

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

ANTI DUMPING APPEAL NO. 51668 OF 2022

(Arising out of Final Findings F.No. 6/30/2020-DGTR dated 31.03.2022 and Office Memorandum No. F. No. CBIC 190354/211/2021-TRU Section-CBEC dated 6th June 2022)

**Chemical and Petrochemicals
Manufactures Association (CPMA)**

...Appellant

708, 7th Floor, Kailash Building,
26, KG Marg, New Delhi,
Delhi 110001

VERSUS

1. The Union of India

Through the Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001

**2. Designated Authority, Directorate
General of Trade Remedies**

Department of Commerce & Industry
Parliament Street, Jeevan Tara
Building, 4th Floor, New Delhi-110001

3. Reliance Industries Limited

Maker Chambers – IV Nariman Point
Mumbai 400 021, India

4. Qatar Embassy

EP-31A, Chandragupta Marg,
Chanakyapuri, New Delhi, Delhi-110021

5. Saudi Arabia Embassy

C-14, Anand Niketa
New Delhi-110021, India

6. Singapore Embassy

E-6, Chanfragupta Marg,
Chanakyapuri, New Delhi, Delhi-110021

7. Thailand Embassy

56N, Nyaya Marg, Chanakyapuri,
New Delhi, Delhi-110021

8. United Arab Emirates Embassy

12, Chandragupta Marg, Chanakyapuri,
New Delhi, Delhi-110021

9. United States of America Embassy

H5XQ+264, Panchsheel Marg,
Shantipath, Chanakyapuri, New Delhi-110021

10. Ministry of Economy, UAE

Central Park Towers, DIFC,
38th, 39th, 40th and 41st Floor
Dubai-United Arab Emirates

11. General Authority of Foreign Trade, Saudi Arab

General Authority of Foreign Trade,
King Khalid Road, Riyadh, Kingdom of Saudi Arabia

12. Qatar Chemical and Petrochemical Marketing and Distribution Company (Muntajat)

Q.P.J.S.C, Qatar Amwal Tower,
Omar Al Mukhtar St, Al Dafna Doha, Qatar

13. Qatar Petrochemical Company (QAPCO)

Q.P.J.S.C, Qatar Amwal Tower,
Omar Al Mukhtar St, Al Dafna Doha, Qatar

14. Al-Jubail Petrochemical Company (KEMPYA), Saudi Arabia

P.O. Box No.: 10084 Jubail Industrial City,
Jubail, Saudi Arabia

**15. Aramco Chemicals Company, Saudi Arabia
Saudi Aramco**

P.O. Box 5000, Dhahran 31311
Kingdom of Saudi Arabia

16. Abu Dhabi Polymers Company Limited (Borouge) L.L.C, Saudi Arabia

Borouge Tower, Shaikh Khalifa Energy
Complex, Corniche Road,
P.O. Box 6925, Abu Dhabi, UAE

17. Dow Saudi Arabia Product Marketing B.V., Saudi Arabia

Herbert H. Dowweg 5, Hoek, 4542 NM,
Terneuzen, Netherlands

**18. Sadara Chemical Company, Saudi Arabia
Jubail Industrial City 2**

P.O. Box 11811, Jubail 31961, KSA

19. Saudi Basic Industries Corporation, Saudi Arabia

P.O. Box 5101, Riyadh 11422, Saudi Arabia

20. Saudi Kayan Petrochemical Company, Saudi Arabia

P.O. Box 110320, Jubail Industrial City 31961
K.S.A.

21. Borouge Pte Limited, Singapore

Borouge Tower, Shaikh Khalifa Energy Complex, Corniche Road, P.O. Box 6951, Abu Dhabi, UAE

22. Dow Chemical Pacific (Singapore) Private Limited, Singapore

260 Orchard Rd, 18-01
The Heeren Singapore 238855

23. Marubeni ASEAN Pte Limited, Singapore

138 Market Street, 31-01 Capita Green
Singapore 048946, Singapore

24. SABIC Asia Pacific Pte Limited, Singapore

One Temasek Avenue, 06-01 Millenia Tower,
Singapore

25. Sumitomo Chemical Asia Pte Limited, Singapore

3 Fraser Street, 07-28 DUO Tower,
Singapore 189352

26. GC Marketing Solutions Company Limited, Thailand

Energy Complex Building A, 9th Fl 555/1
Vibhavadi Rangsit Rd, Chatuchak, Bangkok
10900, Thailand

27. PTT Global Chemical Company Limited, Thailand

555/1 Energy Complex, Building A,
14th-18th Floor, Vibhavadi Rangsit Rd,
Chatuchak, Bangkok 10900

28. SCG Performance Company Limited, Thailand

1 Siam Cement Road, Bangsue, Bangkok
10800 Thailand

29. SCG Plastics Company Limited, Thailand

1 Siam Cement Road, Bangsue, Bangkok
10800 Thailand

30. Thai Polyethylene Company Limited, Thailand

10 I-1 Rd. Map Ta Phut Industrial Estate,
Muang District, Rayong 21150 Thailand

31. Abu Dhabi Polymers Company Limited, UAE

Borouge Tower, Shaikh Khalifa Energy
Complex, Corniche Road – Abu Dhabi
United Arab Emirates

