
(2016) 09 CESTAT CK 0003

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Anti Dumping Appeal No. 12 Of 2012, Anti Dumping Stay No. 1056 Of 2012

M/s. Shanghai Fortune Chemical Company Ltd.

APPELLANT

Vs

Designated Authority And Ors.

RESPONDENT

Date of Decision : 05-09-2016

Acts Referred:

Customs Tariff Act, 1975 — Section 1(B), 9A(I), 9AA, 9A(5)
Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 — Rule IA, 23

Citation : (2016) 09 CESTAT CK 0003

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

Bench : Full Bench

Advocate : Dhruv Gupta, Amit Singh, Govind Dixit, Reena Khair, Rajesh Sharma, Rita Jha

Final Decision : Dismissed

Judgement

1. The challenge in the present appeal is to the Final Finding of the Designated Authority dated 7.12.2011 passed in Sunset review and the consequent

Notification No.7/2012 -Cus (ADD) dated 7.1.2012 issued by the Ministry of Finance, Government of India levying definitive Anti-Dumping duty on

imports of product under consideration from China PR.

2. As per facts on record, provisional duties were imposed on Saccharin, the product under consideration, during the original investigation on 6.6.2006,

and after arriving at the Final Finding, the notification imposing Anti Dumping duty was issued, which in the normal ordinary course, would have

expired on 5.6.2011. It is seen that Mid-term Review was undertaken in December 2009 and duties rates were revised in respect of the present

appellant. It may be noted here that though the duty rate was revised for the present appellant, the same were still less compared to other Chinese

exporters. There was no challenge to the original Final Finding as also to the Mid-term Review Finding of the Designated Authority.

3. Thereafter the Sunset review was initiated by Designated Authority on 8.12.2010, by adopting the period of investigation of 15 months starting from 1.4.2009 to 30.6.2010. The appellant participated along with its related trading company M/s. Majestic International Trading Company Ltd.

incorporated in Hong Kong, co-operated with the Designated Authority throughout the course of Sunset review and filed a detailed response for

exporter's questionnaire, attended the public hearing, filed written submissions as also rejoinder and filed comments on the disclosure statement.

4. After following the due process of law, the Designated Authority observed that during the period of investigations, the exports by the appellant to

India was very low and at higher prices. As per facts on record during the period of investigation, there were only two exports of 5 MT to one M/s.

Eljay Impex at USD 14 per Kg and export of 1 MT of peppermint traders through M/s. Majestic International Trading Company Ltd at USD 8.35 per

Kg. By taking note of the low exports during the period of investigation at higher transaction values, the DA had come to a finding that the exports

during POI were stage managed and were not reflecting the correct factual position. Accordingly, the DA took into consideration the entire data

including the concerned exporters from third country exports at the average price and the exports to India during pre POI period and post POI period.

He accordingly, concluded that the export price of the appellant was factually incorrect and was stage managed inasmuch as their exports to India

during POI do not appear to be normal and reliable as compared to their exports during the period prior to POI and post POI. Accordingly, he rejected

the exports price of the appellant and also increased the rate of Anti Dumping duty, and recommended that there is likelihood of continuation and

intensification of dumping and injury on account of import of subject goods from the subject country. He accordingly recommended the extension of

Anti Dumping duty for a further period of 5 years along with recommendation for increase in the Anti Dumping duty.

5. Based upon the recommendations of the Designated Authority, notification No.7/2012-Cus (ADD) dated 7.1.2012 was issued by the Ministry of

Finance, Government of India. The said Final Finding of the Designated Authority along with notification are the subject matter of the present appeal.

6. Learned advocate Shri Dhruv Gupta appearing for the appellant made a primarily contested on the period of investigations adopted by the

Designated Authority. It stands contended before us that the period adopted by the Designated Authority was of 15 months as against normal practice

of adoption of 12 months for a Sunset review. Learned Advocate submits that there was no justification on the part of the Designated Authority to

resort to the export price of the appellant during the POI inasmuch as the appellant could not have foreseen that the Designated Authority is going to

adopt 15 months period of investigation and as such, could not have staged managed their exports. Inasmuch as the initial levy of Anti Dumping duty

was going to expire on 5.6.2011, the exporter even if presumed to be in a position to stage manage the export price would have normally done it during

the one year last leg of the period from 6.6 2006 to 5.6.2011. The exporter would not have known that Sunset review would be taken up to two and a

half years prior to date of expiry of duty and as such, could not have managed the show.

Explaining in principle, learned Advocate further submits that the exports during the period in question were low and at a higher price as the duty was

increased during Mid term review and in view of higher Anti Dumping duties, they could not have got any orders from India till several months later.

Regular orders started coming only after August, 2010 and the regular exports started and continued during September, October and November, 2010.

By that time the Designated Authority had not initiated the Sunset review and no one could have thought that August - November, 2010 would not

form part of POI for the sunset review. Inasmuch as the Sunset review was initiated six months earlier than the expiry itself, for which the exporter

could not have foreknown or anticipated there is no justification for adopting the period from April, 2009 - end of June, 2010.

