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**(2013) 12 CESTAT CK 0001**

**In the Customs, Excise And Service Tax Appellate Tribunal**

**Case No :** Anti Dumping Appeal No. 590 Of 2006

M/s. Hindustan Lever Ltd.

APPELLANT

Vs

Designated Authority And others

RESPONDENT

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**Date of Decision :** 03-12-2013

**Acts Referred:**

Customs Tariff Act, 1975 — Section 9B, 9A(5), 9A(l)(c)  
Customs Tariff (Identification, Assessment And Collection Of Anti Dumping Only On Dumped Articles And For Determination Of Injury) Rules, 1995 — Rule 2(b), 5, 5(4), 6(3), 6(4), 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 14, 20, 23

**Citation :** (2013) 12 CESTAT CK 0001

**Hon'ble Judges :** G.Raghuram, J;D.N. Panda, J;Sahab Singh, Technical Member

**Bench :** Full Bench

**Advocate :** Suhail Nathani, Vikram Naik, Govind Dixit, Ameet Singh, Reena Khair, Rajesh Sharma

**Final Decision :** Dismissed

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**Judgement**

1. This appeal by Hindustan Lever Ltd is against out come of mid-term review resulting in continuation of levy of anti- dumping duty on the import of caustic soda (hereinafter referred to as "subject goods") originating in or exported from EU (excluding France) Indonesia and Chinese Taipei (hereinafter referred to as "subject countries") in terms of Customs Notification No. 72/06-Cus dated 10.07.2006 as per the table appended thereto, based upon recommendation of the Designated Authority (hereinafter referred to as "The DA") notified vide Notification No.15/05/2005- DGAD dated 2nd June, 2006. The duty so levied was country specific and on the basis specified in the said table.

2. Notices were returned back un-served on Respondent at sl. No. 9, 22, 23, 26, 31, 49 and 50 with postal remarks thereon. Appellant and Ministry of Finance, the Designated Authority and Domestic Industry only participated as respondents in this appeal hearing.

3. At the out set, in view orders dated 31.05.2007, 22.11.2007, 24.4.2008

passed by the Tribunal recording that civil appeal No. CA-2242 of 2006 being pending before Apex Court on the issue whether chlorine and caustic soda are to be treated as co-products or chlorine is to be treated as by-product against order of Tribunal passed against Notification No 168/2003-Cus dated 14.11.2003 levying definitive antidumping duty on the subject goods and Tribunal having decided to wait for apex court decision on the above civil appeal, enquiry was made from both sides as to whether this bench shall proceed to hear the present appeal or wait till decision of apex court. Ld. Advocate appearing for the appellant categorically submitted that he shall not press any ground on the above issue pending before apex court and withdrew the ground stated in para (U), (V), (W), (X), (Y) of the appeal memo confining his argument against mid-term review Notification No. 72/2006-Cus dated 10.07.2006 submitting that this appeal is independent of the levy of definitive anti dumping duty made by customs Notification no. 168/2003 dated 14.11.2003 and there is no bar for the Tribunal to dispose the present appeal. Representative for Dept of Revenue, Ministry of Finance, learned advocate appearing for Designated Authority (D.A.) as well as domestic industry did not object to the above proposition. Accordingly hearing proceeded to dispose the present appeal confirming our decision to the challenges made against mid term review notifications in this appeal.

4. It was noticed in the course of hearing that after the mid-term review, sunset review has also been made and final finding thereon has been notified by Notification No.15.11.2008 - DGAD dated 26th March, 2009 recommending levy of Anti-Dumping duty on the subject goods originating in or exported from the subject countries.

5. Original levy (definite antidumping duty) was made against application dated 21.8.2002 filed by M/s. Alkali Manufacturers Association of India (AMA) representing domestic industry complaining dumping of subject goods originating in or exported from the subject countries. Notice dated 8th October 2002 was issued for initiation of anti-dumping investigation for the period covering 01.01.2002 to 30.09.2002 and on the basis of preliminary finding made by D.A. in terms of notification dated 5th January, 2003, provisional anti-dumping duty was levied by customs Notification dated 27.03.2003. Upon detailed investigation, final finding was notified by the D.A. on 01.10.2003 resulting in imposition of definitive anti-dumping duty by Customs Notification dated 14.11.2003.

6.1 During currency of the levy of definitive antidumping duty, an application dated 31.05.2005 was made by appellant M/s Hindustan Lever Ltd, requesting the D.A. to review and withdraw the levy on the ground that condition of dumping and injury has changed.

6.2. On the basis of above request for mid term review, the Designated Authority issued a public notice dated 03.06.2005 initiating anti-dumping mid-term review for the period from 1st January, 2004 to 31st December, 2004 (12 Months) to determine dumping margin and make injury analysis for the period from April

2001 - March 2002, April 2002 - March 2003 and April 2003- March 2004 on the subject goods originating in or exported from the subject countries to opine whether continuation of the definitive antidumping duty notified vide Customs Notification dated 14.11.2003 would be necessary to off-set dumping and whether the injury would likely to continue or recur if the duty is removed or varied. It may be stated that this midterm review was fourth investigation against subject goods as tabulated by the DA in Para 65 of the final finding.

#### ARGUMENTS ON BEHALF OF APPELLANT

7.1. Being aggrieved by customs notification No. 72/06- Cus dated 10.7.2006 notifying continuation of the levy recommended by the DA by notification dated 02.06.2006, the appellant came in appeal before Tribunal. Claiming to be an industrial user of the subject goods the appellant has challenged the levy of Anti-Dumping duty on the subject goods on the ground of erroneous composition of producers of Domestic Industry in mid term review and due to change of composition of producers of Domestic Industry, injury analysis was made faulty; dumping margin as well as injury margin calculated was erroneous and in absence of injury and likelihood of injury, as well as causal link, further continuance of the levy was uncalled for. So also it was challenged that claiming excess confidentiality, the designated Authority did not provide relevant information to the appellant.

7.2. Submission of the appellant was that the composition of producers who formed domestic industry at the original investigation for imposition of definitive anti-dumping duty underwent change in mid-term review investigation. While 9 Members of Domestic Industry joined in the original investigation, 10 members joined in the mid term review, investigation. 6 parties among them were common in both the investigations. While 3 parties of the original investigation were not in mid term review, 4 new parties joined in such review. Such composition of the producers of Domestic Industry was contrary to the provisions of Rule 2 (b) of the customs Tariff (Identification, Assessment and collection of Anti Dumping only on dumped articles and for determination of Injury) Rules, 1995 (herein after referred to as "the 1995 Rules") and that has ultimately disturbed the injury analysis giving rise to an erroneous conclusion in the final finding. The said Rule at the relevant point of time in so far as that is relevant for this appeal reads as under-

" domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion or the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are importers thereof in which case such themselves producers may be deemed not to form part of domestic industry."

[Emphasis supplied]

7.3. According to the appellant the concept of Domestic Industry should cover the producers as a whole as has been held by Apex Court in the case of Reliance Industries Ltd. vs. Designated Authority - 2006 (202) ELT 23 (S.C.). The DA committed an error entertaining new producers to constitute domestic industry in mid term review. That has made injury analysis faulty.

7.4. It was further submitted on behalf of appellant that when the mid term Review was initiated on 31.05.2005 the Designated Authority should have given due regard to the trade notice No.2/2000 dated 28.08.2000, No.1/2009 dated 25.03.2009, No.1/2004 dated 15.03.2004 for proper compliance by the domestic industry as well as interested parties in respect of the matters specified in the said trade notices. Since the Designated Authority determines a lis between parties supporting levy of anti-dumping duty and those opposing, the said authority should act in accordance with law as has been held by Apex Court in judgement of ATMA - 2011 (9263) ELT 481 (S.C.). To submit so, para 52 and para 53 of the judgement was placed stressing that Designated Authority performs quasi-judicial function under Customs Tariff Act 1975. Natural justice is to be followed as has been held in para 55 to 59 of the judgement. The Authority should not have changed composition of domestic industry but should have taken the industry as a whole.

