
(2016) 10 DEL CK 0001

In the Delhi High Court

Case No : Writ Petition (C) No. 9462 of 2016, C.M. Appl. Nos. 37861-37863 of 2016

Anhui Baoheng Advanced Material Techno. Co. Ltd.

APPELLANT

Vs

Designated Authority

RESPONDENT

Date of Decision : 07-10-2016

Acts Referred:

Citation : (2017) 346 ELT 249

Hon'ble Judges : S. Ravindra Bhat and Deepa Sharma, JJ.

Bench : Division Bench

Advocate : S/Shri Akhil Sibbal, Sr. Advocate with Aditya Mukherjee and Vikram Shah, Advocates, for the Petitioner; S/Shri Sandeep Sethi, Sr. Advocate with Ms. Reena Khair, Shri Rajesh Sharma, Ms. Rita Jha and Rajdipa Behura with Ms. Garima Singh Yadav and Ms. Philom

Final Decision : Dismissed

Judgement

1. The petitioner challenges the notification dated 12-4-2016 [hereafter "the notification"] issued by the respondents for initiation of Countervailing Duty/Anti-Subsidy Investigation concerning the import of Hot Rolled and Cold Rolled Stainless Steel Flat Products originating from the Republic of China. The petitioner's brief submission and challenge is to the notification and initiation notification subsequently issued on 30-9-2016, inviting hearings which are to take place - which has subsequently fructified into a scheduled hearing, are that the initiation of investigation itself is legally flawed and opposed to Rule 5 of the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 [hereafter "the 1995 Rules"]. In this regard, it is pointedly urged that the Designated Authority which initiates investigation and did so in the present case through the impugned notification, is required first to determine the relevant factors, having regard to the opposition or support, as the case may be, and subject to the conditions outlined in the proviso to sub-rule (3). It is contended importantly that firstly the investigation has proceeded on a composite basis in respect of

two distinguished and separate articles, i.e. Hot Rolled and Cold Rolled Stainless Steel Flat Products. Here, it is urged that not only the production processes but also the economics for the manufacturer of these articles are different as are the manufacturers themselves. It is stated that the result of an initiation is likely to lead to a distorted picture as the statistics and figures available could result in prejudice to the manufacturers of other or both articles. It is secondly urged that the question of subsidy, manufacturing and economic matrices has already been subject to intense scrutiny in anti-dumping proceedings which culminated in the imposition of duty which in turn depended upon the margin of injury and fixed incomes of each exporter from different countries. After subjecting the concerned practise to such an intensive review and scrutiny, the effort of the domestic manufacturers to get the enquiry into the countervailing measures/anti-subsidy investigation underway is nothing but an attempt to overreach the concluded process in the anti-dumping regime which has resulted in imposition of high rates of anti-dumping duty. It is highlighted that the final findings in the anti-dumping proceedings had specifically taken into account that China is a non-market economy and that this resulted in the imposition of an extremely high rate of determination of high injury margin which in turn led to the imposition of over 57% anti-dumping duty.

2. Rules 6 and 7 of the 1995 rules read as follows :

"6. Initiation of investigation. -

(1) Except as provided in sub-rule (4) the designated authority shall initiate an investigation to determine the existence, degree and effect of alleged subsidy only upon receipt of a written application by or on behalf of the domestic industry.

(2) An application under sub-rule (1) shall be in the form as may be specified by the designated authority in this behalf and the application shall be supported by evidence of -

(a) subsidy and, if possible, its amount,

(b) injury where applicable, and

(c) where applicable, a casual link between such subsidized imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless -

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like article, that the application has been made by or on behalf of the domestic industry :

Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like product by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -

(i) subsidy,

(ii) injury, where applicable; and

(iii) where applicable, a casual link between such subsidized imports and the alleged injury, to justify the initiation of an investigation.

Explanation.—For the purpose of this rule, the application shall be considered to have been made "by or on behalf of domestic industry" if it is supported by those domestic producers whose collective output constitutes more than fifty per cent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition as the case may be, to the application.

(4) Notwithstanding anything contained in sub-rule (1), the designated authority may initiate an investigation suo motu, if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or any other source that sufficient evidence exists as to the existence of the circumstances referred to in sub-clause (b) of sub-rule (3).

(5) The designated authority shall notify the government of the exporting country before proceeding to initiate an investigation.

7. Principles governing investigations. -

(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged subsidization of any article, issue a public notice notifying its decision. Public notice regarding initiation of investigation shall, inter alia, contain adequate information on the following :

(i) the name of the exporting countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practise or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested countries and interested parties should be directed; and

(vi) the time-limits allowed to interested countries and interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been subsidized, the government of the exporting country concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 6 to -

(i) the known exporters or the concerned trade association where the number of exporters is large, and

(ii) the government of the exporting country :

Provided that the designated authority shall also make available a copy of the application, upon request in writing, to any other interested party.

(4) The designated authority may issue a notice calling for any information in such form as may be specified by it from the exporters, foreign producers and governments of interested countries and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation. - For the purpose of this sub-rule the public notice and other documents shall be deemed to have been received one week from the date on which these documents were sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organisations in cases where the article is commonly sold at retail level, to furnish information which is relevant to the investigation regarding subsidization and where applicable injury and casualty.

(6) The designated authority may allow an interested country or an interested party or its representative to present information relevant to the investigation orally also, but such oral information shall be taken into consideration only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented by one party to other interested parties participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances."

3. Rules 6 and 7 outline the necessary elements which the Designated Authority has to keep in mind. Rule 6(3) pointedly states that it is to be determined "on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like article.....". This allusion to "domestic producers of the like article" necessarily means that at the stage of deciding to launch an investigation, it is the support or the opposition to the investigation on the part of the domestic producers which is relevant. The foreign

exporter whose articles are subject matter of scrutiny and investigation are not involved at this stage. The other requirement is that the Designated Authority should examine the accuracy and adequacy of evidence provided in the application by the domestic producer - subsidy, injury (wherever applicable), the casual link between the subsidized imports and resultant injury.

4. The launch of investigation, therefore, is confined to the materials provided by the domestic producers. It is at this stage after the publication in the public domain with respect to the pendency of the petition that the petitioner/foreign exporter to China has approached this Court complaining that the Designated Authority did not take into account certain factors. To decide whether it did or did not, the best evidence or rather the best material the Court has to examine is the determination contained in the notification dated 12-4-2016 impugned in these proceedings. That notification is a detailed one and discusses what, in the opinion of the Court, are the relevant factors. The petitioner's concern that the Designated Authority appears to have proceeded in a composite manner might be legitimate. However, that is not sufficient for this Court to stall the proceedings. The petitioner has every right to contest the initiation with respect to both the articles, i.e. Hot Rolled and Cold Rolled Stainless Steel Flat Products. Furthermore, as to whether while determining the appropriate margin of injury and fixing the anti-dumping duty, the exporters in China were deemed to be from a non-market economy and that has a relevant bearing on the investigation in the identification/subsidy rules or not is a matter that should not be prejudged by this Court but rather determined by the Designated Authority on a fuller enquiry. Whilst there is possibility of overlapping between the two, at the same time, there cannot be presumption of an overlapping that the petitioner seems to urge here.

5. To a pointed enquiry, learned senior counsel could not show any provision in the rules which compels the Designated Authority to give a preliminary ruling as to the validity of the objections raised. In the circumstances, it would not be appropriate for this Court to intervene and interdict with the impugned notifications. It is open to the petitioner to urge all the contentions raised in these proceeding which the Designated Authority shall take into consideration and make a speaking order on each of the questions urged.

6. The writ petition is dismissed but in the above terms.