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Article

Refund of anti-dumping duty as a result of review investigation

By **Bhargav Mansatta**

Section 9AA[1] of the Customs Tariff Act, 1975 provides for refund of anti-dumping duty in certain cases. It provides as below:

1. Where upon determination by an officer authorised in this behalf by the Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed under sub-section (1) of section 9A on any article, in excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty.

Rule 21A[2] lays down the procedure to determine the amount paid in excess of the actual margin of dumping. Rule 21A (1) provides as below:

1. Where an importer is of the opinion that he has paid any anti-dumping duty imposed under sub-sections (1) or sub-section (1A) of section 9A of the Act on any imported goods, in excess of the actual margin of dumping in relation to such goods, he may file an application for determination of the actual margin of dumping in relation to such goods before the designated authority in such form and accompanied by such documents as the said authority may specify in this behalf.

An officer authorised by the Central Government i.e. the Designated Authority (DA) is required to determine through an investigation if the importer has paid excess duty than the actual margin of dumping. However, in case of review carried out under Rule 23 of the Anti-dumping Rules, similar exercise of re-determination of dumping margin as well as injury margin is carried out by the DA. Period of Investigation (POI) is ascertained (during which the anti-dumping duty was in force) and margin of dumping and margin of injury is re-determined.

The purpose of the review determination is to assess the need for continuation of duty. However, final determination in the form of final finding will certainly reflect the difference between the actual margin of dumping and injury during the POI as compared to the anti-dumping duty actually paid.

Thus, in both cases, investigation is carried out on a product on which there is already an anti-dumping duty and in both the cases margin of dumping is re-determined for the identified period.

Final finding at the end of the mid-term review may determine a lesser margin of dumping or a lesser margin of injury than the actual duty paid. In such a case, refund of anti-dumping duty, for the period for which no

[1] Inserted by Section 89 of the Finance Act, 2000 (10 of 2000).

[2] Inserted by the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Amendment Rules, 2012

dumping was found, is clearly warranted. The outcome of the mid-term review can give rise to a legitimate claim of refund under Section 9AA.[3]

Section 9A of the Customs Tariff Act provides for imposition of duty not exceeding the margin of dumping. Furthermore, under Rule 17(1)(b) readwith Rule 4(d)(i) of the Anti-dumping Rules, 1995, no duty is to be imposed when the margin of injury is negative. Thus, when the duty is determined to be in excess of the prescribed statutory limit, the same is required to be refunded as the excess duty is now determined to have been collected wrongly and thereby without the authority of law. No tax can be levied or collected without the authority of law.[4]

However, the structure of the Customs Tariff Act and the Anti-dumping Rules under Section 9AA and Rule 21A respectively provides for a separate investigation procedure for refund mechanism. Such investigation, in effect, will not and cannot be materially different from a review. If a mid-term review is carried out at the behest of either of the interested party then, for the purpose of refund of anti-dumping duty, no separate investigation should be required.

Also, it may happen that the review determines that there is margin of dumping but there is no margin of injury during the POI. As noted, a non-injurious dumping is not supposed to be remedied under the Anti-dumping Rules. In express terms, refund rules provide for refund of duty when it is determined that it exceeds the margin of dumping. Thus, a situation may arise that despite the determination of negative injury margin or non-injurious dumping, the authority may still refuse to refund the duty on the ground that the duty is not paid in excess of margin of dumping and hence is not refundable. The fact that the duty was wrongly paid and collected and is now determined to have been without the authority of law cannot be overlooked.

Somewhat similar situation may arise in case of Sunset Review (SSR). Section 9A (5) of the Customs Tariff Act, 1975 provides that the anti-dumping duty ceases to have effect at the end of five years unless the continuation of it is recommended by way of SSR. SSR which is initiated before the expiry of five years, an anti-dumping duty may be extended pending the outcome of a review for a period not exceeding one year. In event, the determination made for discontinuation of duty at the end of the review due to non-existence of margin of dumping/ injury or causal link, the anti-dumping duty collected for one year in addition to the five year period also needs to be refunded as the same was collected without any determination of dumping, injury and causal link.

It is very likely, given the non-harmonious framework of the applicable law, that a claim of refund of duty which arises as an outcome of such reviews may be rejected by the authority simply on the ground that a separate

[3] Designated Authority may nevertheless recommend continuation of anti-dumping duty if there is likelihood of continuation of injury based on post POI analysis despite negative dumping or injury margin during the POI. In any case, such a determination will not affect the legitimacy of refund claim.

[4] Article 265 of the Constitution of India.

investigating mechanism under the rules is required to be fulfilled.

The procedural dichotomy in the law is required to be remedied through harmonious reading of the provisions or else it results in a situation whereby a duty which could not have been imposed could nevertheless be allowed to be retained if already collected. It prejudices the interest of the exporters/importers, by imposing anti-dumping duty, even though they are not involved in dumping of the subject goods or have caused injury to the domestic industry.