7.5. Inviting attention to page 25 of the paper-book it was submitted that changed circumstances resulting no injury to the domestic industry warranted mid term review. So also when the domestic supply was insufficient compared to the demand of the subject goods, continuance of levy of anti-dumping duty was unwarranted. It was further submitted that the appellant justified in the written submission that the composition of domestic industry having been disturbed in the mid-term review, that does not give the real picture of the demand and supply for which the finding should not have been returned recommending continuation of the levy. It is pertinent to mention that the appellant failed to justify its stand when demand and supply figures of subject goods were open for perusal from the public file as per information provided by domestic industry.

7.6 It was also submitted that duty should not vary in mid term review for no export from Taiwan. Original duty levied should have been continued without variation when there was no current dumping and no likelihood injury in absence of export from Taiwan. Argument of the appellant that for no export from Taiwan, change in duty structure was unwarranted was negated by DA on the ground that Formosa Plastics Corpn. (FPC) from china Taipei responded to the exporter's questionnaire providing details of third country exports verifiable from Chlor Alkali Market report 2004 which provided basis for calculation of the volume effect of the imports warranting the levy to continue to set off injury to domestic industry.

7.7. It was further argued that Designated Authority followed inconsistent practice in determining export price. Similarly, normal value determined was erroneous. Although it was argued that normal value and export prices were

constructed for no reason, nothing was pointed out how, the calculation of export price and normal value involved in the present appeal was erroneous when Designabad Authority has wide choice of constructing export price and the normal value depending on the facts and circumstances of each case.

7.8. It was further argued that when exports were made from Taiwan during the period of investigation (POI), strangely mid term review records no exports. It was submitted that the export from Taiwan from 2005-06 till September, 2012 were available from the record maintained by DGCIS; there was a downward trend in the year 2008-09, 2009-10, 2010-2011 till September, 2012; compared to the figures of 2005-06 and 2006-07; although there was small amount of export from Taiwan the said country should have been included in the review proceedings. But that was excluded by the Designated Authority in the mid term review for no reason. That made injury analysis faulty. It is strange how such argument was advanced when there was no export from Taiwan soon after levy of definitive anti dumping duty and record of DGCIS established no export during POI.

7.9. It was further submitted on behalf of appellant that when there was no export from Taiwan there was no dumping margin. That need not be determined and in absence of such determination there is no question of imposition of Anti-dumping duty in mid term review. There was also no situation for calculating dumping margin and injury margin in absence of export from Taiwan. Accordingly calculation of dumping margin and injury margin is unsustainable following the decision in the case of B.P. Foam, reported in 2011 (270) ELT 715 (Tri.-Del.)

7.10. It was further submitted that export price of Taiwan should not have been determined and third country export price can not be taken as basis. DA has followed inconsistent practice in this regard which is established from a sunset review notified on 22.7.2009 revealing inconsistent practice (Para 69, 70 & 71). Similarly another sunset review notification dated 17.1.2012 also shows such practice of Designated Authority (Para 29 & 30 page 143). So also notification dated 10.4.2012 reveals similar position (refer page 169, Para 9 and page 194). Citing Para 11 of the decision in Saudi Basic Industries vs. Designated Authority - 2006 (200) ELT 488 (Tri.-Del.) it was submitted that there cannot be inconsistent practice. It may be stated that there is no quarrel to the proposition of law decided by Tribunal. But in respect of all the reviews stated above, parties thereto not being before us for Judicial review, it is not desirable to express any opinion thereon prematurely. Accordingly plea of inconsistent practice followed by DA is liable to be rejected without making parties not before us to become fate accompli.

7.11. Learned Counsel citing Para 14 of the decision of the Tribunal in B.P. Foam (supra) submitted that there should have been a finding that import from Taiwan shall not result in dumping and injury when exporters of Taiwan were dropped in review finding by DA. Only by a finding in this manner the Authority may not recommend duty in respect of the export from Taiwan. We notice that such

submission has no legs to stand since export from 2005-06 were not material when POI comprised the period 1.1.2004 to 31.12.2004.

7.12. It was also argued by appellant that Designated Authority claiming excess confidentiality did not provide relevant information to the appellant. Figures relating to quantum of production by domestic industry were not provided. There was no likelihood injury and recurrence thereof to recommend continuation of the levy. Even claim of excess confidentiality was for no good reason.

7.13. According to appellant section 9B of the Customs Tariff Act, 1975 (herein after referred to as "the Act") requires the DA to establish that there was threat of material injury to establish industry in India or there was material retardation of the establishment of any industry in India before imposing Anti dumping duty. But that was not done by D.A. The Injury analysis, therefore suffered from flaws. There was gross irregularity committed by Designated Authority in not providing relevant information to the appellant to argue that continuation of Anti-dumping duty was uncalled for.

7.14. Relying on Para 17 of the judgement of the Apex Court in the case of Designated Authority vs. HALDOR Topse 2000(120) ELT 11(SC) it was submitted by the appellant that Designated Authority is not restricted to the information placed before it by interested parties but has discretion to look into any other information that it requires. It was bound to disclose relevant information to satisfy that the dumping margin was rightly determined taking the normal value and export price of subject goods correctly. When there was no likelihood of injury or recurrence thereof, the Authority should have withdrawn the levy.

7.15. It was lastly argued that for the aforesaid reasons, there was no causal link between dumping and injury claimed by domestic industry and calculation of dumping margin as well injury was erroneous.

#### ARGUMENT OF DOMESTIC INDUSTRY

8.1 On behalf of domestic industry it was argued that the mid term review is not the original investigation for levy of anti dumping duty but only a process followed after definitive antidumping duty is imposed to ascertain whether Cessation of levy of Anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury. Therefore, the argument of composition of producers to ascertain status of domestic industry does not merit consideration looking to object of first proviso to section 9A (5) of the Act. Law does not warrant re-examination of composition of the producers of domestic industry in review exercise since injury determination is object of original investigation while likelihood determination thereof is on exercise done in mid term review. All that required in mid term review is to reach to a conclusion as to whether dumping and injury shall continue or recur if there is cassation of the levy. Review relates to prospective dumping. The DA had rightly opined taking into account interest of the domestic industry as a whole considering major proportion of the total domestic production which is one of the criteria prescribed by Rule 2(b) of 1995

Rules defining the term "domestic industry". Statistics of number of productions is irrelevant when quantum of output taken into consideration constitute major proportion of the total domestic production of subject goods as an alternate criteria prescribed by law. When all producers of domestic industry do not join the investigation, the producers of major proportion of production have right to complain for initiation of investigation under section 9A of the Act and they constitute domestic industry under Rule 2 (b) of the 1995 Rules.

8.2 Citing report of the panel in respect of Argentina - definitive anti dumping duties on poultry from Brazil WT/DS241/R it was submitted that the word "major" appearing in Rule 2(b) is significant. The rule does not define domestic industry in terms of "producers of the major proportion of the total production" but it "refers to producers of a major proportion of total domestic production". The requirement of law is satisfied for action under law when the domestic producers accounting for major proportion of domestic production. In the present case that was more than 50%.

8.3 Further relying on the panel report in the case of China Anti-dumping and countervailing duty measures on broiler products from the United States - WT/DS 427/R it was submitted that it is not necessary that the DA should necessarily seek information from all domestic producers to constitute all such producers as domestic industry in a review proceeding. Placing para 7.145 to 7.147 of the said panel report it was further submitted that the DA normally attempts to define the domestic producers as a whole and only if that proves impossible, may then move to define the domestic industry as those producers producing a major proportion of the total domestic production. Although Rule 2 (b) of 1995 Rules do list one criteria before the other, that has not expressly indicated a hierarchy or sequencing, between the two definitions. Indeed the test provided by the provision has used the term "or" rather than the terms that would indicate a hierarchy, such as first "or" if not, then. The use of the term "or" indicates the flexibility. This grants liberty to DA with respect to definition of the domestic industry. The authority has a choice in the manner indicated above. Inherent flexibility in the rule means that the DA is not required to first admit to identify every domestic producer before it can define the domestic industry as those producers whose output constitutes a major proportion of total domestic production. The domestic industries vary widely from investigation to investigation and what would be easier in one situation may not be in another. Therefore the DA in the present case applying the output criteria has not committed any error to define domestic industry. Considering total domestic production the concept of domestic industry was adopted by the DA in the present mid term review taking those producers producing major proportion of the total domestic production of the subject goods. It is a proved case that the producers producing a major proportion of total domestic production constituted domestic industry. That remained un-rebutted by appellant.

