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February  
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## Article

### Anti-dumping duty – Power to grant exemption

By **Atul Gupta**

Generally duties are levied by the legislature. The statute as enacted by the legislature would indicate the nature, incidence and rate of levy. The statute may not contain detailed conditions for administration of the levy. Such conditions may be notified by the Government if the concerned statute grants power therefor. The taxation statute may also delegate power to the Government to grant exemption from the levy of duties in public interest or under other conditions as may be specified in the statute.

In this article, let us examine the legality of the notifications issued by the Central Government under Section 25 of the Customs Act, 1962 granting exemption from the levy of anti-dumping duty, safeguard duty and countervailing duty. The provisions of anti-dumping duty, safeguard duty and countervailing duty are analogous in nature for examining this issue. First of all, Section 25 of the Customs Act, 1962 empowers the government to exempt the goods of any specified description from the whole or any part of the duty of customs leviable thereon, if it is considered necessary in public interest.

Accordingly, only customs duties may be exempted under Section 25. Let us see whether anti-dumping duties are 'customs duties'. Section 2(15) of the Customs Act defines "duty" to mean a duty of customs leviable under that Act. Section 12 of the Customs Act further provides that duties of customs shall be levied at such rates as being specified under the Customs Tariff Act, 1975, or any other law for the time being

in force, on goods imported into India. Section 2 of the Customs Tariff Act provides that the rates at which duties of customs shall be levied under the Customs Act are specified in the first or second schedules. Anti-dumping duty is neither levied under the Customs Act nor is the rate of duty specified in the first or second schedule to the Customs Tariff Act. Anti-dumping duties are levied under Section 9A of the Customs Tariff Act 1975. The Hon'ble Supreme Court has held that the anti-dumping duty is not a customs duty leviable under the Customs Act<sup>1</sup> and, therefore, the assessment provisions contained in the Customs Act are not applicable to assess anti-dumping duty. At that time though the provisions contained in the Customs Act relating to non-levy, short levy, refunds and appeals were applicable to anti-dumping duty in the same manner as they were applied in relation to duties leviable under the Customs Act [sub-section 9A(8)<sup>2</sup>].

To overcome such interpretations, the scope of sub-section 8 of Section 9A was enlarged. The amended Section 9A provides that the provisions of the Customs Act, the rules and regulations framed thereunder relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties as far as may be applied to the duty chargeable under this section (i.e. Section 9A of the Customs Tariff Act 1975) as they apply in relation to duties leviable under the Customs Act<sup>3</sup>. However, once again sub-section 8

<sup>1</sup> Civil Appeal No. 706 of 2005 decided on 8-9-2006 decided by the Hon'ble Supreme Court in *Sneh Enterprises v. Commissioner of Customs, New Delhi*

<sup>2</sup> Inserted by Section 89 of the Finance Act, 2000

<sup>3</sup> Substituted by Section 76 of the Finance (No.2) Act, 2004

was substituted<sup>4</sup> and at the same time a provision to validate it from January 1, 1995 was passed. This time the words ‘including those’ were added.

Now, one should examine whether the power to grant exemption from duty of customs delegated under Section 25 of the Customs Act, 1962 could be used by the Central Government to grant exemption from anti-dumping duty. In this regard, analogous provisions contained in Section 3 of the Customs Tariff Act relating to imposition of additional duty of customs equal to excise duty, sales tax, local taxes and other charges may be relevant. Sub-section 8 of Section 3 of the Customs Tariff Act borrows the provisions of the Customs Act and the rules and regulations made thereunder, including those relating to drawbacks, refunds and ‘exemptions from duties’ as they apply in relation to duties leviable under the Customs Act. Section 9A dealing with the levy of anti-dumping duty does not specifically borrow the provisions relating to grant of ‘exemptions’ provided for under the Customs Act, 1962.

Further, the Customs Tariff Act also provides for imposition of other duties such as safeguard duty under Section 8B, China specific safeguard duty under Section 8C, countervailing duty on subsidized article under Section 9. Sections 8B and 8C empower the Central Government to grant exemption only to such *quantity* of any article as may be specified in the notification. It may also be kept in mind that Section 9A(2A) grants exemption to EOU from imposition of anti-dumping duty.

The power to impose duty as a delegated legislation does not include the power to grant exemption unless it is specifically provided<sup>5</sup>. So a doubt may be raised

that the Central Government is lacking the power to grant exemption from anti-dumping duty.

The Central Government issues notifications to grant exemption from these duties under Section 25 of the Customs Act. The exemptions can be of two types, namely, end-use based exemptions on a case specific basis and exemptions from duties payable upon importation of inputs for utilization in the manufacture of goods for exports. The example for the first category is exemption granted to importers of Metcoke<sup>5</sup>. The example of second category is exemption of import of goods under Advance License<sup>6</sup>. It is pertinent to keep in mind that if the EOUs have been granted exemption under the statute itself, whether Central Government can grant exemptions to other similarly placed entities is a question to be answered.

