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Article

Sunset Reviews - Timeline for filing of applications and issuance of notification imposing anti-dumping duty

By **Greetika Francis**

Resolving an old and long-debated issue in anti-dumping investigations, the Division Bench of the Delhi High Court, delivered a judgment on 31 May, 2018 in *Kumho Petrochemical Co. Ltd. v. The Designated Authority & Ors.* [W.P. (C) 4886/2014]. It held that extensions of anti-dumping duty post expiry of the duty in force, whether it be one-year extension in the interim of sunset review or five-year extension in view of likelihood of recurrence or continuation of dumping and injury to the domestic industry pursuant to a sunset review determination, are both impermissible. The judgment interprets the legal provisions governing the levy and collection of duties in the interim of and pursuant to sunset review as contained in Section 9A(5) of the Customs Tariff Act, 1975.

Legal Provision

The legal provision under consideration pertains to the conduct of sunset reviews and states, in relevant part, as follows:

“9A. Anti-Dumping Duty on dumped articles,-

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further

period shall commence from the date of order of such extension:

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.”

Factual background

The writ petition arose from the sunset review for extension of anti-dumping duties imposed on imports of rubber chemical known as PX-13 (6PPD) originating in or exported from China and Korea RP. The following facts and dates are relevant for following the progression in the matter:

30-04-2013	Initiation of sunset review with respect to certain Rubber Chemicals (including PX-13) from China and Korea RP.
04-05-2013	Expiry of definitive anti-dumping duty imposed pursuant to original imposition by Customs Notification No. 133/2008-Customs dated 12-12-2008.
05-07-2013	Issue of Customs Notification No. 17/2013-Customs (ADD) pursuant to second proviso of Section 9A(5) imposing duty retrospectively from 5-5-2013 for a one year period up to 4-5-2014, in the interim of the

	sunset review investigation. Thus, there was a gap of 60 days between expiry of anti-dumping duty and retrospective re-notification.
29-04-2014	Issue of final findings of the subject sunset review.
24-07-2014	Issue of Customs Notification No. 35/2014-Customs (ADD) re-imposing the anti-dumping duty for a further five-year period. Thus, there was a gap of 80 days when there was, effectively, no duty in force.

Issues raised before the High Court of Delhi

The petitioners challenged the following:

1. Validity of the extension of anti-dumping duty, post-expiry of the same, for the one year pending sunset review; and
2. Validity of the extension of anti-dumping duty, post-expiry of the extended one-year period, for the five years pursuant to the sunset review determination.

Judgement of the High Court of Delhi and underlying assessment

The High Court of Delhi allowed the petition filed by M/s Kumho Petrochemical Co. Ltd. and set aside:

1. The notice of initiation of sunset review dated 30 April, 2013;
2. The final findings dated 29 April, 2014 recommending continued imposition of duties pursuant to the sunset review;
3. Customs Notification No. 17/2013-Customs (ADD) dated 5 July, 2013 issued pursuant to second proviso of Section 9A(5) imposing duty retrospectively from 5-5-2013 for a one year period up to 4-5-2014, in the interim of the sunset review investigation;

4. Customs Notification No. 35/2014-Customs (ADD) dated 24 July, 2014 re-imposing the anti-dumping duty for a further five-year period.

Basis for setting aside the notice of initiation of sunset review dated 30 April 2013

The High Court saw it fit to set aside the notice of initiation in the present case as the underlying petition was filed on 9 April, 2013, less than a month prior to the expiry of the anti-dumping duty in force. In light of the prescribed guidelines as contained in DGAD Trade Notice No. 2/2011 dated 06.06.2011, the High Court of Delhi noted that a strict stipulation enjoins the DGAD to initiate sunset reviews on the basis of a duly substantiated petition *only when the same is filed at least 90 days prior to the date of expiry of the anti-dumping duty*. According to the Court, such prescribed time period should not be deviated from. The Court observed that requirement to adhere to timelines is an overriding feature of the anti-dumping duty regime and leniency shall not be shown in allowing delays in filing of the application for sunset review.