[The author is a Senior Associate, International Trade Team, Lakshmikumaran & Sridharan, New Delhi]

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Albendazole	China	F.No.14/31/2013-DGAD	11-9-2014	Anti-dumping investigation initiated
Bare elastomeric filament yarn	All countries	GSR D-22011/23/2013	29-9-2014	Safeguard investigation terminated
Cold rolled flat products of stainless steel of chromium type (of specified specifications)	All countries	F.No.D-22011/17/2014	19-9-2014	Safeguard investigation initiated
Digital offset printing plates	China	F,No.15/27/2013-DGAD	26-9-2014	ADD mid-term review initiated
Electrical insulators of glass or ceramics/ porcelain	China	40/2014-Cus. (ADD) and F.N.14/11/2013-DGAD, dated 4-9-2014	16-9-2014	Provisional anti-dumping duty imposed while time period for completing AD investigation extended till 4-3-2015
Flexible Slabstock Polyol	China, Korea RP and Chinese Taipei	42/2014-Cus. (ADD)	25-9-2014	ADD extended till 30-8-2015 after initiation of sunset review
Pentaerythritol	Chinese Taipei	No.15/19/2012-DGAD and Office Memorandum No 354/29/2002-TRU (Pt.-II)	5-9-2014	Time period for completing sunset review extended till 24-10-2014
Phenol	Chinese Taipei and USA	43/2014-Cus.(ADD)	30-9-2014	Definitive ADD imposed

Product	Country	Notification No.	Date of Notification	Remarks
Sodium Citrate	All countries, other than developing countries except China	F.No. D-22011/20/2013	16-9-2014	Safeguard duty recommended to be imposed for 3 years
Sulphur Black	China	41/2014-Cus. (ADD)	18-9-2014	ADD re-imposed for 5 years

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen warmwater shrimp	USA	79 FR 55430 [A-533-840]	16-9-2014	ADD - Correction in final results of 2012-13 administrative review. Cash deposit rate applied to Devi Fisheries Limited extended to Satya Seafoods Private Limited and Usha Seafoods
Oil Country Tubular Goods	USA	79 FR 53688 [C-533-858]	10-9-2014	CVD - Total estimated net countervailable subsidy rates revised
Open mesh fabrics of glass fibres	EU	2014/C 330/06	23-9-2014	ADD - Initiation of partial interim review, examining possibility of granting exemption from duty applicable to imports from China as extended to imports consigned from India
Preserved mushrooms	USA	79 FR 52300 [A-533-813]	3-9-2014	Administrative review of anti-dumping duty rescinded

WTO News

Argentina appeals panel report on import measures

Justifying WTO Director General's statement made on 26-9-2014 that WTO should prepare for around 10-12 appeals being filed per year during the next 24 months, Argentina on the same day filed a Notice of Appeal regarding the Panel Report in *"Argentina – Measures Affecting the Importation of Goods"* (DS438). Argentina seeks review of the Panel's findings that it's alleged "Trade Related Requirements" (conditions imposed on economic operators by Argentina for import or to obtain certain benefits) measure is inconsistent with Articles III:4 and XI:1 of the

GATT 1994, as well as the Panel's separate findings that said measure is inconsistent "as such" with said Articles. Argentina also requests the Appellate Body to modify or reverse Panel's findings implying that any import procedure which is a "necessary pre-requisite for importing goods" or by which a Member "determines the right to import" is outside the scope of Article VIII of the GATT dealing with fees and formalities connected with importation and exportation. The dispute had started with EU's complaint on 25-5-2012 while the Panel report was circulated by the DSB in August this year. India along with 15 other countries exercised their third party rights in the dispute.

EU seeks panel establishment against Russia

Both European Union and Russia have been, in recent times, vocal in airing their displeasure against the sanctions or trade restrictions imposed by the other, with the EU alleging that the Russian ban on import of food from EU violates WTO norms and Russia on its part calling EU's trade restrictions against some specific Russian entities as not in line with various multilateral agreements. While no new dispute has been filed in the WTO concerning the above, EU has requested the DSB, on 15-9-2014, for establishment of the panel in the dispute pertaining to imposition of anti-dumping duties by Russia on imports of light commercial vehicles from Germany and Italy (DS479). According to EU, consultations had not resolved the matter and Russia had not shown any intention to remove the measures which as per the consultation request are in violation of various provisions of Anti-dumping Agreement. *[For details of the dispute, please refer International Trade Amicus-June 2014 issue]*

India's preference to domestically manufactured goods questioned

European Union has, on 16-9-2014, questioned India's certain preferences to domestically manufactured telecommunication products. EU has sought clarifications on planned value addition targets, methodology and timeline of implementation of measures for domestically manufactured telecommunication products and on the planned self-certification system by vendors. According to the document circulated in WTO on 17-9-2014, EU's similar request concerning electronic products has not been answered by India till date.