8.4 Placing reliance on Mexico anti-dumping investigation of high fructose corn

syrup (HFCS) from United States panel reports - WT/DS 132/R it was submitted by domestic industry that domestic industry is not only confined to all producers for definition thereof but the producers of the domestic industry contributing to the major proportion of the production equally qualify to constitute domestic industry. Therefore the likelihood injury analysis has dealt the suffering of domestic industry. That is not faulty. The authority has not made merely a Performa exercise following empty formality. But made substantial enquiry in to the dumping margin and made injury analysis with full proof of facts and figures making adequate disclosure thereof in the course of investigation to both sides. There was nothing hidden when fact and figures were available in public domain.

8.5 It was submitted that when the term "major proportion" appears in Rule 2(b) of 1995 Rules, that refers to the substantial quantum of output of domestic industry which is one of the criteria to recognise locus standi of "domestic industry". This does not mean that all producers should only constitute domestic industry for initiation of investigation. To obviate difficulties and absurdities, Rule 2(b) of 1995 Rules has therefore provided two alternate criteria for determination of status of domestic industry. In the judgement of Reliance Industries case (supra), apex court found that said Industry was getting power at reduced cost from its captive power plant lower than the price of electricity. It is in this context held by Apex Court that cost should be determined having regard to the market price and not lower cost of generation of power from the captive power plant. Normal cost of power was required to be considered. Therefore, in that context Hon'ble Court held that data relating to industry as a whole to be considered. The appellant without understanding the context of the case misplaces reliance on the said judgment. An alternate criterion of Rule 2(b) being mandate of law, plea of erroneous composition of domestic industry by the appellant is devoid of merit.

8.6 It was also argued by domestic industry that following the principle laid down in the case of Lubrizol India (Pvt.) Ltd. vs. D.A. - 2005 (187) ELT 402 (Tri. Delhi) by the Tribunal, so far as criteria of "major proportion" in the context of Rule 2(b) defining domestic industry is concerned that would mean the share which means significant or important share. Such an interpretation when permissible in law, the share of the producers in the total domestic production being more than 50% in the present appeal, that was undoubtedly significant and important to constitute domestic industry. The expression "major proportion of total domestic production" cannot be viewed from the angle of solving a mathematical sum involving comparative measurements of size of different parts of a whole. The phrase is used in the context of the production of domestic producers and calls for broad interpretation so as to take in its sweep collective outputs that constitute a significant or important share of the total domestic production of the subject goods by the producers engaged in the manufacture or engaged in an activity connected with the manufacture of such article, as contemplated by Rule 2 (b).

8.7 According to learned Advocate for domestic industry, the Normal Value and Export price of subject goods exported from subject countries were determined in terms of Para 26 to 40 of the final finding correctly. Dumping margin which is the difference between these two was rightly worked out in para 41 of final finding. The dumping margins so worked out were 68.93% of export price in respect of Chinese Taipei, 165% in respect of Indonesia and 56.53% in respect of EU (except France). There was positive dumping margin and that had an adverse impact on domestic industry. Similarly third country export from Chinese Taipei was determining factor in absence of actual import from Taiwan during POI. DA has not committed any error in arriving at the dumping margin.

8.8 It was further submitted that arguments and submissions made by the interested parties were properly examined by learned D.A. and having regard to the information/evidence gathered by him and made available to him about the present and potential capacity, production, sales, imports, exports, domestic demand, the price levels in respect of domestic sales, exports to third countries, he made injury analysis correctly in accordance with municipal law as well as Anti Dumping Agreement of member countries. In order to determine whether the continued imposition of the duty is necessary to offset dumping, the Authority considered respective parameters prescribed by injury analysis Rules under the anti dumping law in India. So also, other factors were considered by him.

8.9 Dumping margin in mid term review was determined by DA taking exports to India during the investigation period. Where there were no exports to India during the investigation period, the Authority rightly determined dumping margin in respect of exports to third countries and likelihood of dumping was considered taking the normal value and export price. Surplus unutilized capacities of exporting producers, present and potential capacity, known expansions undertaken by them, prices prevailing in India, past, actual and potential volume of exports gained importance by the DA to make injury analysis.

8.10 The Authority did not act in vacuum. He noted that dumping margins in respect of exports to third countries were significant. It is quite obvious that exports were likely to be made at dumped prices when those were below the benchmark. That was weighed in the mind of the D.A. He was conscious about ex-factory realization of export price to third countries. Considering such prices as basis, the resultant landed price of imports was considered to be significantly below the selling prices in India. That was also below the non injurious price (NIP). One of the Taiwanese exporters had committed as high as 1.5 lac MT supplies against single tender which was indicative of its surplus capacity and export potential. Export price from Taiwan to third countries were not only significantly below the normal value but also the prevailing prices in India and non injurious price.

8.11 It was also submitted by the Id. Advocate for the Domestic Industry that following the ratio laid down by the Tribunal in the case of Virchow Laboratories

Ltd. vs. Ministry of Finance - 2002 (214) ELT 60 (Trib. Delhi) the importer has no right to contend that normal value was not properly determined by DA.

8.12 It was further submitted that the appellant importers and exporters failed to demonstrate that withdrawal of anti dumping duty would not lead to likelihood of injury to the domestic industry and continued imposition of the duty was unnecessary to offset dumping. Producers in Taiwan were found to have shipped goods in the past against orders placed by third country. Considering the level of capacity utilization achieved by the producers in the exporting countries in the past over the injury period and the capacity utilization achieved during the investigation period, the Authority determined unutilized capacities in Taiwan, Indonesia and EU (except France). It was noted that the unutilized capacities with the Indonesia producers were to the extent of 87000 MT, while the same was to the extent of 236000 MT in case of European producers. In other words, producers in these countries had capacity to readily offer their subject goods to such extent. As per information provided by Chlor Alkali Magazine market Report, the installed and supplies capacity of exporting countries were as under:-

Taiwan surplus capacity

54,000

Taiwan Expansion planned

466,666

Total likely surplus of Taiwan

520,666

Indonesia surplus capacity

327,000

Europe surplus capacity

1,886,000

Total Surplus

2,733,666

Indian Demand:

excluding captive consumption

18,74,596

including captive consumption

21,22,251

8.13 As per CMAI reports, the demand-supply situation of the subject goods during POI in the world was as follows: -

Demand

5,00,31,000

Capacity

5,75,74,000

Surplus

7,543,000

8.14 It was further submitted by domestic industry that exporters did not place any evidence on record to show that dumping and injury would not recur in the event of withdrawal of the anti dumping duty. Therefore considering the capacity, production, sales and demand it was found by D.A. that withdrawal of anti dumping duty would likely result in continuance or recurrence of injury to the domestic industry. There was causal link between dumping and injury and that proved from the detailed examination by the DA which does not warrant interference. The DA therefore rightly concluded that evidence on record established that injury would recur in the event trade remedy measure is withdrawn.

8.15 There was also strong opposition of domestic industry on the ground that withdrawal of antidumping duty from subject goods shall defeat the purpose behind mid-term review contemplated by Article 11.3 of Anti-Dumping Agreement and first proviso to section 9A(5) of the Act and claim of appellant that if industry experienced improvement, there should not be continuance of the levy was baseless since purpose of the midterm review is to examine whether dumping and injury is likely to continue or recur if the duty is removed or withdrawn. Therefore, dumping having resulted in injury to the domestic industry, the appeal should fail.

8.16 Domestic industry placed reliance on the decision of Hon'ble High Court of Delhi in the case of Kalyani Steels Ltd. vs. Revenue Secretary, M.F.-2008 (224) ELT 47 (Del.) to submit that power conferred on the D.A. in terms of first proviso to section 9A(5) of the Act to make Sunset Review does not take away his power to make midterm review. His arena of powers extends to review of both kinds to be conducted in the same manner. D.A. does not make original investigation in a review proceeding for the distinguished object of each other. It was further submitted that even in the panel reports it is the view abroad that possibility or recurrence of dumping is essential consideration in review.

