(2011) 08 CESTAT CK 0001

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Anti Dumping Stay No. 1081, 1206 Of 2009, Anti Dumping Appeal No. 5, 8 Of 2009

?M/s Rishiroop Polymers Pvt. Ltd. APPELLANT

Vs

Designated Authorit& Others RESPONDENT

Date of Decision : 03-08-2011

Acts Referred:
Customs Tariff Act, 1975 — Section 9A(1)
Customs Tariff (Identification, Assessment And Collection Of Anti Dumping Only On Dumped Articles And For Determination Of Injury) Rules, 1995 — Rule 16, 18

Citation : (2011) 08 CESTAT CK 0001

Hon'ble Judges : R.M.S. Khandeparkar, J;Dr. Chittaranjan Satapathy, Technical Member;M.V. Ravindran, J

Bench : Full Bench

Advocate : S. Seetharaman, Atul Sharma, Sagnik Sinha, Bhargav Mangatta, Ameet Singh, Satish Kumar

Final Decision : Dismissed

Judgement

1. These two appeals are directed against Notification No.1/2009 dated 2.1.2009 issued by the Government of India, Ministry of Finance (Department of Revenue) that imposed definitive Anti- dumping duty on the goods "Acrylonitrile Butadiene Rubber" (hereinafter referred to as NBR) originating in or exported from Korea RP, Germany, pursuant to the findings recorded by the Designated Authority vide his final findings dated 4.10.2008 in second sunset review of Anti-dumping duty on imports of NBR.

2. The relevant fact that arise for consideration are the Designated Authority had imposed definitive Anti-dumping duty on NBR originating in or exported out of Germany and Korea RP and in the first sunset review, the Designated Authority recommended for continuation of the definitive Anti-dumping duty on the said NBR originating in or exported from Germany and Korea, which was done by the government vide Notification No.109/2007 - Customs dated 9.10.2007, which was valid up to 8.10.2008. The current proceedings are in the second sunset

review which was initiated on a petition filed by the domestic industry. The initiation Notification by the Designated Authority was dated 8.10.2007. Pursuance to said initiation notification dated 8.10.2007, the appellants herein filed the questionnaire response as required under the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules,1995 (hereinafter read as AD Rules). The Designated Authority conducted a public hearing on 17.6.2008 which was attended by all the interested parties. Consequent to such public hearing, all the interested parties filed written submissions and rejoinder submissions. The Designated Authority on 12.9.2008 sent a letter to all the interested parties disclosing the revised cost of production of various NBR grades and on 23.9.2008 the Designated Authority disclosed the essential facts to form the basis for final findings. The appellants submitted comments on the revised cost of production on 25.9.2008 and on the disclosure statement on 30.9.2008. On 4.10.2008, the Designated Authority made a further disclosure informing revision of normal value calculation for the appellant (Korea Kumho Petrochemicals Co. Ltd.) against which appellants filed their comments. The Designated Authority issued final findings on 4.10.2008 pursuant to which Notification No.01/2009-Customs dated 2.1.2009 was issued by the Ministry imposing definitive Anti-dumping duty. Aggrieved by such an order, the appellants are before us.

3. S/Shri S. Seetharaman, Atul Sharma, Sagnik Sinha & Bhargav Mangatta Advocates for the appellants appeared before us and made the following submissions.

(i) Learned advocate took us through the entire case records right from the 1st Sunset Review to 2nd Sunset Review and submitted:

v The likelihood of injury of Respondent No.1 is based on presumptions and conjectures and is not supported by the relevant facts or objective data.

v The impugned findings suffer from gross violation of principles of natural justice as certain critical facts and evidence relied upon were not disclosed. Appellants were not given disclosure statement and the final findings were issued on the same day defeating the very purpose of issuing of disclosure statement.

v Injury determination by Designated Authority is illegal and unsustainable.

v Dumping Margin determined by the Designated Authority for the appellant is illegal and is in contravention to the AD Rules.

v Amount of duty recommended by the Designated Authority is contrary to the provisions of Section 9A(1) of Customs Tariff Act and read with Rule 18 of AD Rules.

v Single weighted average normal value for the exporting country i.e., Korea RP was determined by the Designated Authority is incorrect and unwarranted.