32. Basell Trading International FZE, UAE

214 Al Quds St-Dubai Airport Free Zone
Dubai-United Arab Emirates

**33. Dow Chemical International Private Limited,
UAE**

1st Floor, Godrej Business District, Godrej IT
Park, Lal Bahadur Shastri Rd, Block B,
Pirojshanagar, Vikhroli West, Mumbai,
Maharashtra 400079

**34. Dow Chemical Pacific (Singapore)
Private Limited, UAE**

260 Orchard Rd, 18-01,
The Heeren, Singapore 238855

**35. National Petrochemical Industrialization
Marketing Company Limited, UAE**

Economic Gate G3, East Ring Road, Qurtuba
Street, 26707, Riyadh 11496

**36. Rabigh Refining & Petrochemical Company,
UAE**

P.O. Box: 101, Rabigh 21911
Kingdome of Saudi Arabia

**37. Saudi Ethylene and Polyethylene Company,
UAE**

Tasnee Building, Street 210, Jubail Industrial
City, 35579, 1st Floor Saudi Arabia

38. Equistar Chemicals LP, USA

A LyondellBasell Company
P.O. Box 777, Channelview, TX 77530
United States

39. Westlake Longview Corporation, USA

2700 Post Oak Blvd Ste 1950 Houston, TX,
77056-5795, USA

40. Westlake Polymers LLC, USA

2801 Post Oak Blvd Houston,
TX 77056, United States

41. Renuka Agencies Limited, Hongkong

A/603, Mangalya, Opp Marol Fire Brigade,
Andheri East, Mumbai 400059, India

42. Tetra Pak Global Supply SA, Switzerland

Avenue General-Guisan 70, 1009 PULLY

43. Paharpur 3P Private Limited

Plot No. 19, Site IV Industrial Area
Sahibabad 201010 (Delhi NCR), India

44. Tetra Pak India Private Limited

15th Floor, One Horizon Center,
Golf Course Road, DLF Phase 5, Sector-43,
Gurgaon-122002 (Haryana)

**45. SABIC Research & Technology
Private Limited**

India Technology Center, Plot No. 81 to 85,
Chikkadunnasandra Village, Anekal Taluk,
Off Sarjapura-Attibele State Highway,
Bangalore 562125, India

46. Uflex Limited

A-107-108, Sector-IV, Noida (U.P), India

47. Ultimate Flexipack Limited

C-20, Sector-57, Noida-201301

**48. Telangana and Andhra Plastics
Manufacturers Association**

914, 9th Floor, Ragava Ratna Towers,
Chirag Ali Lane, Abids Hyderabad 500001

49. All India Plastics Manufacturers, Association

A-52, Street No. 1, M.I.D.C. Marol, Andheri
(East), Mumbai – 400093, India

50. Organization of Plastics Processors of India

404/405, Golden Chamber, New Link Road,
Andheri West, Mumbai – 400053

51. Sipchem Marketing Company, Saudi Arabia

3rd Floor, Sipchem Building, King Saud Street,
P.O. Box 130 Al Khobar, 31952 Saudi Arabia

52. International Polymers Company, Saudi Arabia

P.O. Box 1201 Jubail Industrial City31961
Kingdom of Saudi Arabia

53. Micro Manufacturing Enterprise

Room No. 468 C, Udyog Bhawan, Rafi Marg,
New Delhi – 110011

54. Husch Blackwell LLP

1801 Pennsylvania Avenue, NW, Suite 1000
Washington. DC 20006

55. TPI Polene Public Company Limited

26/56 Chan Tat Mai Rd.,
Tungmahamek, Sathorn, Bangkok
10120, Thailand

**56. All India HDPE/PP Woven Fabrics
Manufacturers Association**

110, 1st Floor, L.S.C., D & E Market,
Pocket E, Sarita Vihar, New Delhi,
Delhi 110076

.....Respondents**WITH****ANTI DUMPING MISCELLANEOUS APPLICATION NO. 50691 OF 2022**

(filed by the appellant)

ANTI DUMPING MISCELLANEOUS APPLICATION NO. 50692 OF 2022

(filed by the appellant)

APPEARANCE:

Shri Vipin Jain, Shri Rajesh Sharma, Ms. Tuhina Sinha and Shri Samarth,
Advocates for the Appellant

Shri S. Seetharaman and Shri Darpan Bhuyan, Advocates for Respondent No.
14,19,24,45

Shri Jayant Raghuram and Shri Ashutosh Arvind Kumar, Advocates for
Respondent No. 21

Shri Abhay Chattopadhyay and Shri Nagham Ghai, Advocates for the
Respondent No. 5, 25

Shri Ashish Singh, Ms. Juhi Chawla, Ms. Shiraz Patodia and Shri Mayank
Singhal, Advocates for the Respondent No. 18

Ms. Jaya Kumari, Authorized Representative for the Revenue

Shri Ameet Singh, Advocate for the Designated Authority

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA MEMBER (JUDICIAL)

Date of Hearing: 14.11.2022

Date of Decision: 19.12.2022

FINAL ORDER NO. 51191/2022

JUSTICE DILIP GUPTA:

The grievance raised by the appellant, which is a domestic industry, is that despite a recommendation having been made by the designated authority in the final findings notified on 31.03.2022 for imposition of anti-dumping duty under section 9A of the Customs Tariff Act 1975¹, the Central Government did not issue the notification for imposition of anti-dumping duty. The relief, therefore, that has been claimed in the appeal is that the office memorandum dated 06.06.2022 issued by the Ministry of Finance, Department of Revenue, Tax Research Unit conveying the decision of the Central Government not to impose anti-dumping duty proposed in the final findings of the designated authority be set aside and a direction be issued to the Central Government to issue a notification for imposition of anti-dumping duty, based on the recommendation made by the designated authority.