8.17 It was plea of domestic industry that analysis of different parameters relating to injury prescribed by the 1995 Rules established that domestic industry was yet to achieve financial stability which was struggling to get reasonable return considering investment made in caustic soda industry. Therefore, continuation of the levy was warranted. World wide production capacity of subject goods in 2004 was assessed as 65.41 million MT whereas the world

demand thereof was only 52.89 million Mt. There existed surplus production of 12.52 million MT which was nearly 70% of production capacity. Due to low demand of the goods in producing countries, they were in an advantageous position to export the subject goods abroad. D.A. noticed that one of the subject countries i.e. Taiwan stopped export of subject goods soon after levy of definitive anti dumping duty.

8.18 Likely injury can be evaluated by several considerations. Existing injury is not necessity of a review proceeding nor mandate of law when first proviso to section 9A(5) of the Act is read. Cumulation of the parameters of injury enables the DA to reach to a conclusion whether there is a likelihood of dumping and injury to recommend continuation of levy.

8.19 Relying on the appellate body's report in WT/DS 268/AB/R in the case of Tubular goods from Argentina Oil Company it was submitted by domestic industry that anti-dumping agreement distinguishes between "determination of injury" addressed in Article 3 of Anti-Dumping Agreement and "determinations of likelihood of continuance or recurrence of injury" addressed in Article 11.3 of the said agreement. In addition, Article 11.3 does not contain any cross reference to Article 3 to the effect that ,n making likelihood of injury determination, provisions of Article 3 or any particular provision of Article 3 must be followed by the DA. Nor does any provision of Article 3 indicates that wherever the term "injury" appears in anti-dumping agreement, determination of injury must be made following the provision of Article 3. The appellate body rightly held that the determination of injury and likelihood of continuation of recurrence of injury are two different circumstances in anti-dumping levy. when determination of injury is subject of investigation at the stage of levy of definitive anti-dumping duty, the likelihood of continuation or recurrence of injury is subject of review proceeding.

8.20 It was highlighted by domestic industry that where, there are import from different countries being made simultaneously subject to anti-dumping duty investigation, the Designated Authority shall cumulatively assess the effect of such import subject to de-minimis criteria. Even for a likelihood determination under a review which is prospective in nature, there cannot be any objection of cumulation of imports to determine likelihood of injury. The DA has very rightly made cumulation of various injury factors in respect of imports from EU (excluding France) Indonesia, Chinese Taipei even though there were no exports from Taiwan during POI.

8.21 Domestic industry further submitted that there was no ground in the memo of appeal of appellant to plead that there was erroneous determination of NIP and injury margin. Tribunal although granted 4 weeks time to the appellant to file application to bring out such ground, nothing was done by the appellant even after expiry of the said time. Therefore, appellant was barred to plead on any ground on the above aspect and Tribunal should not entertain such ground. To submit so, domestic industry relied on Apex Court judgement in the case of National Textile Corporation V. Naresh Kumar Badrikumar Jagad ana ors - AIR

2012 SC 264: (2011) 12 SCC 695, where it was held that additional ground is not entertainable at the belated stage.

8.22 The Designated Authority took all facts into consideration which are normally considered for injury analysis and nothing contrary to proposition of law in Annexure-II of 1995 Rules, was followed by D.A. to do so. Every aspect of information in this regard was well known to both sides before filing written submission. Reliance was placed by domestic industry on the judgement in the case of Rishiroop Polymers Pvt. Ltd. vs. D.A., reported in 2006 (196) ELT 385 (SC). Citing Para 26 of the said judgement it was submitted that in changed circumstances duty levied earlier shall continue. Further, relying on a decision in the case of Acrylic Fibre vs. D.A., reported in 2010 (253) ELT 164 it was submitted by domestic industry that review is done to determine likelihood injury. Article 11.3 of Anti-dumping agreement does not require that injury is again to be determined in accordance with Article 3 in a review which was already determined at the initial stage. In that case Tribunal concluded that D.A. is not required to follow the provision of Article 3 of Anti Dumping Agreement in a review but shall only make likelihood recommendation as to dumping and injury therein. Current dumping is necessary to examine dumping margin. But likely dumping is considered in a review which was rightly done by D.A. in the present case. Decision of the Tribunal in the case of Association of Synthetic Fibre Industry vs. UOI, reported in 2010 (256) ELT 745 (Tri.) was relied upon by domestic industry to submit that in the mid-term review not only the tenure of levy may be extended but also rate of levy may be varied with a view to eliminate the current or likely injury which was held in the Acrylic Fibre case by Tribunal reported in 2010 (253) ELT 564 (Tri.).

8.23 Last plank of argument of Domestic Industry was that there was causal link between dumping and injury when dumping was established and injury could not be ruled out by appellant. Appellant had full information about volume and price at which it had purchased material from the Indian producers but suppressed the same and resorted to price mentioned in the AMAI bulletin. It being an applicant for review, it was bound to establish its assertions. But appellant failed to do so. The Domestic industry provided entire information which was available in public domain. Appellant had all access to public file. Therefore, plea of claim of excess confidentiality by DA is untenable.

8.24 On the aforesaid premises it was prayed by the domestic industry that the appeal is liable to be dismissed when withdrawal of the levy is unwarranted.

#### ARGUMENT ON BEHALF OF DA

9.1 Repelling all the contentions of appellant, learned Advocate for DA submitted that upon filing of application by the appellant for review before DA, request was made to the Central Board of Excise and Customs (CBEC) and Director General of Commercial Intelligence and Statistics (DGCI&S), Kolkata to provide details of imports of subject goods made to India for the period of investigation (POI) to

determine dumping and margin and import figures relating to preceding three years were obtained for injury analysis.

9.2 The D.A. provided copies of the non confidential version of the application to the known producers and/or exporters and the Embassy/territory of the subject countries in accordance with Rules 6(3) of the 1995 Rules. Copy of non-confidential application was also provided to other interested parties wherever and whenever requested. Entire information was available in public record for inspection by appellant Nothing specific was pleaded by appellant before DA at any time alleging claim of excess confidentiality by it.

9.3 The D.A. also sent questionnaire seeking relevant information to the government of subject countries including known exporters/producers, in accordance with the Rule 6(4) of the 1995 Rules. One of the exporters from Chinese Taipei M/s Formosa Plastics Corporation, Taiwan (FPC) filed response in the prescribed exporters questionnaire. That was considered. No Taiwan producers participated in the investigation. It was a proved fact that Taiwan had not made export of subject goods to India during POI. Questionnaire was also sent to the known importers/user and associations of the subject goods for necessary information in accordance with Rules 6(4) of the 1995 Rules.

9.4 The D.A. during the course of investigation was satisfied as to the accuracy of the information supplied by various interested parties upon which it made its final findings. The Authority also conducted verification of data of the foreign producer, domestic producers and consumers to the extent considered relevant and necessary for investigation. Additional details regarding injury were sought from the domestic industry and considered.

9.5 Following due process of law the Designated authority made final finding in the mid term review concluding that the subject goods were entering Indian market at dumped prices and dumping margins of the subject goods imported from EU (excluding France), Indonesia and Chinese Taipei were substantial and above de-minimis.

9.6 In paragraph 41 of the final finding, dumping margin was determined as under:-

Exporter/Producer

Normal Value (US\$/MT)

Export Price (US\$/MT)

Dumping margin as % of Export Price

All producers/ exporters from Chinese Taipei

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\*\*\*\*\*

68.93

All producers/ exporters from Chinese Indonesia

\*\*\*\*\*

\*\*\*\*\*

165

All producers/ exporters from / European Union (Excluding France)

\*\*\*\*\*

\*\*\*\*\*

56.53

It was opined by DA that the subject goods were also likely to enter Indian market at dumped prices without continuation of levy of anti dumping duty. Accordingly withdrawal of the levy was considered redundant. Continued imposition of the duty to offset dumping was considered proper.