(ii) It is his further submission that the Designated Authority has concluded that the appellant had proposals to create reasonably higher additional capacities in the near future is not based on any substantive evidence but on certain press reports, though the said press reports were never disclosed to the appellants to contradict or to defend the same. It is his submission that on the contrary appellants had stated very categorically that there were no plans for capacity expansion.

(iii) It is his submission that while determining the volume of imports, data given by the exporters have been used for the period of investigation but the Designated Authority continued to use DGCIS data for the previous years, hence, the conclusion that the volume of imports from the subject countries is recorded as a very significant jump in the period of investigation, is erroneous.

(iv) It is his next submission that Designated Authority had recorded import volumes from Korea RP are set to grow while the unit export rates to India have consistently remained lower than the export rate to other countries. It is his submission that the export prices to other countries are higher than the export price to India, there is no incentive to shift volumes to other countries to India. It is his submission that the conclusion of Designated Authority rs not supported by facts determined during the investigation.

(v) It is his submission that the Designated Authority did not disclose press reports, transaction wise DGCIS data, WT A Statistics and reasons for rejection of actual consumption data as supplied by the appellant. It is the submission that non-disclosure of information has affected the rights of defense during the investigation phase as well as the right of the appellant to make a proper appeal before the Tribunal. He would rely upon the judgments of the Tribunal in the case of Bhagirathi Iron and Steel Pvt. Ltd. Vs. CCE, Meerut- 2010 (261) EL T 654; Premier Electrodes Ltd. Vs. UOI - 2010 (256) EL T 354; CCE & C Vs. Chandan Steel Ltd. - 2009 (238) ELT 716; and Kothari Filaments Vs. CC (Port), Kolkata - 2009 (233) ELT 289.

(vi) It is his submission that the Designated Authority partly revised the disclosure statement on 4.10.2008 through email to the appellant (Korea Kumho Petrochemicals) and sought their comments. It is submission that the appellants submitted their comments within few hours through email on the same day and filed a hard copy on 6.10.2008 as 4.10.2008 was a Saturday. It is his submission that the impugned final findings were issued on 4.10.2008 itself without considering the comments sent by the appellants in return. It is his submission that Article 6.9 of the Agreement stipulates that such disclosure should take place in sufficient time for the parties to defend their interests. It is his submission that for this reason also the impugned final findings were passed in violation of the principles of natural justice.

(vii) Injury analysis was highly deficient in view that the cumulation of imports from other countries other than those that are subject to simultaneous investigation was in violation of the provisions, import volume was not properly determined, as consequence entire injury analysis was flawed and positive performance of the domestic industry across a number of examined factors were not given due weight.

(viii) It is his submission that dumping margin determined for the appellant was wrong in view of the fact that certain grades of NBR, actual consumption factors reported by the appellants were rejected without assigning any reasons; SGA expenses and financial expenses were not allocated based on turnover following the standard practice and while calculating weighted average normal value, weight given to various grades of product concerned sold in the domestic market and export market was not uniform resulting into a skewed weighed average normal value. It is his submission that the definitive Anti-dumping duty imposed of US $ 38. 73 is disproportionate to the dumping margin which is determined as 1.69°/o for the exports made from Korea RP. Hence, determination of single normal value for Korea as whole is not in accordance with law.