2. During the pendency of the appeal two Miscellaneous Applications bearing no's. 50691 of 2022 and 50692 of 2022 were filed by the appellant.

3. The former application contains the following two prayers:

"a) pending final hearing of this appeal, impose the provisional anti-dumping in terms of the sub-section 2 of Section 9A of the Customs Tariff Act, 1975 at the rates mentioned in paragraph 203 of the Final Finding issued by Respondent No. 2.

1. the Tariff Act

b) direct the Respondent No. 1 to submit its records/files wherein reasons, if any, for not imposing the anti-dumping duty in the present matter, has been recorded."

4. The prayer made in the latter application is as follows:

"(a-1) To call for records and relevant files, basis which the Respondent no. 1 had decided to not impose anti-dumping duty as recommended by the Respondent no. 2, and after considering the reasons, if any, recorded therein, modify the impugned order issued by the Respondent no. 1 and impose Anti-dumping duty as recommended by the Respondent no. 2.

(b-1) Impose the provisional anti-dumping duties in terms of the Sub-section 2 of Section 9A of the Customs Tariff Act, 1975, pending determination in the matter."

5. It transpires from the records that the appellant had filed an application before the designated authority for initiation of anti-dumping investigation under the provisions of the Tariff Act and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995² on imports of Low Density Polyethylene³ originating in or exported from Qatar, Saudi Arabia, Singapore, Thailand, United Arab Emirates and United States of America⁴. The designated authority, thereafter, issued a public notice dated 23.10.2020 for initiation of anti-dumping investigation under rule 6(1) of the 1995 Anti-Dumping Rules to determine the existence, degree and effect of alleged dumping

2. the 1995 Anti-Dumping Rules
3. the subject goods
4. the subject countries

and to consider recommendation for imposition of anti-dumping duty, if any. The period of investigation for the purpose of anti-dumping duty was from 01.04.2019 to 30.06.2020 and the injury investigation period was from 01.04.2016 to 31.03.2019 and the period of investigation. Oral hearings were conducted and the parties that attended the oral hearings were advised to file written submissions on the views expressed orally, followed by rejoinders, if any. As contemplated under rule 16, the essential facts of the investigation were disclosed to the known interested parties by a disclosure statement dated 17.01.2022. The interested parties, including the appellant, filed comments to the disclosure statement.

6. Thereafter, the designated authority notified the final findings on 31.03.2022. The relevant portions of the conclusion drawn and the recommendation by the designated authority in the final findings are as follows:

"K. CONCLUSION & RECOMMENDATIONS

201. Having regard to the contentions raised, submission made, information provided and facts available before the Authority as recorded above and on the basis of the above analysis of dumping and consequent injury to the domestic industry, the Authority concludes that:

- a. The subject goods produced by the domestic industry is a like article to the product under consideration imported from the subject countries.
- b. While there is a particular market situation in Saudi Arabia, there is no evidence to show that it prevented a proper comparison between the domestic and export sales.

- c. The Authority has determined that dumping margin for exports from Qatar and UAE is negative. Thus, the Authority concludes that imports from Qatar and UAE into India are not dumped imports. Rule 14(c) of the Rules requires that the Authority shall terminate an investigation immediately if it determines that the margin of dumping is less than two per cent of the export price. Thus, the investigation is terminated against exports of the subject goods from UAE and Qatar in accordance with Rule 14(c) of the Rules. Accordingly, the subject countries comprise of USA, Saudi Arabia, Singapore, and Thailand only.
- d. **The subject goods are being dumped into India from the subject countries i.e. USA, Saudi Arabia, Singapore and Thailand.** Considering the normal value and the export price of the product under consideration, the dumping margin has been determined for the subject countries. **The dumping margin is positive and significant for subject countries.**
- e. The volume of imports into India declined in 2018-19, as the domestic industry increased capacity. However, during the period of investigation, the imports have increased, in absolute terms as well as in relation to production and consumption.
- f. **The imports of the subject goods from the subject countries are undercutting the prices of the domestic industry.**
- g. **The imports have suppressed and depressed the prices of the domestic industry, as the landed price and selling price of the domestic industry declined despite an increase in raw material price.**
- h. The capacity, production and capacity utilization of the domestic industry increased. The domestic sales of the domestic industry increased till 2018-

19, but declined marginally in the period of investigation.