It was argued by the respondent domestic industry that the petition had been filed well in advance, but was revised and refiled in April, 2013 with modified POI. The High Court dismissed the claim stating that such modification reflected that either the unmodified petition lacked substance or that it was replete with errors.

Based on the foregoing, the High Court observed that the amended Petition filed belatedly on 9 April, 2013 was, in effect, a new application and could not be treated as an application that was filed in a time bound manner. Accordingly, the High Court set aside the

initiation of the sunset review investigation based on such delayed petition.

Basis for setting aside the Final Findings dated 29 April, 2014

Having set aside the Notice of Initiation, as discussed above, the High Court went on to also set aside the final findings in this case.

Basis for setting aside the Customs Notification No. 17/2013-Customs (ADD) dated 5 July, 2013

The primary issue raised in the petition pertained to the validity of the extension of anti-dumping duty, post-expiry of the same, for one year pending sunset review. In this regard, the High Court of Delhi held that the power under the second proviso to Section 9A(5), to “extend” an anti-dumping duty in the interim of an ongoing sunset review, after expiry of the original notification, is unavailable. The Court considered the recent judgment of the Supreme Court dated 9.6.2017 in *Union of India & Anr. v. Kumho Petrochemicals* [Civil Appeal Nos. 8309-8310/2017] wherein it was held that:

“40. Two things which follow from the reading of the Section 9A(5) of the Act are that not only the continuation of duty is not automatic, such a duty during the period of review has to be imposed before the expiry of the period of five years, which is the life of the Notification imposing anti-dumping duty. Even otherwise, Notification dated January 23, 2014 amends the earlier Notification dated January 02, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated January 02, 2009 itself had lapsed on the expiry of five years, i.e. on January 01, 2014, and was not in existence on January 23, 2014 question of amending a nonexisting Notification does not arise at all. As a sequitur, amendment

was to be carried out during the lifetime of the Notification dated January 02, 2009. The High Court, thus, rightly remarked that Notification dated January 02, 2009 was in the nature of temporary legislation and could not be amended after it lapsed.....”

Thus, the High Court held that the Notification No. 17/2013-Customs (ADD) issued 60 days after the expiry of the levy of anti-dumping duty for the first five-year period, would be *non-est* because it sought to extend a levy which had lapsed on 04.05.2013. Specifically, the High Court observed that *“The phrase “may continue to remain in force”, assumes that there is a levy which exists and its continuance i.e. its carrying forward - without a break in its existence, is necessary. The moment the levy comes to an end or there is a break in its continuance, it cannot be revived in the Sunset Review exercise.... In the present case, the original levy came to an end on 04.05.2013. The levy had a limited life and unless fresh life was infused in it before its predetermined expiry date, it could not be deemed to have been extended. Infusion of fresh life into the levy for a period of one year requires a fresh notification, in addition to the notification for initiation of the Sunset Review. That not being so, in the present case the levy under impugned Notification is without authority, hence it has to be and is set aside.”*

Basis for setting aside the Customs Notification No. 35/2014-Customs (ADD) dated 24 July, 2014:

Examining the second issue, the High Court held that the second notification, i.e., Notification No. 35/2014-Customs (ADD) dated 24 July, 2014, could not be sustained because it was not issued within the period of the original five years or in the extended period of one year in the

interim of the sunset review by which the earlier duty had been extended. It found that there was cessation of duty on 5.5.2013 and again on 5.5.2014, therefore, there was no duty on two dates which could have been extended.

In this regard, it remains open to interpretation whether the cessation of duty on 5.5.2013 alone could have led to the setting aside of the second customs notification (owing to the gap between the expiry of the original levy and the date of issue of the second notification) or whether such an outcome is the result of the two breaks, as in the present case.