Ecuador launches safeguard investigation on floors of wood and bamboo & accessories

On 2 September 2014, Ecuador notified the WTO Committee on Safeguards that it has initiated on 28 August 2014 a safeguard investigation on floors of wood and bamboo and accessories.

Interested parties must present themselves before the Investigating Authority, and justify their status within 30 days from the date of initiation of the investigation. According to the notification, Investigating Authority will receive information up to sixty days after the initiation of the investigation.

Ratio Decidendi

ADD – Effect of non-cooperation and change in trade pattern in circumvention investigation

The Court of Justice of the European Union (CJEU) has upheld the findings on circumvention of anti-dumping duty and consequential extension of such duty on imports of specified goods (hand pallet trucks) from China, to similar imports from Thailand. Noting non-cooperation from exporting producers in Thailand, and the Thai authorities and significant increase in imports from Thailand during the period of investigation, the court held that there was a change in the pattern of trade between China, Thailand and the EU. The court in this regard also relied upon the Advocate General's Opinion that definition of 'circumvention' leaves a broad margin of discretion to the EU institutions, inasmuch as no details of nature and form of the 'change in the pattern of trade between third countries and the Union' are given. On the question of link between the change in pattern and circumvention, the court answering the reference from Finance Court, Hamburg, noted that change in the pattern of trade between Thailand and the EU began just after the imposition of the anti-dumping duty on imports from China. It held that such coincidence in time constitutes significant evidence to establish link between considerable increase in imports from Thailand and the imposition of the anti-dumping duty on such goods from China. It was also noted that there was no explanation from exporters from Thailand and the Thai Government for significant increase in exports to EU and as per information available with EU authorities there was significant amount of assembly operations of the product concerned in Thailand.

The questions referred to the court were whether a change in the volume of exports from the third country (Thailand here) at issue makes it possible, in itself, to establish a link between imports from countries subject to the anti-dumping duty and imports from countries which the anti-dumping duty must be expanded to and whether the change in the pattern of trade between third countries and the EU can be attributed to the introduction of anti-dumping duties on hand pallet trucks originating in China when, during the investigation period, imports from China themselves increased considerably. [*Simon, Evers & Co. GmbH* v. *Hauptzollamt Hamburg-Hafen* – EU Court of Justice (Second Chamber) Order dated 4-9-2014 in Case C-21/13]

ADD – Denial of market economy treatment when subsidies extended to upstream sector

The CJEU has held that the EU authorities were correct in considering state subsidies granted in the Chinese steel sector for denial of Market Economy Treatment (MET) to certain Chinese exporters in respect of imposition of anti-dumping duty on steel wire rod from China. The court observed that the General Court did not err in law in holding that action of authorities did not result in circumvention of the rules relating to subsidies. It was noted that the authorities merely took account of the economic reality of such state interference in favour of the industrial sector upstream of the

sector to which the appellants belong, as they had to examine whether the costs of the major inputs of the producers in question substantially reflect market values. The court in this regard also observed that the EU authorities were not obliged to initiate and conclude an anti-subsidy investigation in respect of products other than the product concerned and situated in the upstream market. [*Gem-Year Industrial Co. Ltd.* v. *Council of the European Union* – EU Court of Justice (Seventh Chamber), Order dated 11-9-2014 in Case C-602/12]

News Nuggets

Cotton trade – Facilitating weft and warp

United States and Brazil have agreed to settle the dispute as regards certain US subsidies provided to cotton sector. The dispute, spread over a decade witnessed rulings in favour of Brazil wherein the US measures like export credit guarantees, marketing loan payments were held to be trade distorting causing price suppression. The US was required to make its programmes WTO compliant by September 2005. However, since it failed to comply, Brazil requested, and was granted, authorisation to withdraw concession under GATT, GATS and TRIPS. However, in 2010 the two countries reached an agreement by which Brazil agreed to receive payments in exchange for not imposing retaliatory measures for a 4 year period. The funds were to be used by the Brazilian Cotton Institute (IBA) for technical assistance and capacity building programmes.

The new US Farm Bill in 2014 was expected to address issue of non-compliance with WTO obligations. In the interim, payments under the 2009 agreement had also ceased.

Without extending into further dispute, Brazil and USA have come to what is reported to be permanent solution to the problem. As per the Memorandum of Understanding signed by both the countries on 1st October, related to the Cotton Dispute (WT/DS 267), US will make a one-time payment of USD 300 million to the IBA and report semi-annually to Brazil on the operation of the subsidy programme in dispute. Brazil shall ensure and report on the use of funds. As per the peace clause though Brazil does not recognise the consistency of US measure, it will not approach the WTO as regards the programmes in dispute. The memorandum shall be in force upto 30-9-2018.