- i. While the market share of domestic industry has declined slightly in the period of investigation, it has increased over the period. By comparison, the market share of imports has reduced over the injury period, though is higher than the preceding year. The domestic industry has maintained its market share by lowering its selling price to match with the dumped imports.
- j. The inventories of the domestic industry have increased over the period.
- k. The profits, the cash profits and the return on capital employed of the domestic industry have declined significantly during the injury period.
- l. The EBITDA per unit of the domestic industry has declined over the injury period. Therefore, the decline in profitability of the domestic industry cannot be attributed to increase in finance and depreciation costs.
- m. While the volume parameters of the domestic industry are not affected by the imports, the price and profitability parameters show a significant adverse impact. This implies that while the domestic industry was able to increase its market share, it was forced to compromise on its profits and reduce its prices to achieve the same. This is because the imports entered the market at prices below the prices of the domestic industry. The price of imports has declined, despite an increase in the price of ethylene. It is, therefore, evident that while the domestic industry has not suffered injury in terms of its volume parameters, the imports have adversely impacted the profitability of the domestic industry. **Thus, the domestic industry has suffered material injury.**
- n. The domestic industry is engaged in production of a number of polymers. However, injury analysis is required to be conducted with

reference to the performance of the like article, or the narrowest range or group of products, which includes the like article. Therefore, the performance of the polymer segment as a whole is not determinative of the performance of the domestic industry for the subject goods.

- o. The injury to the domestic industry has been caused by the dumping of the subject imports in India, and the injury cannot be attributed to other known factors, including Covid-19, shutdown of plant, increase in capacity, imports by the domestic industry or use of naptha.**
- p. The price of imports from other countries is much higher than the price of imports from the subject countries.**
- q. The information on record shows that non-imposition of anti-dumping duty will adversely impact the indigenous production, while imposition of anti-dumping duty will not materially impact the consumers or the downstream industry or the public at large.**
- r. The imposition of the anti-dumping duty will not hamper the availability of the product under consideration but will ensure that the same is available at fair prices. Further, the product under consideration can also be imported from other sources, such as Qatar, UAE, Belgium, Netherlands, Korea RP.**
- s. The impact of duties on the prices of the downstream products would be negligible.**
- t. On the basis of the information provided by the interest parties and the investigation conducted, the Authority is of the view that imposition of the anti-dumping duty will not be against public interest.**
- u. In view of the foregoing, the Authority concludes that the domestic industry has suffered material injury due to the**

significant dumping of the product under consideration from the subject countries.

202. ***** **Having initiated and conducted the investigation into the dumping, the injury and the causal link in terms of the provisions laid down under the Anti-Dumping Rules, the Authority is of the view that the imposition of the anti-dumping duty is required to offset the effect of dumping and remedy the injury to the domestic industry. The Authority considers it necessary to recommend imposition of the anti-dumping duty on the imports of the subject goods from the subject countries.”**

(emphasis supplied)

7. It would be seen from the aforesaid final findings that it was on the basis of a detailed analysis carried out by the designated authority on the aspect of dumping and consequent injury to the domestic industry that the designated authority found as fact that the subject goods were being dumped into India from the subject countries and that the dumping margin was positive and significant. The designated authority also found that injury was caused to the domestic industry by dumping of the subject goods and that non imposition of anti-dumping duty would adversely impact the production in India. The designated authority ultimately concluded that the domestic industry had suffered material injury due to significant dumping of the subject goods from the subject countries and, therefore, made a recommendation to the Central Government to impose anti-dumping duty on the import of the subject goods from the subject countries.

8. An office memorandum dated 06.06.2022 was then issued by the Ministry of Finance to convey the decision of the Central Government not to impose anti-dumping duty. It is reproduced below:

"F. No. CBIC-190354/211/2021-TRU Section -CBEC

**Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)**

Room No. 156, North Block,
New Delhi, dated 6th June, 2022

OFFICE MEMORANDUM

Subject: Anti-Dumping Investigation concerning imports of "Low Density Polyethylene (LDPE)" from Qatar, Saudi Arabia, Singapore, Thailand, United Arab Emirates and United States of America-regarding

The undersigned is directed to refer to anti-dumping investigation final findings on the above subject issued vide notification F. No. 6/30/2020-DGTR, dated the 31st March, 2022, wherein it was recommended to impose anti-dumping duty on imports of "Low Density Polyethylene (LDPE)" originating in or exported from Saudi Arabia, Singapore, Thailand and USA.

2. In exercise of the powers conferred by sub-sections (1) and (5) of section 9A of the Customs Tariff Act, read with rules 18 and 20 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, the Central Government, after considering the final findings of the designated authority, has decided not to accept the aforesaid recommendations.

Under Secretary (TRU-I)"

9. The main contention that has been advanced by Shri Vipin Jain, learned counsel appearing for the appellant assisted by Shri Rajesh Sharma, Ms. Tuhina Sinha and Shri Samarth is that the office memorandum, communicating the decision of the Central Government not to impose anti-dumping duty, despite a recommendation having

been made by the designated authority in the final findings to impose anti-dumping duty should be set aside for the reason that the principles of natural justice have been violated and even otherwise the decision is arbitrary, unreasoned and bad in law. The contention advanced by Shri S. Seetharaman learned counsel for the respondents assisted by Shri Darpan Bhuyan and other learned counsel for the respondents, is that the appeal is not maintainable under section 9C of the Tariff Act and that the exercise of power by the Central Government under section 9A of the Tariff Act read with rule 18 of the 1995 Anti-Dumping Rules is legislative in nature and so neither the principles of natural justice are required to be complied with nor a reasoned order is required to be passed.