The issue may be divided into four periods (i) before amendment in 2000, (ii) amendment after 2000, (iii) amendment after 2004 and (iv) amendment after 2009 with validation provisions. It is evident that before the amendment made in 2004, when the Hon’ble Supreme Court held that the provisions of assessment were not applicable, no power could be traced under Section 25 for the Central Government to grant exemption from anti-dumping duty. Even after amendment in 2004, the borrowed provision was exhaustive in respect of the matters contained in the then inserted sub-section 8. However, when sub-section 8 was reinserted in 2009, the provision was made inclusive in respect of the matters contained in the then inserted sub-section. This means, matters like ‘exemption’ being analogous in nature vis-a-vis the matters contained in the sub-section like determination of rate of duty, it may be safely assumed

<sup>4</sup> Substituted by Section 101 of the Finance (No.2) Act, 2009

<sup>5</sup> W.P. (C) No. 592 of 2004(U), decided on 30-6-2009 decided by Kerala High Court in *Rubfila International Ltd. v. Union of India*

<sup>6</sup> Notification No. 5/2003-Cus, dated 3-1-2003 and Notification No. 100/2002-Cus, dated 1-10-2002

<sup>7</sup> Notification No. 41/1997-Cus, dated 30-4-1997 and Notification No. 75/1999-Cus, dated 11-6-1999

that the provision relating to exemption has also been borrowed. Further, the provision as inserted in 2009 validated the relevant provisions from January 1, 1995. This means the exemption notifications issued under Section 25 before 2009 (though may have been issued without power) got validated.

Therefore, it appears that the notifications issued under Section 25 of the Customs Act granting

exemption from anti-dumping duty, safeguard duty or countervailing duty are not beyond the power delegated to the Central Government by the Legislature. Though for avoiding any unwarranted litigation, the provision in sub-section 8 could have been worded more explicitly.

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## Trade Remedy News

### Anti-dumping actions by India

Product	Country	Notification No.	Date of Notification	Remarks
Meta Phenylene Diamine (MPDA)	China	14/4/2012-DGAD	1-1-2013	Provisional ADD recommended
Plain Gypsum Plaster Boards	China, Indonesia, Thailand, and UAE	14/45/2010-DGAD	15-1-2013	Definitive ADD recommended
Stainless Steel Cold Rolled Flat Products of 200 series	China, UAE and USA	Office Memorandum 14/21/2010-DGAD	4-1-2013	Termination of investigation upon request from applicant domestic producers approved on 27-7-2011

### Safeguard action by India

Product	Country	Notification No.	Date of Notification	Remarks
Hot Rolled Flat Products of Stainless Steel-304 grade	China	Notification No. 1/2013-Cus. (SG)	4-1-2013	Provisional Safeguard duty imposed at the rate of 20% <i>ad-valorem</i> , for 200 days

### Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon steel welded pipe	Canada	Dumping file #: 4214-36	7-1-2013	ADD re-investigation initiated
Frozen warm water shrimp	USA		18-1-2013	Countervailing duty investigation initiated

## WTO News

### US files dispute against Indonesia on import restrictions for animal products

The United States has sought consultations with Indonesia on latter's certain measures regarding importation of horticulture products and animals & animal products. As per communication dated 10-1-2013 of the US authorities, Indonesia subjects the importation of horticultural products, animals and animal products to non-automatic import licenses and quotas (requiring completion of multiple steps) prior to importing, thereby restricting imports of goods. The US also argues that the licensing regimes do not appear to be administered in a uniform, impartial and reasonable manner, because the measures are applied inconsistently and unpredictably. The measures are said to be inconsistent with Articles X:3(a) and XI:1 of the GATT 1994; Article 4.2 of the Agriculture Agreement; and Articles 1.2, 3.2 and 3.3 of the Import Licensing Agreement of the WTO.

### Argentina's import licensing measures – WTO sets up DSB panel

The Dispute Settlement Body of the WTO has, on 28-1-2013, established a panel (DS438,

DS444, DS445) pursuant to second time request by EU, USA and Japan to establish the panel in the dispute concerning Argentina's import licensing regulations. According to the complaining countries, the measures are inconsistent with the GATT, 1994 and the Import Licensing Agreement. India along with 13 other countries has reserved third party rights to participate in the proceedings of the panel. It may be noted that through Resolution No. 11/2013, dated 25-1-2013, Argentina has annulled 17 earlier resolutions, signed between 1999 and 2011 to establish import restrictions on certain products and hence, before the WTO, Argentina was of the view that the panel should not rule on measures that were not in force at the time of panel composition.