9.7 It was noticed by the D.A. that even though the domestic industry had improved its performance over the injury period, the situation of domestic industry continued to be fragile. Further, it was concluded that if the levy of anti dumping duty is withdrawn, injury to the domestic industry is likely to continue or recur. While concluding so, the DA recommended the Central Government to remove the injury to the domestic industry prescribing the levy equal to the margin of dumping or the margin of injury whichever was lower.

9.8 To determine the levy, value of import was compared with the weighted average non-injurious price (NIP) of the domestic industry determined for the period of investigation. In terms of para 48 to 98 of the finding various injury parameters were examined.

9.9 Cumulative assessment of the injury to the Domestic Industry by the export of subject goods from subject countries was made and volume effect as well as price effect on the Domestic Industry was analysed. The price under cutting due to import resulted with under cutting margin in the range of 10% to 48% during the period of investigation. Similarly, the price under selling margin was worked out to be 17% to 56% during that period. Various injury parameters as prescribed by the 1995 Rules were taken into consideration to make injury analysis.

9.10 It was further submitted by DA that it was conscious that price under selling was an important indicator of the assessment of injury in order to determine whether the exports were likely to depress the prices of domestic industry to significant degree. To reach to the conclusion, non-injurious price (NIP) was determined by D.A. considering reasonable return on investment @ 22% on capital employed by domestic industry enabling the domestic industry to

manufacture and sell subject goods so that it would not complain injury. The NIP so determined was compared with the landed value of the imports to arrive at the extent of price under selling. Upon determination of injury, the authority in para 80 onwards examined the likelihood of recurrence of injury on the domestic industry and concluded that if levy of anti-dumping duty is revoked, there shall be likelihood of recurrence of injury to the domestic industry.

9.11 Causal link between dumping and injury was examined by the Id. Designated Authority in para 91 of the final finding in order to know factors affecting the domestic industry. While arriving at the final finding Id. Authority noted that the domestic industry continued to be fragile and there was likelihood of continuation or resumption of dumping and injury on account of imports from EU (excluding France), Indonesia and Chinese Taipei if the levy is revoked. Accordingly it was considered proper to continue imposition of anti dumping duty on all imports of subject goods from EU (excluding France), Indonesia and Chinese Taipei in order to remove the injury to the domestic industry.

9.12 Composition of domestic industry was rightly done by DA in accordance with Rule 2(b) of 1995 Rules following major proportion of total domestic production criteria. There was no legal infirmity in such adoption. Similarly dumping margin was determined on the basis of actual export from EU (excluding France) and Indonesia during POI and on the basis of third country export from Chinese Taipei correctly. The construction of normal value and export price was correct when exporters did not cooperate. Figures of exports to different countries were carefully considered as basis for determination of export price and Chlor Alkali. When market Report statistics was considered, ex-factory price was rightly determined. The NIP determination was rightly done and price under cutting as well as price under selling was rightly determined. That demonstrated injury to domestic industry. There was causal link between dumping and injury. Therefore, DA's enquiry was transparent and its findings are flaw less as well as lawful which were made following principles of natural justice and following the law of the land as well as ratio laid down by Apex Court and Tribunal in various decisions on the subject. That does not call for any interference. It was accordingly prayed that appeal may be dismissed.

#### ARGUMENT OF DEPT. OF REVENUE MINISTRY OF FINANCE.

10.1 On behalf of Dept. of Revenue it was argued that levy of anti dumping duty is a trade remedy measure which is not in the nature of taxation. The levy prohibits dumping to provide level playing field in world trade protecting domestic industry. The DA is authorised under law to carry out investigation when dumping and injury is complained by domestic industry. Review is done to determine likelihood of dumping and injury. In this case, Dept. of Revenue of Ministry of Finance examining recommendation of DA in midterm review considered proper to notify continuation of the levy.

10.2 Central Government making an overall assessment of health of domestic

industry notified extension of tenure of levy rightly. The DA while making review exercise has acted in accordance with law. It was rightly opined that cessation of the levy was to result continuation and recurrence of dumping and injury. Recommendation of the DA for continuation of levy was therefore justified. That does not warrant interference.

10.3 Entire finding of DA was based on facts, evidence and accurate information as well as reliable facts and figures. Findings have been made granting fair opportunity of hearing to all interested parties including the importer appellant. All parameters of law were followed to determine likely injury and dumping for which action of DA cannot be assailed. It has not failed in its duty to enquire into quantum of dumping and potentiality of dumping and various implications thereof. So also the injury likely to ensue therefrom was examined.

10.4 When likely injury was found to be due to dumping, tenure of the levy was bound to be extended in mid term review in existence of causal link. There was proved causal link between dumping and injury. Therefore, neither constitution of domestic industry, dumping margin and determination of injury was faulty. Action of DA is beyond question and not interferable. So also customs notification does not call for interference since nothing was done contrary to law.

## FINDING AND CONCLUSION OF TRIBUNAL

### REVIEW IS PROSPECTIVE EVALUATION

11.1 Power of Review is mandate of first Proviso to sub-section (5) of Section 9 A of the Act read with Rule 23 of the 1995 Rules for continued imposition of anti dumping duty if the Central Government is of the opinion that cessation of levy of Anti-Dumping duty is likely to lead to continuation or recurrence of dumping and injury. In terms of review, tenure of levy may be extended for a further period of five years and such further period shall commence from the date of order of such extension. Review is not an exercise like original investigation. Law is well settled in *Rishirop Polymers Pvt. Ltd. V. Designated Authority and Additional Secretary - 2006 (196) ELT 385 (SC)* that entire purpose of the review enquiry is not to see whether there is a need for imposition of antidumping duty but to see whether in the absence of such continuance, dumping would increase and the domestic industry suffer. Tribunal in Para 12.1 of the decision in the case of *Saudi Basic Industries V. Designated Authority - 2006 (200) ELT 488 (Tri - Del)* dealt scope of review prescribed by Rule 23 of 1995 Rules, as under:

"12.1 In a review investigation under Rule 23, the authority is required to examine whether injury was likely to continue or recur if duty were removed. Therefore, the impact of various determinations made in the review investigation was required to be viewed in their overall context to find out whether there was no justification for the continued imposition of the duty. The factors which may be relevant for initiation of the anti-dumping duty proceedings under Rule 5, such as identification of the article under consideration and the situation where

investigation may be required to be terminated as per Rule 14, would not govern the issue of deciding whether there is no justification for continued imposition of duty because, they have a bearing on imposition of duties rather than on the impost being continued. Section 9A (5) contemplates revocation of anti-dumping duty even earlier than the period of its expiry after five years from the date of imposition. Therefore, it contemplates not only a "sunset review", but also a "mid-term review" and as per the first proviso, the period of imposition could be extended for five years, if in a review, the central government is of the opinion that the cessation of such duty was likely to lead to continuation or recurrence of dumping and injury. Therefore, dumping and injury are two important aspects which are required to be kept in mind by the designated authority while deciding whether cessation of duty is likely to lead to continuation or recurrence of dumping and injury" [Emphasis supplied].

Rule 23 dealing with review of levy and exemption of duty from time to time read as under:

Review -"23. (1) The designated authority shall, from time to time, review the need for the continued imposition of the anti-dumping duty and shall, if it is satisfied on the basis of information received by it that there is no justification for the continued imposition of such duty recommend to the Central Government for its withdrawal.

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

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

11.2 Following the ratio laid down by apex Court and also following the ratio laid down by Hon'ble High Court of Delhi in the case of Kalyani steels Ltd. V. Revenue Secretary, M.F. - 2008 (224) ELT 47 (Del), Tribunal in the case of Thai Acrylic Fibre Co. Ltd., V. Designated Authority - 2010 (253) ELT 564 (Tri-Del) in para 13 and 14 thereof held that:

"Unlike original investigations, sunset reviews are prospective in nature, as they focus on the likelihood of the continuation or recurrence of dumping and injury, in case ant/dumping duties are removed. With respect to the question whether dumping is likely to occur in the event that the anti-dumping duties are removed, the D.A. has to consider relevant economic facts which might indicate that in the event the anti-dumping duty is removed, dumping will recur. With respect to the injury determination, if the anti-dumping duty has had the desired effect, the condition of the domestic industry would be expected to have improved during the period the anti-dumping duty was in effect. Therefore, the assessment whether injury will continue, or recur, would entail a counter-factual analysis of future events, based on projected levels of dumped imports, prices, and impact on domestic producers. Thus the D.A. has to address the question as to whether the domestic industry is likely to be materially injured again, if duties are lifted.