The High Court also addressed the claims put forward by the DGAD and other Respondents that no delay could be found in the issue of the second notification, i.e., Customs Notification No. 35/2014 dated 24.7.2014 because it was notified within the timelines prescribed under Rule 18(1) of the Rules (within 3 months of the issue of final findings by the DGAD). The High Court noted that the timeline prescribed under Rule 18(1) is not a stand-alone authorization to the Government but rather, must be read in harmony with the rigid timelines of Section 9A(5) of the Act.

Conclusion

The judgment introduces valuable clarity in terms of the timelines for levy and collection of anti-dumping duties. The following principles emerge from the judgment of the Delhi High Court:

1. An application seeking the initiation of a sunset review or claiming the likelihood of continuation or recurrence of dumping and injury to the domestic industry in case of discontinuance of duties must be filed well in advance, in line with the prescription of the DGAD;

2. Where the DGAD determines that sunset review merits initiation, it must ensure that the same is initiated prior to the expiry of the original period of levy;

3. Once a sunset review is initiated, the Customs notification extending the period of original levy must be issued prior to the expiry of such period;

4. Where the DGAD comes to the conclusion, in a sunset review determination, that there is a likelihood of continuation or recurrence of dumping and injury in case of revocation of duty and therefore, recommends the continuation of duties, then the notification of levy must be issued prior to the expiry of the original levy or prior to the expiry of the extended one-year period, whichever applicable;

5. There should be no break in between the levy pursuant to the sunset review determination and the original levy. The thread of the existing duty has to continue from the initial five year levy to the one year extended period of sunset review to the proposed five year period.

Further, it appears that the Designated Authority was aware of the lacunae in the procedures for the conduct of the sunset review and the difficulties posed by the same. Accordingly, the DGAD had issued Trade Notice No. 02/2017 dated 12 December, 2017 wherein it introduced strict timelines for the filing of the petition seeking sunset review as well as timelines for DGAD action, leaving sufficient time for issuance of Customs Notification, where required. The Trade Notice creates a time bound schedule to ensure that sunset review investigations would not suffer from procedural ambiguities.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Castings for Wind Operated Electricity Generators	China	F.No.14/28/2013-DGAD	28-5-2018	Re-examination of the Final Finding dated 28.7.2017 issued by Designated Authority, pursuant to CESTAT Final Order No. AD / A / 50938-50942 / 2018-CU [DB] dated 13.3.2018
Digital Offset Printing Plates	China	32/2018-Cus. (ADD)	1-6-2018	Definitive anti-dumping duty rescinded
Grinding Media Balls	China, Thailand	F.No.7/7/2017-DGAD	11-6-2018	Final Findings issued in sunset review recommending extension of duties for a period of five years
Hydrogen Peroxide	Bangladesh, Taiwan, Korea RP, Pakistan and Thailand	33/2018-Cus. (ADD)	1-6-2018	Definitive anti-dumping duty revised and re-imposed pursuant to remand Final Findings issued
Jute Products	Bangladesh and Nepal	30 and 31/2018-Cus. (ADD)	30-5-2018	Notification of Provisional assessment for certain New Shipper during pendency of New Shipper Review
New/unused Pneumatic Radial Tyres	China	F.No.7/8/2018-DGAD	7-6-2018	Corrigendum to initiation notification No.7/8/2018-DGAD dated 16.5.2018- Change in Name of Exporter
Nonyl Phenol	Chinese Taipei	F.No.7/20/2018-DGAD	12-6-2018	Initiation of Sunset Review investigation
Ofloxacin Ester / O-Acid	China	F. No. 7/14/2018-DGAD [AC] 02/2018	1-6-2018	Addendum to initiation notification dated 4.5.2018 for Anti-Circumvention Investigation