4. Learned counsel appearing on behalf of the Designated Authority would submit that the dumping and injury analysis was based on hard facts and evidence relied upon by the authority which was conducted during the investigations. It is his submission that the statement of Korean Stock Exchange for LG Chem Ltd. was considered along with various statements of the responsible officers of Kumho Petrochemicals. It is his submission that the Designated Authority had in fact issued a disclosure statement on 23.9.2008 and only a partly revised disclosure statement was issued on 4.10.2008. Hence, it is incorrect to state that not much time was offered to the interested parties to respond to the disclosure statement. It is his submission that the partly revised disclosure statement issued on 4.10.2008 contained only some minor modifications in the normal value and dumping margin. It is also submitted that cumulation of imports from other countries and other than those that are subject to simultaneous investigation was not carried out. The final findings of the Designated Authority have only indicated the volume of imports of subject goods from other countries which were subject to Anti- dumping duty in addition to subject countries. It is his submission that import volume was properly determined and the positive performance of the domestic industry was given a due weight in the final findings. However, in a sunset review, the Designated Authority is required to examine whether cessation of duty would lead to continuation or recurrence of dumping and injury and this has been properly analyzed in the final findings. It is his submission that the ground of the appellant that the dumping margin determined for the appellant was wrong in respect of certain grades of NBR, the actual consumption factors reported by the appellant Kumho Petrochemicals were not rejected. It is also submitted that due weightage was given to the SGA expenses and financial expenses and proper allocation was done by following the standard practices as adopted by the Designated Authority. It is his submission that these allocations were done on turnover basis. It is his further submission that in the sunset review, the scope of product remains restricted to what was defined in the original investigation, where all grades were treated as a single

product. Therefore a single average normal value has been computed for both the companies and then weighted to arrive at the country-specific normal value, in pursuance of the Supreme Court ruling in the Civil Appeal No.1294 of 2001. It is his submission that this normal value has been compared with the export price for the individual exporters to determine individual dumping margins of the exporters. It is his submission that though the dumping margin was determined less in sunset review, authority considered the Anti¬dumping which was imposed previously should be continued.

5. We have considered the submissions made at length by both sides and perused the records. At the outset, it is recorded that the appellants herein are challenging the continuance of definitive Anti¬dumping duty imposed on goods originating in or from Korea RP.

5.1 The undisputed fact in these cases is that, mid-term review initiated by the Designated Authority vide initiation Notification dated 8.10.2007 was well within the powers of the Designated Authority as per the provisions of Rule 16 of the AD Rules. It is also undisputed that all the interested parties were informed about the initiation of mid-term review by the Designated Authority. It is also undisputed that all the interested parties filed their submissions to the Designated Authority during the investigations conducted. It is also seen from the records that the Designated Authority had given a disclosure statement on 23.9.2008 for which, the current appellants have filed their comments on 25.9.2008 I 30.9.2008. It is also undisputed that the Designated Authority partly revised disclosure statement on 4.10.2008 only to M/s. Kumho Petrochemicals. It is also undisputed that the partly revised disclosure statement issued on 4.10.2008 contained only some modifications in the normal value and the dumping margin.

5.2 We find that the powers of the Designated Authority to initiate the sunset review in respect of the goods on which definitive anti- dumping duty has been imposed cannot be called in question. We find that in cases of sunset review by the Designated Authority, this Tribunal in Final Order in Appeal No.AD/4/2009 [2010 (253) EL T 564 (Tri.)} had clearly held as under:

"13. 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 antidumping 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."

It can be seen from the above reproduced findings and also various decisions that the sunset review can be initiated by the Designated Authority, to ascertain the need for continuance of definite Anti- dumping duty and hence is prospective in nature. Since the continuance of Anti-dumping duty is of prospective nature, it is also settled law, that the Designated Authority need not follow the rigours of the original investigation initiated for imposition of definitive Anti- dumping duty.

5.3 We are fortified in our view by the judgment of the apex court in the case of Rishiroop Polymers Pvt. Ltd. Vs. Designated Authority & Addi. Secretary - 2006 (196) ELT 385 (SC) wherein there Lordship in paragraph 37, clearly spelt out the role of the Designated Authority in the case of sunset or mid-term review, which is as under:

"37. The final findings recorded by the Designated Authority at the time of initial imposition of anti-dumping duty on the existence of injury to the domestic industry must be considered to continue to remain valid, unless it is proved to be otherwise, either by the Designated Authority in suo motto review or by the applicant seeking review. In the present case, the review had been initiated by the Designated Authority. Neither the Designated Authority nor the appellant had placed any material on record which could possibly displace the findings given by the Designated Authority at the stage of initial anti-dumping duty."