Sunset review entails a likelihood determination in which present levels of dumping is obviously not so relevant as is the likelihood of continuance or recurrence of dumping. Moreover, during the investigation period, the anti-dumping duty would be in force and hence, the current level of dumping may be non-existent or minimal. The exporters under investigation may also sell at a non-dumped price during this period knowing fully well that a sunset review would be in progress. Hence, the criteria under Section 9A (1) that the anti-dumping duty should not exceed the dumping margin would have no practical application for continuance of the duty under Section 9A(5). There is also no such warrant in law under the said Section 9A (5) to do so." [ Emphasis supplied]

11.3 Thus review is an examination of post levy situation to ascertain whether cessation of the levy is likely to lead continuation or recurrence of dumping and injury. Such exercise is undertaken depending on the facts and circumstances of each case which is not equated with the initial investigation made while levying antidumping duty u/s 9A (1) of the Act against complaint of domestic industry or suo-moto by the DA under Rule 5(4) of the 1995 Rules.

11.4 While provisions of Rule 6, 7, 8, 9, 10, 11, 16, 17, 18, 19 & 20 of the 1995 Rules are mutatis mutandis applicable to review, Rule which deals with initial initiation of investigation for levy of definitive Anti dumping duty. Rule 6 deals with the principles governing investigation. Rule 7 deals with the confidential information. Rule 8 deals with Accuracy of the information. Rule 9 deals with investigation in the territory of other specified countries. Rules 10 deals with determination of normal value, export price, margin of dumping. Rule 11 deals with determination of injury. Rule 16 deals with disclosure of information. Rule 17 deals with final finding. Rule 18 deals with levy of duty. Rule 19 deals with imposition of duty on non-discriminatory basis. Rule 20 deals with commencement of duty.

11.5 Law relating to initiation of initial investigation and making of review are dealt by different set of provisions. Both the provisions are independent of each other and operate on their own field. Similarly both the exercises differ by their object and nature. Sub Rule (1), (2) and (3) of Rule 5 of the 1995 Rules are Regulatory measures in respect of initiation of investigation by the DA when dumping and injury is complained by domestic industry. Similarly sub rule (4) of Rule 5 deals with initiation of investigation suo-moto by the Designated Authority. But Rule 23 which is not guided by Rule 5 is guided by aforesaid set of Rules with necessary modifications. These sub-rules of Rule 5 dealing with initial investigation process at the relevant point of time read as under:-

"(1) Except as provided in sub-rule(4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping 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 maybe specified by

the designated authority and the application shall be supported by evidence of-

(a) Dumping

(b) injury, where applicable, and

(c) Where applicable, a causal link between such dumped 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 product, 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 article 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) dumping,

(ii) injury, where applicable; and

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

Explanation:- For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent of the total production of the like articles 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-moto if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clauses (b) of sub-rule (3)." [Emphasis Supplied]

11.6 Reading of aforesaid sub-Rules of Rule 5 make clear that while investigation is an outcome of complaint of dumping and injury by domestic industry in terms of, section 9A(I) of the Act, Review under Rule 23 is a post investigation evaluation of the situation to ascertain likelihood of dumping and injury. When the question of investigation at the instance of domestic industry or suo-moto comes, constitution of domestic industry becomes relevant. The term "domestic

industry" is therefore defined by Rule 2(b) of the, 1995 Rules to read as under:

"2. Definition-In these Rules, unless the context otherwise requires:-

(a) "Act" means the Customs Tariff Act, 1975 (51 of 1975),

(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers may be deemed not to form part of domestic industry.

Provided that in exceptional circumstances referred to in Sub-Rule(3) of Rule, 11 of the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if-

(i) the producers within such a market sell all or almost all of their production of the article in question in that market; and

(ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;

Explanation: - For the purposes of this clause:-

(i) Producers shall be deemed to be related to exporters or importers only if,-

(a) One of them directly or indirectly controls the other; or

(b) Both of them are directly or indirectly controlled by a third person; or

(c) Together they directly or indirectly a third person subject to the condition that are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-related producers.

(ii) a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter." [Emphasis supplied]

11.7 There was misconception by the appellant about review and investigation. Levy of definitive anti dumping duty under section 9A (1) of the Act is done carrying out investigation to determine dumping and injury to the domestic industry. But after the levy of definitive anti dumping duty, continuation or cessation thereof is examined by Review exercise. Review is post levy event, mandated by first proviso to section 9A (5) of the Act. It is immaterial whether 10 members or 9 members constituted the domestic industry when producers of major proportion of output of domestic industry participated in review exercise explaining injury to larger interest of domestic industry due to dumping. All producers of subject goods in India were members of Alkali Manufacturer's

Association of India (AMA!). A number of manufacturers of such goods producing major proportion of domestic output provided accurate and reliable information relevant to dumping, injury, costing, returns on investment, sales price etc. There was no basis of law for appellant to argue that composition of domestic industry in mid term review should have remained the same as that was in the original investigation. It is quite probable that some new producer members may have entered into domestic industry after levy of definitive antidumping duty due to protection granted and some may have gone out of industry for various economic or financial reasons. Appellant's challenge to the constitution of the domestic industry in review is therefore, devoid of merit when likelihood determination of injury to domestic industry is object of review enquiry.

## CONSTITUTION OF DOMESTIC INDUSTRY

12.1 The term "domestic industry" as defined by Rule 2(b) of the 1995 Rules has prescribed two criteria to recognise larger interest of producers of such industry. Each criterion is different from the other. When all most all or a majority of domestic produces complain dumping and injury that shows suffering of larger interest of the industry calling for investigation to impose antidumping duty. Thus producers of an industry whose collective output of the subject goods constitute a major proportion of the total domestic production of that article, they represent domestic industry to complain dumping and injury for investigation. It is in this sense of larger interest of producers of domestic industry; meaning of domestic industry is understood by law for initiation of antidumping investigation. Both the criterion are separated from each other by use of the proposition "or" as disjunction in the Rule (b) of the 1995 rules. Such criteria provide means of recognition of majority interest of the producers of domestic industry as a whole. Initiation of investigation is thus made when all produces of domestic industry or majority thereof complain dumping and injury. Accordingly, producers whose collective output of subject goods constitute a major proportion of the total domestic production they have a right to complain dumping and injury. In other words monopoly is ruled out by that Rule. Suo moto investigation by DA under Rule 5 (4) of 1995 Rules is also to protect larger interest of domestic industry.

12.2 Tribunal in the case of Lubrizol India (Pvt) Ltd (supra) has held that "major proportion" means substantial quantity produced which is higher. This criteria reflects larger interest of domestic industry which is envisaged to be protected by law. In the present case, the ratio laid down by Tribunal in Lubrizol's case is applicable in view of major proportion of total domestic production was more than 50% and constitution of domestic industry not questionable.

12.3 It flows from the aforesaid discussions that on complaint of domestic industry, anti-dumping investigation is carried out by Designated Authority provided condition of sub rule 3(b) of Rule 5 of 1995 Rules is fulfilled. Suo-moto investigation under sub rule (4) of Rule 5 is also regulated by sub-Rule. So far as the review governed by Rule 23 of 1995 Rules is concerned that does not warrant re-examination of constitution of domestic industry which was already

known to both parties at the initial investigation stage of levy.

12.4 When mid term review application was made by the appellant, it was expected that the applicant was aware of producers of the subject goods in the domestic industry and their number when the appellant was also a party in the original investigation of levy of anti-dumping duty. Performance of producers of domestic industry, quantum of output manufactured by them and their financial affairs was also expected to be within the knowledge of the appellant when review was sought by it on the ground of change in circumstances. It cannot plead innocence or unawareness of essential facts relating to domestic industry for a misplaced sympathy that goes to the root of the matter touching the interest of such industry. Burden of proof is on the applicant to show that its assertions are correct and based on evidence and there is neither dumping nor injury. Plea of ignorance of relevant facts attributable to dumping and injury to the domestic industry is difficult to be entertained on the ground of improper constitution of domestic industry.

