

**(2016) 08 CESTAT CK 0006**

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

**Case No :** Anti Dumping Appeal Nos. 3, 4, 14 Of 2012, Anti Dumping Stay No. 90, 91 Of 2012, Anti Dumping Condonation of Delay No. 248 Of 2012

M/s Rishircop Polymers Pvt. Ltd. And Ors.

APPELLANT

Vs

Designated Authority And Ors.

RESPONDENT

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**Date of Decision :** 23-08-2016

**Acts Referred:**

Customs Tariff Act, 1975 — Chapter 29, 38  
Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995  
— Rule 23, 23(3)

**Citation :** (2016) 08 CESTAT CK 0006

**Hon'ble Judges :** Dr. Satish Chandra, J; Archana Wadhwa, J; B. Ravichandran, Technical Member

**Bench :** Full Bench

**Advocate :** Dhruv Gupta, Ankur Sharma, Amit Singh, Govind Dixit, Rajesh Shanna, Rita Jha

**Final Decision :** Dismissed

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**Judgement**

1. Notification No. 92/2011-Cus. dated 20.09.2011 of Ministry of Finance and Final Findings on Mid Term Review dated 05.08.2011 of the Designated

Authority (DA), Directorate General of Anti Dumping and Allied Duties, Ministry of Commerce and Industry are challenged in these three appeals by

the appellants. M/s Kumho Petrochemical Co. Limited, Korea are manufacturers and exporters of rubber chemicals known as PX13 (6 PPD) falling

under chapter 29 and 38 of the Customs Tariff Act (subject goods), M/s Rishirop Polymers Pvt. Limited legal representatives in India of the said

Korean company in India and M/s National Organic Chemical Industries Limited (NOCIL). Mumbai representing domestic industry have filed these

appeals against the said impugned findings and notification.

2. The brief facts of the case are that the domestic industry approached the DA with a plea for imposition of AD duty on exports of subject goods

from, inter alia, Kumho Petrochemical Co. Limited, Korea. The DA after following the procedure prescribed in terms of Customs Tariff Act, 1975

and the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules,

1995 gave his findings which resulted in provisional AD duty for imports of subject goods from PR China and Korea RP vide Customs Notification

No.61/2008-Cus. dated 05.05.2008. The Final Finding was notified on 01.10.2008 and definitive AD duty on the subject goods were notified vide

Notification No.133/2008-Cus. dated 12.12.2008. The DA received an application from NOCIL pleading for the need of a Mid Term Review of the

AD duty on the subject goods originating in or exported from Korea RP for enhancement. The DA initiated action for such Mid Term Review in

terms of Rule 23 and after following the procedure set out in the said Rules arrived at the final findings dated 05.08.2011 which is under challenge.

The said Final Finding resulted in the Customs Notification No. 92/2011 dated 20.09.2011 which is also under challenge.

3. Shri Dhruv Gupta, Id. Advocate appearing on behalf of appellant No.1 and 2 submitted that they are contesting the enhancement of AD duty

consequent upon Mid Term Review by the DA. His submission may be summarised as below:

(i) DA has no jurisdiction to revise the AD duty before its expiry. Section 9A(5) provides for period for which such duty can be imposed. The proviso

to the said section grants powers to the Central Government to review for extension of such duty and DA has no power.

(ii) The AD duty imposed on a definite finding cannot be increased ma review.

(iii) Rule 23 of the AD Rules only refers to continued imposition of AD duty. Even the Customs Act provides for only withdrawal of existing duty not

for its enhancement.

(iv) The determination of normal value for the applicant is incorrect. In a multi-product company the records may not reasonably reflect the cost of

production and sale of subject goods. The comparison of raw material cost from other market economy country is not correct. The cost of production

in the country of origin is relevant.

(v) The finding on injury analyses is incorrect. The domestic sales of the subject goods have increased as well as the profit margin and cash flow has

also improved over the injury period with reference to domestic industry.