The learned Advocate also contested that during the sunset review, the rate of duty could not be increased and the Designated Authority, if at all

satisfied about the continuation of imposition of Anti Dumping duty, should have recommended continuation of the earlier rate.

7. We have heard Ms. Reena Khair, Shri Rajesh Sharma and Ms. Rita Jha, learned advocates for the interested party, Shri Dhruv Gupta, learned

Advocate appearing for the Appellant and Shri Amit Singh, learned Advocate appearing for the Designated Authority and Shri Govind Dixit, learned

DR appearing for the Revenue.

7. After carefully considering the submissions made by all the sides, we find that the appellants main grievance is that the period of investigation, for

the purpose of sunset review was adopted as 15 months instead of 12 months normally adopted by the Designated authority. On being questioned as

to whether in terms of Anti Dumping Rules, the period of investigation in the sunset review is to be restricted to a period 12 months, learned Advocate

fairly agreed that there is no such provision of law and he is making submission on the basis of regular practice being adopted by the Designated

Authority. He has given examples of other sunset reviews undertaken by the Designated Authority.

However, we do not feel convinced with the above argument of learned advocate. Sunset review, which is mandatory in nature is undertaken by the

authorities to adjudge as to whether the Anti Dumping duties imposed, shall unless revoked earlier ceased to have effect on expiry of 5 years from the

date of such imposition and whether expiry of duty is likely to lead to continuation or reoccurrence of the dumping and injury. In normal circumstances,

in terms of provisions of section 9A(5) of the Customs Tariff Act, 1975, the Anti Dumping duty imposed ceased to have effect on expiry of 5 years.

The Hon'ble Delhi High Court in the Writ Petition No. 51693/2006 had held that sunset review is mandatory and accordingly, in terms of Rule 23 of

the Rules, the Designated Authority initiated suo moto sunset review investigations. It stand recorded in the impugned Final Findings of the Designated

Authority that as per consistent practice, period of investigation ranging from 6 months to 18 months is usually fixed. In the absence of any period of

investigation prescribed in the law, for the sunset review, we do not find any merits in the contention of the learned advocate that the period of 15

months for sunset review, adopted by the Designated Authority, was unjustified. Learned Advocate has not been able to show any provisions of law

to support his above stand. Accordingly, we do not find any merits in the above contention of the learned Advocate.

9. Further, it stands argued before us that they could not have anticipated that the Designated authority is going to adopt the period from April to June,

2010 of the sunset review and as such, could not have stage managed their exports. Needless to observe that regulatr exporters are well aware that sunset review would be undertaken prior to expiry of the notification in question. As such, that in mind, there is every likelihood of the exporters to stage manage the exports during the period of investigation of sunset review. It has not been rebutted before us that fact of low exports at higher price during the POI is not correct reflection of the facts. The explanation of the exporters that they could not get the orders during POI period on account of enhancement of duty during Mid-term review are self-contradictory to their own stand that post POI, there was increase in the exports. It cannot be held to be a mere coincidence that prior to POI and subsequent to POI, there were exports ranging in the higher volume bracket and it is only during POI that the exports were low and at higher price. Consequent reduction in the export prices during the pre POI and post POI are suggestive of the fact that prices were not in the normal course of business but were rather stage managed with a preliminary motive to obtain the favourable results from sunset review. As such, we fully agree with the Final Finding of the Designated Authority that in case of doubt of export price during POI, he is free to look into the other corroborative evidence and to arrive at a finding.

10. The appellant has further argued that during the course of sunset review, the rate of duty cannot be enhanced. We have perused the provisions of Rule 23 of the Anti Dumping Rules, which relates to Mid-term review and sunset review. It is the contention of the assessee that only rate of duty can be enhanced in Mid term review and not during sunset review. By drawing our attention to the said Rule 23 of the Rules, it stands contended that sub-rule IA, which provides for variation in the Anti Dumping duty applies to only mid-term review and Rule sub section 1(B) which relates to sunset review does not provides any variation in the rate of duty and only relates to the extension of period.

11. We find that an identical issue stands considered and decided by the Tribunal in the case of Indian Graphite Manufacturers Association vs.

Designated Authority [2006 (199) ELT 722 (Tri-Delhi)]. It was held that a cumulative reading of the section 9A(I), 9A(5) and 9AA, read together,

empowers the Designated Authority for recommending the amount of Anti Dumping Duty different from the amount of duty imposed at the time of

initial imposition of definitive Anti Dumping duty. The purpose of review will be frustrated if the Designated Authority cannot recommend higher or lower Anti dumping duty than the original definitive Anti Dumping duty. As such, the said plea of the exporter / appellant is also not tenable.

12. In view of our foregoing analysis of the submissions made before us during the course of hearing (as other grounds taken in the appeal were not pressed), we find no infirmity in the impugned Final Findings and accordingly, reject the appeal.

(Pronounced in the open Court on 05.09.2016)