10. In order to examine these submissions it would be useful to first examine the relevant provisions of the Tariff Act and the 1995 Anti-Dumping Rules.

11. Anti-dumping duty is imposed by the Central Government under section 9A of the Tariff Act. It provides that where any article is exported by an exporter or producer from any country to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. The margin of dumping, the export price and the normal price have all been defined in section 9A(1) of the Tariff Act.

12. Sub-section (5) of section 9A provides that anti-dumping duty imposed shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

13. Sub-section (6) of the section 9A of the Tariff Act provides that the margin of dumping has to be ascertained and determined by the Central Government, after such enquiry as may be considered necessary and the Central Government may, by notification in the Official Gazette, make rules for the purpose of this section.

14. In exercise of the powers conferred by sub-section (6) of section 9A and sub-section (2) of the section 9B of the Tariff Act, the Central Government framed the 1995 Anti-Dumping Rules.

15. The duties of the designated authority are contained in rule 4 and the relevant portion is reproduced below:

"4. Duties of the designated authority.-

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(d) to recommend to the Central Government-

(i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and

(ii) the date of commencement of such duty;"

16. Rule 5 deals with initiation of investigation to determine the existence, degree and effect of any alleged dumping.

17. Rule 6 deals with the principles governing investigation and it is reproduced below:

"6. Principles governing investigations.-

(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such

public notice shall, inter alia, contain adequate information on the following:-

- (i) the name of the exporting country or countries and the article involved;
- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed; and
- (vi) the time-limits allowed to interested parties for making their views known.

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

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to-

- (i) the known exporters or to the concerned trade association where the number of exporters is large, and
- (ii) the governments of the exporting countries: Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefor in writing.

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

Explanation: For the purpose of this sub-rule, the notice calling for information and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

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

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

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

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

18. Rule 10 deals with determination of normal value, export price and margin of dumping and it is reproduced below:

"10. Determination of normal value, export price and margin of dumping-

An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal

value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules."

19. Rule 11 deals with determination of injury and it is reproduced below:

"11. Determination of injury. –

(1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

- (i) there is a concentration of dumped imports into an isolated market, and
- (ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market."

20. Rule 17 deals with final findings. It is reproduced below:

"Final findings.-

(1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and

submit to the Central Government its final finding-

- (a) as to, -
 - (i) the export price, normal value and the margin of dumping of the said article;
 - (ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;
 - (iii) a causal link, where applicable, between the dumped imports and injury;
 - (iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

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- (b) Recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry after considering the principles laid down in the Annexure III to rules."

21. Rule 18 deals with levy of duty and the relevant portion is reproduced below:

"18. Levy of duty.-

- (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17."

22. **Annexure-I** to the 1995 Anti-Dumping Rules deals with the principles governing the determination of normal value, export price and margin of dumping. It provides that the designated authority while determining the normal value, export price and margin of dumping

shall take into account the principles contained in clauses (1) to (8) of the Annexure.

23. **Annexure-II** to the 1995 Anti-Dumping Rules deals with the principles for determination of injury. It provides that the designated authority while determining the injury or threat of material injury to domestic industry or material retardation of the establishment of such an industry, and causal link between dumped imports and such injury, shall inter alia, take the principles enumerated from (i) to (vii) of Annexure II under consideration.

24. **Annexure-III** to the 1995 Anti-Dumping Rules deals with the principles for determination of non-injurious price.

25. It is keeping in mind the aforesaid legal provisions that the submissions advanced by the learned counsel for the appellant and the learned counsel for the private respondents, as also the learned authorized representatives appearing for the respondent Union of India have to be considered.

26. The maintainability of the appeal under section 9C of the Tariff Act was examined at length by this very Bench in **M/s. Apcotex Industries Limited vs. Union of India and 38 others⁵** and it was held that the appeal would be maintainable against the decision of the Central Government contained in the office memorandum not to impose anti-dumping duty.

27. The Bench also examined whether the determination by the Central Government was legislative in character or quasi-judicial in nature and after examining the relevant provisions of the Tariff Act, the 1995 Anti-Dumping Rules and the decisions of the Supreme Court

5. **Anti-Dumping Appeal No. 51491 of 2021 decided on 30.08.2022**

and the High Courts observed that the function performed by the Central Government would be quasi-judicial in nature. The Bench also, in the alternative, held that even if the function performed by the Central Government was legislative, then too the principles of natural justice and the requirement of a reasoned order have to be compiled with since the Central Government would be performing the third category of conditional legislation contemplated in the judgment of the Supreme Court in **State of Tamil Nadu vs. K. Sabanayagam and another**⁶. The relevant observation of the Bench in **Apcotex Industries Limited** are as follows:

