different order.

36. Section 9A(5) of the Customs Tariff Act is modeled after Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. India, having acceded to the World Trade Organization with effect from 1995 was required to align its laws relating to countervailing duty and anti-dumping duty with the results of the Uruguay Round of Multilateral Trade Negotiations. Therefore, on 31.12.1994, an Ordinance to amend the Customs Tariff Act, 1975 was promulgated by the President, which, *inter alia*, introduced Section 9A into the Customs Tariff Act.

37. To understand the rationale behind the 5-year period provided under Section 9A (5), reference must be made to Article 11.3 of the Anti-Dumping Agreement. Article 11.3 has been drafted in response to the practice of some countries who were levying anti-dumping duties indefinitely. According to Article 11.3, anti-dumping duties shall terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or

recurrence of dumping and injury. The temporal limitation of 5 years indicates the importance of reviewing the need for the continued imposition of anti-dumping duty.

38. In the present case, 01.04.2014 to 31.03.2015 was chosen as the period of investigation- initiated on 20.10.2015. By Rule 17 necessarily the DA had to furnish its report. On 27.09.2016, DA issued the Impugned Final Findings wherein it recommended against the imposition of anti-dumping duty. The proviso enables the Central Government, in the exercise of its discretion to extend that period by a maximum of six months. In the event that the DA had decided to impose anti-dumping duty, the Central Government, according to Rule 18(1) would be obligated to impose anti-dumping duty within three months of the Designated Authority's final finding. In case of an adverse finding, even the provisional duty (if imposed earlier) has to be revoked within forty-five days of publication of the final findings.

39. In the facts of the case, if the petitioners' contentions were to be accepted, the "window period" for the DA to have reconsidered the matter after judgment, under Article 226 would have been between 27.9.2016 and 20 April 2017. Even if, *arguendo* anti-dumping duty were justified, the matter would necessarily have to be remanded back before the DA for reconsideration. Anti-dumping duty will only be imposed once both the DA and the Central Government agree that it is warranted. However, as the period of investigation is from 01.04.2014 to 31.03.2015, all determinations will only concern this 12-month period.

40. On the merits of the decision, the court notices that the DA in this case, considered all the facts relevant for it to decide whether there was incidence of dumping of the subject goods. The DA noted that the domestic industry is offering product of different varieties and types with different price ranges. Similarly, the Chinese batteries are also being sold in the market at different price ranges. Therefore, the prices of the domestic industry were found to be comparable with the retail prices of Chinese batteries. Furthermore, the DA noted, on the aspect of injury that:

- “i. There is dumping of the product concerned from China PR and Vietnam.*
- ii. Both dumping margin and injury margin are positive with positive undercutting.*
- iii. Despite dumping, huge amount of profit is made by the domestic industry with significantly high ROCE position.*
- iv. Net sales realisation of the domestic industry is more than the landed price and also the non-injurious price of the domestic industry. Therefore no price impact on the domestic industry.*
- v. Although huge volume of subject goods have entered Indian market during the POI, there is marginal decline in sales of the domestic industry and they do not appear to have had any injurious effect on the domestic industry in terms of price parameters since their net sales realization is much more than the landed value and profit position is phenomenal.*
- vi. Therefore, the dumped imports from China PR and Vietnam cannot be dubbed as causing material injury to the domestic industry. Since the domestic industry is able to sale at prices higher than the landed prices and still then make huge profits, the huge volume of imports may not cause much injury to the domestic industry.*

vii. *Therefore, the Authority concludes that the domestic industry did not suffer material injury during the POI.”*

41. This court also notices that significantly, the DA extracted portions of its previous determinations in the sunset review, concerning the immediately preceding period (prior to POI) and noted that domestic demand had not decreased; the share of domestic production had not significantly matched, - during the POI in the present case, though the capacity existed. Despite these factors, the domestic manufacturers recorded significant and substantial products, which led it to hold that despite existence of dumping, there was no injurious effect. The petitioners’ submission was to counter the inference, but nothing on record was brought to show that such conclusions were unreasonable or perverse.

42. The court cannot don the mantle of an economic analyst to decide whether the DA adopted the correct approach; as long as the final findings addressed all the legal requirements, and considered the factors outlined in the rules (as the DA did in this case) without a showing of procedural irregularity or illegality, the court cannot interfere under Article 226 of the Constitution.

43. India’s entry into the GATT system constitutes a multilateral bargain between sovereign nations, where by it and the others have guaranteed that each of them would not resort to protective tariff, unless agreed common principles are followed, whereby free trade impedes and stifles domestic industry by injurious trade practices such as undercutting and dumping by exporters. These principles of determining what constitutes dumping are

embodied in GATT provisions, which in turn have been assimilated into the domestic law in the form of the Act and Rules. Any action of the court which tends to transgress the timelines for determination and imposition of duty is fraught; the infraction that may ensue – by way of a belated determination and imposition of duty for a past period, might have consequences far beyond the contemplation of the facts of a given case.

44. In view of the above findings, this court is of the opinion that there is no merit in this petition, which is accordingly dismissed. No costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MARCH 27, 2019

न्यायमेव जयते