5.4 In these cases before us in hand, the Designated Authority has recorded the likelihood of continuance of the dumping and the injury in Paragraph 109, 110, 111 and 112, which is as under:

"109. The Authority analyzed the data on likelihood of continuation or recurrence of dumping and injury in the light of the various arguments presented by the interested parties. It was observed that in the current scenario, the volume of the imports from the subject countries recorded a very significant jump in the POI, substantially cutting into the share of the domestic industry in the POI. On the other hand, the Authority also noted that the domestic industry capacity is just about half the domestic demand. so that imports are inevitably required to meet the shortfall. As regards the effect of subject country imports on prices, there is price under-cutting and price suppression, as well as price under selling of 9% in the POI. based on the Supreme Court orders for computing NIP.

110. In assessing the likely scenario, country-wise analysis of import data and rates shows the following highlights:

v In the case of Korea, the Authority notes that the current dumping margin of the cooperating exporters have been determined to be positive on the basis of a single country specific normal value determined in pursuance to Supreme Court judgment. Similarly, the current dumping margin for Germany is negative.

v Imports from Korea RP registered a growth rate of 27% for the period

2003-06 as per Indian import data and 15% as per Korean export data in the WTA. The rate of growth of imports from Germany as per the Indian import data in the WTA for the same period was 13% vis-a-vis a 2% rate of growth in EU exports of NBR to India. In both countries there is evidence of growing imports, not of reduction.

v On the other hand, the growth in the rate per MT of the product was merely 1% as per Indian import data for Germany compared to 4% for EU Export data while that for Korea RP was 10 & 30% respectively for 2003-06.

v Thus, the import volumes from Korea RP are set to grow while the unit export rates to India have consistently remained lower than the export rate to other countries.

111. The possibility of continued imports from Korea RP has also been examined in the light of the data provided by the exporters.

v Looking at the capacity and its utilization levels, it is noted that in the case of both KKPC and LGC capacity utilization have been higher than 100% in 2006, implying the possibility of capacity expansion given the rising export volumes. There are also reports of LGC's and KKPC's planned capacity expansion in the press.

v Total sales have remained close to production levels or exceeded them, particularly in the POI, which again supports the possibility of capacity expansion.

112. It is also a fact that despite anti-dumping duty in place for 10 years, the imports from Korea have not shown any decline. On the contrary, as KKPC has its admitted, the quantities exported by them to India have consistently remained at about 30% of total demand in the country. Demand itself has been growing rapidly during the injury period."

After recording the above examination, the Designated Authority has held that the subject goods are being dumped from the Korean RP and there is likelihood export to India continuing at the dumped prices leading to consequential injury to the domestic industry and that a domestic industry is likely to continue to incur loses if the duties are either revoked or reduced in terms of imports from Korea. It is also recorded that the domestic industries continue to suffer material injury on account of low per unit realization due to the price effect of the dumped exports.

5.5 As regards the submissions made by the learned counsel for the appellant that the Designated Authority has not considered their submission in proper prospective, we hold that in the sunset review, the Designated Authority is only required to look into the likelihood of the injury to the domestic industry in case of discontinuance of the Anti-dumping duty, which in our considered view has been done so by the Designated Authority.

5.6 In conclusion, we hold that the final findings of the Designated Authority dated 4.10.2008 in 2°d sunset review for continuance of definitive Anti-dumping duty on NBR imported from Korea needs to be upheld and consequently the Notification No.1/2009 dated 2.1.2009 issued by the department of Revenue also needs to be upheld. We order accordingly.

6. The appeals are rejected.

7. Since, we have decided the appeals, the stay petitions stand disposed off.

(Pronounced in open Court on 3.8.2011)