(vi) The determination of DA on price under cutting/ price under selling has no consequence. The investigation and analyses in Mid Term Review is

different from that of sun-set review. In sun-set review likelihood of recurrence of injury is examined for extension of AD duty for further period. The

DA has erred in enhancing AD duty as there is no injury at all to the domestic industry during the relevant period.

4. Shri Rajesh Sharma, Id. Advocate appearing on behalf of NOCIL submitted that the present appeal was preferred by them in continuation of their

earlier appeal against the Final Finding recommending for definitive AD duty on import of subject goods. They have preferred this appeal during the

pendency of the above mentioned appeal. He further submitted that the said appeal was disposed of by Final order No. 54808 - 54810/2014 dated

26.12.2012 of the Tribunal. The Tribunal remanded the matter to the DA to re-determine the export price, normal value and the dumping margin with

reference to the subject goods which has been complied with by the DA. The Mid Term Review now the subject matter of the present appeals has

resulted in the increase in AD duty on the subject goods. This Mid Term Review has been initiated on the application of NOCIL. Id. Advocate

submitted that as of now they have no points to press in the present appeal in view of the development in the case during the intervening period as

narrated above.

5. Id. Advocate Sh. Amit Singh for DA and Sh. Govind Dixit, Id. AR for Revenue defended the impugned findings and the Customs notification.

They have submitted that the DA has followed the prescribed procedure and arrived at the findings on Mid Term Review with categorical reasons.

The DA has powers as per the AD Rules to initiate such Mid Term Review. The submission of appellants No.1 and 2 that the DA has no such power

is devoid of any merit. Rule 23 empowers the DA to conduct such review. Regarding the correctness of the finding of DA on the raw material cost

and export price, it is submitted that the DA has followed the correct procedure by comparing the raw material cost of international by accepted price.

The data relating to domestic industry during the relevant period has been

examined and it has been recorded by the DA in his finding. The fact that the domestic industry earned profit or had some increase in profit has no relevance to indicate that the AD duty cannot be varied if the requirements for such variation were found to exist.

6. We have heard all the parties and examined the appeal records. Appellant No.1 and 2 are aggrieved by the findings of DA on Mid Term Review

regarding AD duty imposed on subject goods originating in or exported from Korea RP. A perusal of Rule 23 of Anti Dumping Rules will indicate the

powers of the DA to review the need for continued imposition of any AD duty on its own initiative or upon request by any interested party. In the

present case, M/s NOCIL has approached the DA with information to substantiate the need for Mid Term Review and for appropriate action by DA

in terms of the above said Rules. We have perused the findings of DA. He has exercised the powers under Rule 23 and followed the procedure as

stipulated which are substantially as applicable to the initial investigation as mentioned in Rule 23(3) stipulating the application of various Rules for such review.

7. We find the appellants challenge on lack of power by DA is without legal basis. Hori'ble Punjab & Haryana High Court inM erino Panel Products

Limited vs. Designated Authority - 2011 (271) ELT 336 (P&H) held as under:

7. It is well known that provisions for anti-dumping duty have been incorporated to safeguard the domestic industry against practice of

exporting countries clumping their goods at less than normal value resulting in injury to the domestic industry. To achieve this object, the

Central Government has been authorised to impose anti-dumping duty not exceeding the margin of dumping. If it is proved that anti

dumping duty has been imposed in excess of margin of dumping, the importer is entitled to refund under Section 9AA. The Rules provide for

manner in which the effect of dumping and margin of dumping are determined. Designated Authority is to be appointed by Central