"75. Thus, even if it is assumed that the Central Government exercises legislative powers when it imposes anti-dumping duty or has taken a decision not to impose anti-dumping under section 9A of the Tariff Act, it would still be a piece of conditional legislation falling under the third category of conditional legislations pointed out by the Supreme Court in **K. Sabanayagam**. This is for the reason that in the scheme of the Tariff Act and the 1995 Anti-Dumping Rules, the Central Government has necessarily to examine all the relevant factors prescribed in the Tariff Act and the Rules for coming to a conclusion whether anti-dumping duty has to be levied or not. It cannot be that it is only the designated authority that is required to follow the procedure prescribed under the Tariff Act and the Rules framed thereunder for making a recommendation to the Central Government, for while taking a decision on the recommendation made by the designated authority in the final findings the Central Government would have to examine whether the designated authority has objectively considered all the relevant factors on the basis of the evidence led by the parties. This would be more clear from the provisions of section 9A(6) of the Tariff Act which provide that the margin of dumping, which is a relevant factor, has to be

ascertained and determined by the Central Government, after such inquiry as it may consider necessary. Rules may have been framed by the Central Government under which the designated authority has to carry out a meticulous examination, but nonetheless when the Central Government has to take a decision on the recommendation made by the designated authority in the final findings such factual aspects cannot be ignored. There is a clear lis between the domestic industry on the one hand and the foreign exporter and importers on the other hand since the domestic industry desires anti-dumping duty to be imposed for which purpose investigation is carried out by the designated authority, but the foreign exporters and importers resist the imposition of anti-dumping duty. For exercise of such power, a detail procedure has been provided in the Tariff Act, the 1995 Anti-Dumping Rules or the 1997 Safeguard Rules.

78. It will be evident from the aforesaid judgments that the Central Government, while acting as a delegated legislative body, performs two distinct and separate functions in the context of the levy of anti-dumping and safeguard duty. The first is the function of framing Rules such as the Anti-Dumping Rules 1995 or the 1997 Safeguard Rules, which function is clearly legislative. The second function is the making of a determination under rule 18 of the Anti-Dumping Rules 1995 or rule 12 of the 1997 Safeguard Rules, which function is quasi judicial in nature. While the exercise of the legislative function of framing Rules is not appealable before the Tribunal, the second function of making a determination is expressly made appealable under section 9C of the Tariff Act. The function of making a determination in individual cases by applying the broad legislative framework and policy already set out in the Statute is not at all legislative in character, but clearly a quasi-judicial function requiring the Central Government to follow the principles of natural justice by affording an opportunity to the party likely to be adversely.

82. In view of the judgments of the Supreme Court in **K. Sabanayagam, Cynamide India Ltd.** and **Godawat Pan Masala**, and the decision of the Tribunal in **Jubilant Ingrevia Limited**, it has to be held that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty.”

(emphasis supplied)

28. The Bench also examined the requirements of compliance of the principles of natural justice and a reasoned order and held as followed:

“82. In view of the judgments of the Supreme Court in **K. Sabanayagam, Cynamide India Ltd.** and **Godawat Pan Masala**, and the decision of the Tribunal in **Jubilant Ingrevia Limited**, it has to be held that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty.”

(emphasis supplied)

29. The Bench thereafter observed:

“84. In view of the aforesaid decision of the Supreme Court in **Punjab National Bank**, the submission advanced by learned counsel for the appellant deserves to be accepted. Thus, if the Central Government forms a *prima facie* opinion that the final findings of the designated authority recommending imposition of anti-dumping duty are not required to be accepted then tentative reasons have to be recorded and conveyed to the domestic industry so as to give an opportunity to the domestic industry to submit a representation. Though the Tariff Act and the 1995 Anti-Dumping Rules or the 1997 Safeguard Rules do not provide for such an opportunity to be provided to

the domestic industry, but the principles of natural justice would require such an opportunity to be provided."

(emphasis supplied)

30. Learned authorized counsel for the appellant has also placed a decision of the Gujarat High Court in **Realstripes Limited & 1 other(s) vs. Union of India & 1 other(s)**⁷. The High Court repelled the contention advanced on behalf of the Central Government that the issuance of the notification was legislative in character and the relevant observations are as follows:

"6.5 It was another submission in vain on behalf of respondents seeking to assert that notification rescinding the countervailing duty is of legislative character and amounts of exercise of legislative power by the Central Government and therefore, not amenable to judicial review. 6.5.1 The submission is devoid of substance, if we examine the decisions on this score.*****"

31. After considering the decisions of the Supreme Court in **PTC India Ltd. vs. Central Electricity Regulatory Commission**⁸, **National Thermal Power Corp. vs. Madhya Pradesh State Electricity Board**⁹ and **Reliance Industries vs. Designated Authorities**¹⁰, the Gujarat High Court also observed:

"6.5.4 Under Section 9-C of the Customs Tariff Act, appeal lies against the order of determination or review of the countervailing duty before the Customs, Excise and Service Tax Appellate Tribunal, constitution under Section 129 of the Customs Act, 1962. In view of this, the Notification necessarily takes a quasi-judicial colour."

7. R/Special Civil Application No. 4495 of 2022 decided on 02.09.2022
8. (2010) 4 SCC 603
9. (2011) 15 SCC 580
10. (2006) 10 SCC 368

32. The Gujarat High Court also examined whether quasi-judicial process was involved in issuance of the notification by the Central Government and after analyzing the decision of the Supreme Court in **Indian National Congress vs. Institute of Social Welfare¹¹**, the Gujarat High Court held that the notification issued by the Central Government would be quasi-judicial in nature.

33. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that the decision taken by the Central Government not to impose anti-dumping duty despite a recommendation having been made by the designated authority for imposition of anti-dumping duty, cannot be sustained as it does not contain reasons nor the principles of natural justice have been compiled with. The matter, therefore, would have to be remitted to the Central Government for taking a fresh decision on the recommendation made by the designated authority for imposition of anti-dumping duty on the import of the subject goods from the subject countries.

34. Two applications have also been filed by the appellant. The first application seeks a direction that pending final hearing of this appeal, provisional anti-dumping duty in terms of section 9A(2) of the Tariff Act at rates mentioned in the final findings of the designated authority may be imposed and a direction may also be issued to the Central Government to submit its records/files wherein reasons, if any, for not imposing the anti-dumping duty have been recorded. Paragraph 7 of the application is reproduced below:

11. (2002) 5 SCC 658

"7. The applicant submits that the appellate proceeding before the CESTAT is a continuation the proceedings carried out by the Respondent No. 1 & 2. As such, being the first appellate authority, this Hon'ble Tribunal interalia has the power under Section 9A(2) read with Rule 41 to impose provisional levy. Under Section 9A(2), a provisional levy can be imposed, pending (final) determination, on the basis of a provisional estimate of normal value and dumping margin. In the present facts, the Respondent no. 2 has, after conducting elaborate investigation, issued its final conclusion on the normal value and dumping margin, as well as injury margin and has accordingly recommended imposition of anti-dumping duty, which was, however, not acceded to by the Respondent no. 1. The Applicant has in the present appeal challenged the said decision of the Respondent no. 1. As such, pending the final determination to be made by this Hon'ble Tribunal in the present matter, the applicant prays that power under subsection 2 of Section 9A to impose the provisional duty at the rates mentioned in paragraph 203 of the Final Finding issued by Respondent No. 2, be exercises and provisional levy of Anti-dumping duty be imposed forthwith by this Hon'ble Tribunal."

35. The second application that has been filed by the appellant is that the Tribunal may, after calling for the records of the Central Government and examining them itself, impose anti-dumping duty on the basis of the final findings notified by the designated authority. In this connection it has been stated that even though the Tribunal while deciding Anti-Dumping Appeals filed earlier by **Jubilant Ingrevia Limited vs. Union of India and 5 others**¹² and **Apcotex Industries Limited** on 27.10.2021 and 30.08.2022 had remanded the matter to the Central Government to reconsider the recommendations made by the designated authority, but the Central Government till date has not taken a decision. It has, therefore, been

12. Anti-Dumping Appeal No. 50461 of 2021 decided on 27.10.2021

stated that the Tribunal may, in the present case, examine the reasons, if any, after calling for the records of the Central Government and impose anti-dumping duty in terms of the recommendations made by the designated authority.

36. Learned counsel for the appellant submitted that if the matter is being remanded to the Central Government for reconsideration on the aspect of whether or not a definitive anti-dumping duty is to be imposed, a provisional levy in terms of section 9A(2) of the Tariff Act to the extent of duty recommended by the designated authority may, in the meantime, be imposed by the Tribunal as all the pre-requisites stand satisfied. Learned counsel also submitted that while remanding the matter to the Central Government for determination of a definitive anti-dumping duty, provisional assessment be ordered in respect of the imports of the subject goods, for the reason that if the Central Government orders a definitive anti-dumping duty to be imposed on the subject goods, such duty would have to relate back to the date of original order i.e. the date of issuance of office memorandum. In this connection, learned counsel submitted that in view of the principle of restitution, the order passed by the Tribunal under section 9C of the Tariff Act confirming, modifying or annulling the order appealed against has to necessarily relate back to the date of the original order (i.e office memorandum). In this regard, learned counsel placed reliance on the decisions of the Supreme Court in **Mekha Ram and others vs. State of Rajasthan¹³, Priyanka Overseas Pvt. Ltd. vs. Union of India¹⁴** and **Kuil Fireworks Industries vs. CCE¹⁵**.

13. Civil Appeal No. 2229-2234 of 2022 decided on 29.03.2022

14. 1991 (51) E.L.T. 185 (S.C.)

15. 1997 (95) E.L.T. 3

37. Learned counsel also submitted that though rule 20(1) of the 1995 Anti-Dumping Rules provides that a levy of anti-dumping duty should take effect from the date of its publication in the Official Gazette, but this would be applicable only in respect of notifications issued consequent to the final findings of the designated authority and not to notifications issued for levy of duty consequent to an order of the Tribunal modifying or annulling the earlier decision. According to the learned counsel, levy of duty in such an event would come into effect from the date of original determination made by the Central Government i.e. the date of the office memorandum, otherwise the statutory remedy of an appeal before the Tribunal would be rendered ineffective.

38. Learned counsel also submitted that considering the settled legal principle of "retrospective overruling", a decision of a judicial/quasi-judicial authority must be made effective from the date when the incorrect order was passed and in this connection the decision of the Supreme Court in **Asstt. Commissioner vs. Saurashtra Kutch Stock Exchange¹⁶** has been relied upon.