12.5 Ld. Designated Authority gathered relevant facts and figures from the participants of the mid-term review to make likelihood dumping injury analysis and found that to be sufficient in para 13 of his final finding for recommendation of resumption of duty. In para 14, he noticed that total production of the domestic industry during the period of investigation was 17, 94,587 M .T. and production by the participating producers was 9,11,244 M.T. That was more than 50% of the total output of subject goods manufactured by domestic industry satisfying requirement of Rule 2(b) of the 1995 Rules. So also the authority held that there is no legal requirement to relook to the constitution of domestic industry in mid-term review investigation while that was necessity at the time of original investigation. This is the correct proposition of law and entire submission of domestic industry is this regard with citations merit consideration and appreciable. Appellant's contention that change in composition of domestic industry at review stage has made dumping margin and injury analysis faulty is baseless because prospective dumping and injury was well estimated on the basis of past and present dumping statistics as well as impact thereof. Probability of continuation and recurrence of dumping and injury was determined by an objective analysis by the DA. Appellant fails in its contention that the DA has not considered the domestic industry as a whole. Reliance on the judgment of Apex Court in Reliance Industry's case (supra) was misplaced since that judgment related to cost of power used by Reliance Industry from its Captive Power Plant to determine its cost of production while all other producers of domestic industry had no such facility. That did not represent market pi-ice of power. In the present case, larger interest of the domestic industry as a whole entered into consideration of DA. Therefore appeal fails on this count.

#### EXTENT OF INQUIRY BY DA

13 To examine the continuation or recurring of dumping and injury by the export of subject goods and causal link thereof, DA sent export questionnaire to all

known producer/exporter for the purpose of determination of normal value in accordance with section 9A(l)(c) of the Act. None of the exporter/producers from Indonesia and EU (Excluding France) made response to the same. Only Formosa Plastic Corporation (FPC) from Chinese Taipei responded. Taiwanese exporters did not export the subject goods to India during the POI which was verified from DGCI&S import statistics. Appellant's contention that there was export by Taiwan from 2005-06 to 20-11-2012 was baseless since such export relates to post investigation period. In absence of export price, from Chinese Taipei, no current dumping margin was determined for which that was determined taking third country export price.

#### DETERMINATION OF NORMAL VALUE AND EXPORT PRICE

14.1 DA determined normal value and export price of Chinese Taipei in respect of prospective exports in accordance with 1995 Rules and WTO agreement on Anti Dumping. Export data provided by FPC to third countries during POI as is depicted in Para 28 of Final Finding was considered by DA. It was noticed by him that there were sales to Australia, USA and Singapore in major volume. So also he considered sale of subject goods to both affiliated and unaffiliated countries in home market and exports made to a number of countries other than India during POI. Authority found there was low export price in respect of export to third countries. The claim of sale under long term contract was discarded noticing export to different countries under no long term contracts. Even export volume was higher than sales in domestic market.

14.2 FPC provided copies of chlor Alkali market report 2004 issued by CMAI for each month of POI.

Normal value of subject goods of Chinese Taipei was determined based on all domestic sales to unrelated customers in the home market at ex-factory level. Entire finding in this regard appears in Para 26 to 32 of final finding. Export price was arrived by DA considering significant dumping margin in respect of export to third countries and it was opined that continued imposition of the duty was necessary to offset likelihood of dumping. During investigation, DA also found that export price was much below the normal value disclosed by FPC.

14.3 When there was no response from any exporter of Indonesia and EU (excluding France) to the exporter's questionnaire, provision of Article 6.8 of the agreement guided the DA to determine normal value and export price of Indonesia and EU (excluding France) exporters as is apparent from Para 37 to 40 of final finding. Chlor Alkali market report showed that the prices published therein were quite close to the actual transaction prices and were lower than the accrual prices claimed by Formosa Plastic Corporation (FPC). Therefore, DA followed chlor Alkali Market Report statistics to determine normal value of the subject goods of these two countries. Similarly export price of these two countries was determined on the basis of transaction wise imports provided by DGCI & S. There was export of 3745 MTS of subject goods from Indonesia and

165 MT from EU (exche. diary France). Accordingly ex-factory export price was determined for all exporters/producers therefrom. Such determination being rational, nothing could be challenged by the appellant and appellant fails in its contention as to erroneous determination of normal value and export price. Tribunal in the case of AIIGMA V. Designated Authority-2000 (119) ELT 333 (Tri - Del) and D P Foam (P) Ltd. V. Designated Authority has held that appellant importer do not have an inherent right to question the determination of the normal value.

#### LIKELIHOOD OF DUMPING, INJURY AND CUMULATIVE ASSESSMENT

15.1 The Domestic Industry submitted before Designated Authority that FPC was undertaking significant expansion to the tune of 466000 M.T. (evidence from Website of FPC). That guided the DA to arrive at the potential capacity of production of significant volume of additional quantity for export of subject goods to India when exports were at a level that was depressing the price in domestic market in India. It was also noticed by the DA that landing prices of the exports were below the benchmark recommended by that authority and those were at dumped price. It is quite obvious that if export price is below benchmark that causes injury to domestic industry. The D.A. found that Indian market was more attractive to Taiwan's producers than the third country market if the levy is waived or withdrawn. Such finding remained un-rebutted by the appellant.

15.2. The Designated Authority further noticed that price of the subject goods in Australia, Singapore and USA were much lower than the prices in Indian market. In the past, FPC committed sale of 150000 M.T. materials to various traders for eventual supply to Indian customers and was in-fact awarded an order for supply of 86000 MT material for shipment in less than a year. Even supplies of 13500 MT to NALCO by FPC against an order placed on a third country trader for shipment to be made by a producer in another third country proved how potential Chinese Taipei producers were to export the subject goods to India and that too at dumped price. Therefore there was nothing wrong on the part of the DA to determine the prospective dumping and likely injury expected to be caused thereby.

15.3 Tribunal had occasion to deal with the issue of cumulation of imports in the case of D. P. Foam (P) Ltd. V. Designated Authority - 2011 (270) ELT 715 (Tri - Del) in para 16 of the order as under:

16. As regards the contention regarding cumulation of imports, we are of the view that it has been rightly contended on behalf of the domestic industry that in a sunset review, only a likelihood determination is required to be made and in such a case, there is no need to strictly apply the provisions of Rule 11 of Anti-Dumping Rules, 1995. Rule 11 of the AD Rules, 1995 provides for determination of injury. Annexure-11 to the AD Rules lay down the Principles of determination of injury. Para (iii) to Annexure II reads as under:-

"In cases where imports of a product from more than one country are being

simultaneously subjected to anti-dumping investigation, the designated authority will cumulatively assess the effect of such imports, only when it determines that (a) the margin of dumping established in relation to the imports from each country is more than two percent expressed as percentage of export price and the volume of the imports from each country is three percent of the import of like article or where the export of individual countries less than three percent, the imports collectively accounts for more than seven percent of the import of like article and (b) cumulative assessment of the effect of imports is appropriate in light of the conditions of competition between the imported article and the like domestic articles." [Emphasis supplied]

15.4 In the above decision, Tribunal in Para 17 also held as under:

"17. This is a case of sunset review. The imports from the subject 3 countries, namely China PR, Chinese Taipei and Korea RP, which were already subject to anti-dumping duty, had no doubt come down to less than 7% in the POL. But as recorded by the D.A., imports from other countries (such as USA and Singapore), which were also simultaneously subject to anti-dumping duty under a separate notification was more than 90%. In a sunset review, the D.A. is examining a scenario which is already affected by the existing anti-dumping regime in force. It is bound to be different from the scenario at the time of original examination. In the sunset review, he has to do a likelihood determination as to whether there will be continuance or recurrence of injury if the anti-dumping duty is removed. In such a determination, the percentages fixed under Rule 11 read with Annexure-II (iii) cannot be of relevance as the anti-dumping duty would have brought down volume of dumped imports. For a likelihood determination under the sunset review which is prospective in nature, there cannot be any objection to cumulation of imports to determine likelihood of injury. In the instant case, even though the volume of imports from the subject countries were less than 7% the dumping margins were 41.73%, 65.31% and 50.70% from China PR, Korea RP and Chinese Taipei respectively. We do not, therefore, find any reason to upset the findings of the D.A. arrived in sunset review merely because he has determined the likelihood of injury by cumulating total imports." {Emphasis supplied}

15.5 Cumulative assessment of injury was done in para 51 of the final finding. Although sale of domestic industry increased during injury period indicating recovery from the adversity of past dumpings, that was only due to levy of definitive anti-dumping duty. There was no decline in the export from EU (excluding France) and Indonesia during POI. Imports were considered to increase significantly in the event of withdrawal of the duty since export was not made from Taiwan after imposition of definitive anti-dumping duty. Domestic product faced serious competition with the imported goods due to low price.