Government not below the rank of Joint Secretary to investigate as to existence and effect of dumping and to make recommendations about

the amount of anti-dumping. The said authority also has to review the need for continuance of anti-dumping. Procedure and principles

governing investigation have been laid down. Rule 23 provides for review from

time to time. There is guidelines in the form of purpose for which anti-dumping duty is provided and the Designated Authority has to act on the principles laid down for determining the injury and also to review the need for continuance of anti-dumping duty from time to time. Order of determination or review is appealable under Section 9C. The Rules have stood the test of time. The petitioner never felt aggrieved by the levy of anti-dumping duty and no appeal is stated to have been filed. Moreover, dumping margin in exports from different countries could be different. There is, thus, nothing in the rules which may go against the mandate of the statute. Conferment of such power is necessary for effectuating the object for which the provisions have been enacted. It cannot be held that the Rules are arbitrary and without any guideline. Mere fact that power under Rules may not be exercised properly cannot be a ground to set aside the Rules. There is no presumption that power under the rules will not be exercised to carry out its objectives",

Further, the Tribunal in *Grauer & Weil (I) Ltd. vs. DA* - 2011 (271) ELT 112 (Tri. Del.) held as below:

The DA on being satisfied that a review can be called for the need for continued imposition, mid term review of enhancing Anti-dumping duty can be initiated. In this case, it is seen that the final findings were issued in the initial investigation on 19.3.2007 and mid term review was sought in February, 2008 which was more or less within a year after the imposition of Anti-dumping duty. In the absence of any specific time period indicated in Rule 23 of the anti-dumping rules, the mid term review in the case in hand cannot be held as faulty".

8. The Hon'ble Supreme Court in *Rishiroop Polymers Pvt. Ltd. vs. Designated Authority & Addl. Secretary* - 2006 (196) ELT 385 (SC) examined in detail the scope of power with DA for review. It was held if there is significant change in the facts and circumstances that it is considered necessary either to withdraw or modify appropriately the AD duty which has been imposed the DA can act accordingly. As such, we find no legal infirmity in the Mid Term Review by the DA.

9. Considering the methodology adopted by the DA in arriving at the recommendations for modifying the imposition of AD duty consequent upon such

Mid Term Review. We find that the procedure envisaged has been followed by the DA. The DA has considered volume effect of dumped margin, price effect, price under selling, price suppression and depression and other economic parameters relating to domestic industry before reaching the conclusion. We have perused the said analyses and found no merit in the appellant's challenge to the same. Regarding the substantial change and circumstances, we find the authority followed adjusted cost of production and sale of the subject goods. The DA recorded that the main appellant (Korean manufacturer) continued to source their main input 4ADPA from same non market economy company and as such the DA constructed the cost of production of 4ADPA. We find no merit in the appellant's contention regarding the arrival of normal value. In respect of non cooperating exporters from Korea RP the lowest import price based upon IBIS import data has been taken into account. It is also recorded that the domestic industry have provided positive information in terms of Article 11.2 of WTO Agreement and Rule 23 of Anti Dumping Rules. Based on all the relevant data the DA concluded that subject goods are entering the Indian market from Korea RP at a dumped prices and dumping margin is significant and above the de-minimis limits prescribed. It has been recorded that though the situation of domestic industry has improved due to existing Anti Dumping duties, the price under cutting and price underselling are significant from Korea. Accordingly, it is concluded that the injury to the domestic industry is likely to recur in case the present AD duties are not modified. The definitive AD duty has been revised based on such recommendation by the DA.

We take note that the initial finding of definitive of AD duty was also challenged before this Tribunal by the appellants. The Tribunal vide Final order dated 26.12.2014 upheld the decision of DA regarding cost of procurement of main raw material 4ADPA. The matter was remanded to the DA only for providing certain data to the interested parties. Accordingly, a decision has been taken by the DA on such remand. As such, we find the imposition of AD duty per-se cannot be challenged. The present appeals challenging the Mid Term Review have not brought out any serious infirmity in the methodology or procedure followed by DA. Upon careful consideration of all the points raised and the findings of the DA we hold that there is no merit in the appeals filed by the appellants No.1 and 2 and the same are dismissed. The appeal filed by M/s NOCIL is also disposed of. CoD

application disposed of accordingly.  
(Pronounced on 23.08.2016).