In another dispute between Argentina and USA, the DSB has also established panel. The dispute concerns certain US measures affecting imports of animals and animal products from Argentina (DS447). India along with Australia, China, EU and Korea have reserved their third-party rights in this dispute as well.

## Ratio Decidendi

### Appeal to High Court against Tribunal's order in anti-dumping case

The Bombay High Court has held that order of the Tribunal [Customs, Excise & Service Tax Appellate Tribunal or CESTAT] in anti-dumping matters would be subject to appeal, either to High Court under Section 130 of the Customs Act, 1962 or in the case where appeal relates to the rate of duty or to a valuation of the goods for the purposes of assessment, to the Supreme Court under Section

130E of the said Act. The Court held that the provisions of the Customs Act, 1962 in relation to appeals have been incorporated in Section 9A(8) of the Customs Tariff Act, 1975 and must, therefore, necessarily apply in a manner that would make the appellate provision intelligible and workable. [*Rishiroop Polymers Private Limited v. Designated Authority* – Bombay High Court Order dated 16-1-2013 in Writ Petition No.10277 of 2011].

## Trade remedies by USA - Countervailing duties against non-market economies permissible

The United States Court of International Trade has held that US can impose countervailing duties against non-market economies. The court affirmed the law enacted in March 2012 that affirmed Commerce's authority to retroactively impose countervailing duties on subsidised goods from NMEs. The law itself was enacted after the US court of appeal had earlier denied such powers to the Commerce Department. The Court presently found that said law is rationally related to legitimate government interests and therefore does not violate the due process or equal protection requirements of the US Constitution. Additionally it was found that, if the law is a retrospective change,

it does not run foul of the Ex Post Facto Clause because it is remedial and not penal in nature. [*GPX International Tire Corporation v. United States* - United States Court of International Trade, Order dated 7-1-2013].

It may be noted that in 2011 the Appellate Body of the WTO's DSB in DS379, had held that the United States' concurrent imposition of countervailing duties and anti-dumping duties, on the same products, calculated pursuant to the USDOC's non-market economy methodology, resulted in the imposition of a "double remedy", which was inconsistent with the United States' obligations under WTO. Currently, China has raised the inconsistency of the said 2012 law before the WTO in its latest dispute DS449 where a panel has already been established.

## News Nuggets

### India, SA agree on early finalisation of India-SACU PTA negotiations

On 14th January 2013, India's Union Commerce, Industry and Textiles Minister and Minister of Trade and Industry of South Africa, reviewed the India-Southern African Customs Union (SACU) Preferential Trade Agreement (PTA) negotiations in Johannesburg and agreed for the need for early finalisation of the India and SACU PTA. The Indian Minister has requested his counterpart in South Africa to expedite SACU's response to India's proposal of average Margin of Preference (MOP) in the PTA.

The Southern African Customs Union includes South Africa, Lesotho, Swaziland, Botswana and Namibia. Till date around 10 rounds of talks concerning the Trade Agreement have taken place between the two since 2007

and as per reports, both sides have set a target of achieving \$15 billion worth of bilateral trade by 2014.

### Seal products ban – EU's Advocate General seeks dismissal of petition against ban

European Union's ban on sale of seal products in Europe has been at the centre of many debates since 2009 when the regulation was adopted by the European Parliament and the Council of European Union. While some see killing of seals by clubbing as an act of cruelty towards animals, others debate it as means of livelihood of a large ethnic group in Canada and other parts of Arctic. Recently, on 17-1-2013, EU's Advocate General has sought dismissal

of the petition filed before the European Court of Justice, by one such group against the ban on hunting of seals. The Court's advisor was of the view that the petitioner cannot seek for annulment of the legislative Act as it is not of direct and individual concern to them. Taiwan and Russia have also banned the sale of said products in their markets. Presently two disputes, by Canada and Norway, have been initiated against EU, in the WTO, terming EU's Regulations banning seal products as violative of various provisions of the TBT Agreement, Articles I:1, III:4 and XI:1 of the GATT 1994 and Article 4.2 of the Agriculture Agreement.

### Zeroing in on targeted dumping

Zeroing continues to be part of the US anti-dumping regime. In the case of large residential

washers from Korea and Mexico, it found that foreign manufacturers/retailers had engaged in 'targeted dumping'. The term refers to a situation where the authorities find 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'. The authorities thus compared the weighted average to transaction rather than the norm of weighted average normal value and weighted average of prices of all comparable export transactions. This move has been criticised even within the US stating that a phenomenon like 'Black Friday' sales (post Thanksgiving Day) when all retailers offer aggressive discounts has not been properly factored into the calculations. Also adequate explanation required as per Article 2.4.2 of the Anti-dumping agreement in order to use the zeroing technique has not been provided.

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