15.6 When return on investment and cash flow was examined by the Designated Authority, he found a very low rate of return earned by the domestic industry which were to the tune of 5.62% in the year 2001-02 (-) 0.50% in 2002-03,

1.84% in 2003-04 and 0.04% in 2004-05 till period of investigation. There were losses incurred by domestic industry in 2002-03 compared to the base year. The performance in the year 2003-04 was improved only due to imposition of definitive anti-dumping duty.

15.7 Designated Authority noted that domestic industry was suffering due to dumped imports from Korea and China during the base year and subsequently faced injury due to dumped import from Indonesia Chinese Taipei and EU (excluding France). Only due to imposition of definitive anti-dumping duty, performance of domestic industry improved establishing that injury was sustained by domestic industry resulting in decline in the return on investments year to year as stated above.

15.8 Actual and potential increase in dumped import and its impact on market share of the domestic industry was examined by Designated Authority in para 67 of the final finding. It was found that the decline in the export was due to levy of definitive anti-dumping duty. Price under cutting was examined by the DA in para 71 of the final finding and he found that under cutting margin was ranging from 10% to 48% during the period of investigation indicating that dumped imports were cheaper compared to domestic product. Similarly price under selling was examined by the authority in para 72 of the final finding and recorded that the under selling margin was ranging from 17% to 56% during POI. This indicated serious injury to domestic industry.

15.9 The non-injurious price calculated by DA remained un-assailed by the appellant failing to show the ground in that respect in the Memorandum of Appeal even though four weeks time was allowed by the Tribunal for the same. Therefore domestic industry is right to plead, that following the ratio laid down by Apex Court in the case of National Textile Corporation V. Naresh Kumar Badrikumar Jagad and ors - AIR 2012 SC 264: (2011) 12 SCC 695 nothing can be pleaded without any ground in the memo of appeal nor an additional ground can be entertainable at a belated stage.

15.10 The volume of increase in inventory was noticed in the year 2003-04 while there was a decline during the period of investigation. The authority therefore opined that inventory level may increase in case anti-dumping duty is withdrawn because such withdrawal would lead to increase in importation of subject goods resulting in declining of sale volume of the domestic products causing injury. Such conclusion of DA is correct and based on evidence.

15.11 Growth of domestic industry was due to levy of definitive anti-dumping duty proving withdrawal thereof shall hamper growth of the Industry. Evidence on record showed that the dumping margin in respect of export from EU (excluding France) and Indonesia being substantial and there was likelihood of significant dumping from Chinese Taipei, withdrawal of the duty was considered to be unwarranted. To make the domestic industry economically and financially viable, price under cutting and price under selling were sought to be arrested by

continuation of the levy. It was also noticed that injury due to dumping retarded capital investment by domestic industry. That made withdrawal of levy impossible. All these factors proved causal link between dumping and injury. Learned Authority followed the law laid down by Apex Court in *Harder Topse* (supra) to consider various informations to make recommendation. His action does not appear to be arbitrary or based on no evidence.

#### EXCESS CONFIDENTIALITY NOT CLAIMED BY DA

16.1 Public notice of initiation of review was published in official gazette and that appeared in website of Ministry of Commerce. Record of DA was examined by us. That revealed that entire information were available in public file and accessible to the Applicant/appellant. D.A. also intimated the fact of initiation of mid term review to the associations as well as producers of subject goods, seeking relevant information. It was noticed that all possible steps were taken by D.A. to place the information on public domain without any suppression or concealment. The Economic law practice firm representing the appellant, inspected public file on 18.7.2005. So also copy of non-confidential version of representation of domestic industry was obtained by the said representative on 05.11.2005. Therefore, when public record reveals such transparency, action of DA is not challengeable on the ground of claim of excessive confidentiality. The plea of claiming of excessive confidentiality by D.A. is baseless when public record was open for inspection.

16.2 The profitability and NIP determination figures of domestic producers were not liable to be exposed as such disclosure shall be threat to their survival. No man of ordinary prudence and diligence will disclose his trade secret, cost of production and the know-how he uses, so as to protect himself. Producers of domestic industry are not an exception to such commercial expediency. It is established from record that the D.A. acted within the frame work of law making every material fact available on public record meant for inspection.

16.3 The non-confidential version submitted by domestic industry was well within the notice of the appellant being a matter of record. Disclosure statement depicted entire facts and figures. Nothing is apparent to have been concealed or suppressed by the DA. Allegation of claim of excessive confidentiality by the Designated Authority is ill founded. Quantum of output manufactured by domestic industry, its capacity and utilisation thereof was not out of reach of the appellant to know when it sought review on the ground of changed circumstances. Similarly, Chlor Alkali market reports were available to know performance of exporter and their exporting potentiality. Contention of Appellant that the Designated Authority claimed excessive confidentiality does not merit consideration for the reason that the appellant was an applicant for review and has burden of proof to support its application. But it failed to prove. It is legitimate expectation that the applicant is aware of health of domestic industry when it claimed no dumping and no injury to the domestic industry. It failed to establish that neither dumping shall recur nor there shall be injury to the

domestic industry if levy is withdrawn. When it failed to establish so, that called for dismissal of all the pleadings of appellant.

#### APPEAL DEVOID OF MERIT

17. Aforesaid discussion shows that the Designated Authority, following due process of law and natural justice, has rightly proceeded to deal with the issues before him when information came to its record was accurate and correct. He had not acted contrary to the law laid down in ATMA's case (*supra*). Transparency and fairness was all along followed to determine the dumping, dumping margin and injury in the respective paras of the final finding. Relevant information received was considered and injury analysis was made objectively by him in accordance with law. Injury was established due to dumping demonstrating causal link between the two. Pleadings and citations made by domestic industry, DA and Ministry of Finance have force when the price undercutting and price under selling demonstrated injury to domestic industry. Recommendation for no withdrawal of levy was justified. Plea of variation of duty made by appellant was also baseless. Anti Dumping Duty was rightly imposed in the fitness of the circumstances of the case. Recommendations of DA notifying no cessation of antidumping duty are not at all faulty since he had carried out a detailed examination of various facts to come to the conclusion that the subject goods originating in or exported from Chinese Taipei, Indonesia and EU (excluding France) have been exported below their normal value, resulting in dumping. He also came to the conclusion that in the case of revocation of anti dumping duties, the dumped imports from these countries are likely to continue to cause injury to Domestic Industry. We do not find any reason to disturb the findings of D.A. arrived in midterm review. Conclusion drawn by DA is based on sound reasons and basis. His recommendations flowing there-from, to eliminate injury to domestic industry, are proper. The resultant customs notification issued by Ministry of Finance imposing anti-dumping duty is based on sound reasons. Both the notifications are therefore upheld. All the grounds raised by the appellant in the present appeal against mid-term review initiated at its instance being devoid of merit, the appeal is liable to be dismissed. We order accordingly.

18. Before parting with this order it is necessary to remind the Bar that grounds of appeal in appeal memo should not be narrative and argumentative running into several pages but should be concise and depicted under distinct heads as required by Rule 8 of Customs, Excise and Service Tax Appellate Tribunal Rules, 1982 to make the hearings time effective and productive.

(Pronounced in the open court on 03/12/2013)