Product	Country	Notification No.	Date of Notification	Remarks
Rubber Chemicals	PX-13 and TDQ from European Union; MOR from China	G.S.R. 497(E)	25-5-2018	Corrigendum to Customs Notification in order to rectify references to HS codes in Notification
Sodium Dichromate	Russia, South Africa, Kazakhstan, Turkey	F.No.6/4/2017-DGAD	7-6-2018	Final Findings issued terminating the investigation

Trade Remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Carbon Steel Welded Pipe	Canada	CSWP2 2017 ER	22-05-2018	Issue of Statement of Reasons and Expiry Review Determination
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	83 FR 26962 [A-533-873]	11-6-2018	Anti-dumping duty orders issued
Fine Denier Polyester Staple Fiber	USA	83 FR 24737 [A-533-875]	30-05-2018	Final Affirmative Determination of Sales at Less Than Fair Value
Glycine	USA	83 FR 26415 [C-533-884]	7-6-2018	Postponement of Preliminary Determinations of Countervailing Duty Investigations
Open mesh fabrics of glass fibres	EU	Commission Implementing Regulation (EU) 2018/788	30-5-2018	Regulation extending ADD imposed on goods from China to goods from India, Indonesia, Malaysia, Taiwan and Thailand, revised



WTO News

Canada, European Union and Mexico initiate WTO disputes against US steel and aluminium duties

On 6-7 June, the WTO circulated consultation requests filed by Canada, European Union and Mexico seeking consultations with the United States regarding US duties on certain imported steel and aluminium products. The Members, in their respective requests for consultations claimed that the United States is imposing an additional customs duty of 25% on imports of certain steel products, as well as an additional customs duty of 10% on imports of aluminium products, originating from these countries, from 1st of June, 2018. It is alleged that the measures are inconsistent with GATT 1994 and the Agreement on Safeguards. Specifically, the request alleges violation of Articles I:1, II:1(a) and (b), X:3(a), XI:1, XIV:4, XIX:1(a) and XIX:2 of the GATT 1994 as well as Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9.1, 11.1(a), 11.1(b), 12.1, 12.2, 12.3 and 12.5 of the Agreement on Safeguards. Additionally, Mexico has also challenged the measure as violative of Article XXIII:1(b) of GATT 1994 and indefensible in terms of XXI(b) of GATT 1994. It may be noted that India has already (on 18-5-2018) challenged these additional duties on the said two products.

EU files complaint against China's protection of intellectual property rights

On 6 June, the WTO circulated consultation request filed by European Union seeking consultations with China regarding certain Chinese measures pertaining to the transfer of foreign technology into China which the EU alleges are inconsistent with China's obligations

under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). According to the European Union, these measures adversely affect the protection of the intellectual property rights of foreign companies transferring technology to China. As per communication of the delegation of the European Union, the Chinese measures appear to discriminate against foreign holders of intellectual property rights, and restrict the foreign right holders' ability to protect certain intellectual property rights in China, contrary to China's WTO obligations.

EU initiates new WTO compliance proceedings over Airbus subsidies

On 6 June, the WTO circulated consultation requests filed by European Union seeking consultations with the United States under Article 21.5 of the Dispute Settlement Understanding. The EU claims that the EU and its member states have complied with the ruling of the Appellate Body Report (Compliance) regarding subsidies to Airbus which was recently adopted. The EU claims that it has withdrawn remaining subsidies at issue and/or taken appropriate steps to remove their adverse effects thereof.

Local content requirement - Russia to end its WTO-incompatible auto investment programmes on 1 July 2018

On 1 June, at a meeting of the Committee on Trade-Related Investment Measures (TRIMs), Russia informed WTO members that it will terminate its WTO-inconsistent auto investment programmes as of 1 July 2018, a deadline stipulated by its WTO accession protocols. These programmes allowed auto investors to import

auto parts free of duty on condition of local content requirements (LCR).