39. Learned counsel also submitted that provisional assessment is also warranted if the Tribunal directs the Central Government to decide upon the prayer of the appellant for imposition of a provisional levy under section 9A(2) of the Tariff Act pending the determination on the definitive anti-dumping duty for the reason that section 9A(3) of the Tariff Act provides for retrospective imposition of provisional levy, i.e. with effect from upto 90 days prior to the notification of such

16. (2008) 14 SCC 171

provisional levy, subject to satisfaction of the conditions mentioned therein, which conditions are satisfied in the facts of the present case.

40. As the appeal itself is being decided it would not be appropriate, at this stage, to issue any direction for imposition of provisional anti-dumping duty. The matter is being remitted to the Central Government to take a fresh decision. It would be for appellant, if so advised, to move an application before the Central Government for imposition of provisional anti-dumping duty and there is no reason to doubt that in case such an application is filed, an appropriate order would be passed at an early date by the Central Government. It will also not be appropriate for the Tribunal, at this stage, to impose any anti-dumping duty on the basis of the final findings of the designated authority as it is the Central Government which has to take a reasoned decision in the matter one way or the other.

41. Regarding the prayer that the Central Government should submit the records/files containing reasons for not imposing anti-dumping duty, the Central Government has not taken a stand that reasons are contained in the files. In fact, the stand of the Central Government is based only on the office memorandum dated 06.06.2022 wherein the Under Secretary has informed that the Central Government, after considering the final findings of the designated authority, has decided not to accept the aforesaid recommendation. This is the only communication that has been relied upon by the learned authorized representative for the Central Government to defend the order. In any case, the matter is being remitted to the Central Government to reconsider the recommendation made by the designated authority in the light of the observations made in the order.

42. In the end, learned counsel for the appellant also urged that the Tribunal may protect the interest of the appellant in the same manner as was protected by the Delhi High Court in the writ petition filed by the Union of India against the decision of the Tribunal in **Jubilant Ingrevia.**

43. The Tribunal had also set aside a similar office memorandum issued by the Under Secretary conveying the decision of the Central Government not to impose anti-dumping duty despite a recommendation made by the designated authority for imposition of anti-dumping duty. The order passed by the Delhi High Court on 05.09.2022 in W.P(C)5185/2022 filed by the Union of India against the decision of the Tribunal in **Jubilant Ingrevia**, is reproduced below:

"W.P.(C) 5185/2022& CM No.15389/2022[Application filed on behalf of the petitioner seeking interim relief]

5. The respondent before us is the domestic industry. It is not in dispute that the Designated Authority [in short "DA"] via notification dated 25.08.2020 has recommended the imposition of anti-dumping duty [in short "ADD"].

6. It is also not in dispute that the Government of India has disagreed with the recommendation made by the DA.

7. This decision forms part of the Office Memorandum (OM) dated 14.12.2020.

8. Given this position, we are of the view that as an ad-interim measure, the following direction would suffice, as the need to impose ADD would arise only if the respondent were to succeed in the instant writ petition.

(i) The provisional assessment of imports concerning the product in issue will be made for the time being. The importers would, thus, be put to notice of the possibility of ADD being imposed, albeit as per law, if, as noticed

above, the respondent were to succeed in the instant writ petition.

(ii) It is, however, made clear that the aforesaid direction will not create any equities in favour of the respondent.

(iii) Furthermore, this direction will not have an impact on the merits of the writ petition. 9. CM No.15389/2022 is disposed of in the aforesaid terms. 10. List the matter on 02.03.2023."

44. A similar interim order was passed by the Delhi High Court in W.P(C) No. 6758/2022 on 05.09.2022 in the writ petition filed by the Union of India to assail the decision of the Tribunal rendered in **Association of Synthetic Fibre Industry vs. Union of India and 4 others¹⁷** in which a similar office memorandum was set aside.

45. Though the present appeal is being disposed of but a decision has yet to be taken by the Central Government in the light of the observations made in the order. It is, therefore, considered appropriate to pass a similar order, as was passed by the High Court, which will remain operative till a decision is taken by the Central Government on the recommendation made by the designated authority for imposition of anti-dumping duty. The directions are as follows:

- (i) The provisional assessment of imports concerning the subject goods from the subject countries will be made for the time being;
- (ii) It is, however, made clear that the aforesaid direction will not create any equities in favour of the domestic industry; and

17. Anti-Dumping Appeal No. 51049 of 2021 decided on 01.11.2021

(iii) This direction will not have any impact on the decision to be taken by the Central Government pursuant to the directions issued for reconsideration of the recommendation made by the designated authority.

46. Thus, for all the reasons stated above, the office memorandum dated 06.06.2022 is set aside and the matter is remitted to the Central Government to reconsider the recommendation made by the designated authority in the final findings in the light of the observations made above. The directions contained in paragraph 45 of this order shall continue to operate till such time as a decision is taken by the Central Government. The appeal is allowed to the extent indicated above. The two Miscellaneous Applications also stand disposed of in terms of the observations made above. The learned authorized representative appearing for the Department shall send a copy of this order to all the concerned zones where the imports of the subject goods are likely to be made.

(Order Pronounced on **19.12.2022**)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**

**(RACHNA GUPTA)
MEMBER (JUDICIAL)**