The Committee also discussed the increased LCR measures being taken by various countries in various industries. These included detailed discussions pertaining to China's LCR measures in cybersecurity law which are alleged to be part of China's efforts to push for more use of Chinese domestic products in information and communications technology (ICT) and other sectors; Indonesia's LCR policies which find prevalence in new sectors such as traditional energy and renewable energy; Nigerian LCR measures pertaining to energy and ICT sectors; Russian import substitution policy that requires Russian state-owned enterprises (SOEs) and other entities to source domestic goods and services as well as the new initiatives which introduced a 15% price preference for goods of Russian origin and services provided by Russian suppliers; Argentina's LCR policies with respect to the auto parts industry and Turkey's localization policy in the pharmaceuticals sector.

Panels established to rule on Indian export measures, US duties

WTO has on 28th of May, 2018 established panel to examine certain Indian export measures which according to the United States of America are export subsidies in violation of WTO's Agreement on Subsidies and Countervailing Measures. USA alleges that India appears to be providing such subsidies through various export promotion programmes, special economic zones and duty-free imports for exporters programme. EU, Canada, China, Egypt, Japan, Kazakhstan, Korea, Russia and Sri Lanka have reserved their third-party rights to participate in the panel proceedings.

The DSB also agreed to a request from Korea for a dispute panel to examine US anti-dumping and countervailing duties on certain products from Korea and the US use of "facts available" in the dispute titled "*United States — Anti-Dumping (AD) and Countervailing (CV) Duties on Certain Products and the Use of Facts Available (DS539)*". The next regular meeting of the DSB is scheduled for 22nd of June.



India Customs & Trade Policy Update

Postal export of goods through e-commerce – New procedure prescribed

All exporters holding a valid IE Code have been permitted to export goods (through E-Commerce) through Foreign Post Offices, by filing a Postal Bill of Export (PBE) under new Export by Post Regulations 2018. CBIC Circular No. 14/2018-Cus., dated 4-6-2018 prescribing elaborate procedure for filing manual PBE by firms and companies (other than natural persons), observes that such exporters are eligible for zero rating of exports. The new Regulations will come into effect from 21-6-2018. Further according to

Circular No. 18/2018-Cus., dated 13-6-2018, CBIC has permitted use of PBE-II in case of multiple shipments addressed to multiple consignees.

MEIS application for Project Exports – DGFT notifies procedure

DGFT has issued elaborate guidelines to solve the problem being faced by project exporters in filling of shipping bills under Chapter 98 for the purpose of claiming MEIS benefit. At present higher incentive is available to project exports but exporters are only able to use specific HS codes. As per the guidelines, NIC will create an

'identification tag' and exporter will submit online application and then few documents to DGFT HQs. NIC will revise the application on instructions from DGFT and RA will issue duty credit scrip after change is communicated by NIC.

EOU – DTA clearance of specified services covered as 'goods'

Sale in Domestic Tariff Area (DTA) by an Export Oriented Unit (EOU) in respect of services classified under Heading 9988 and 9989 under GST are to be covered under Para 6.08(a) of

Foreign Trade Policy. According to the amendment by Notification No. 10/2015-20, dated 7-6-2018, such services covered in LOP/Para 9.31 of the Foreign Trade Policy as manufacturing of goods, will continue to be covered under Para 6.08(a) dealing with goods other than by gems and jewellery units. Amendment in Para 6.08(b) in this regard also states that at the time of DTA clearance, applicable GST and Compensation Cess will apply.



Ratio Decidendi

SAD refund not deniable if words in invoice differ from that in Notification

Karnataka High Court has held that even if Notification 102/2007-Cus. prescribes words which should be included in an invoice to avail benefit of refund of Special Additional Duty (SAD), the benefit cannot be denied if invoices contain other words, clarifying the same intention.

The High Court in this regard observed that non-declaration of SAD in the commercial invoice is an affirmation that no Cenvat Credit is available, thus satisfying the condition of notification. Allowing refund, it was observed that the condition was only procedural. [*Commissioner v. Schneider Electric – CSTA No. 8 of 2015, decided on 5-6-2018, Karnataka High Court*]

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