

Merck Ltd. Vs. Designated Authority

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-09-2006

Judge : R Abichandani, M Ravindran, S T T.V.

Appellant : Merck Ltd.

Respondent : Designated Authority

Judgement :

1. The appellant - importer has challenged the final findings dated 22nd December 2004 by the Designated Authority and the impugned notification issued on 21st March 2005 under Sub-section (1) read with Sub-section (5) of Section 9A of Customs Tariff Act imposing anti-dumping duty and has prayed for annulling the final findings and the notification imposing duties and seeking modification of the notification to the extent of products manufactured by the domestic industry.

2. On 23rd December 2003, the designated authority initiated investigation on the basis of the petition filed by M/s. Sudarshan Chemicals Industries Limited with regard to imposition of anti-dumping duty on the alleged dumping of 'Mica Pearl Pigment' originating in or exported from China PR, Japan, USA and EU. The designated authority notified the embassies and representatives of the subject countries and also forwarded a copy of the public notice of initiation to all known exporters and importers and industry/user associations. The authority also made available the public file to all interested parties containing non-confidential version of the evidence submitted by various interested parties for inspection upon request. A public hearing was held on 29th April 2004 and all the interested parties

attending the public hearing were directed to file their comments and submissions expressed orally, in writing. The authority issued a disclosure of essential facts on 30th November 2004, as required under Rule 16 of Customs Tariff (Identification, Assessment and collection of Anti-Dumping Duties on Dumped Articles and for Determination of Injury) Rules, 1995. The authority after considering all the evidence on record and submissions made, in final findings concluded that, 'Mica Pearl Pigment' were exported to India from USA and EU below its normal value resulting in dumping and that the domestic industry had suffered injury and that the injury had been caused cumulatively by the imports from subject countries.

3. The respondent raised a preliminary objection on the maintainability of this appeal filed by the importer. It was submitted by the advocate appearing for the respondent that the importer being only an "interested party" could in no way be affected by the findings of the authority. It was submitted that no known exporter affected by the final findings preferred an appeal and they have, therefore, accepted the findings. It was submitted that even if the appellant importer is a subsidiary of the exporter, that in itself did not grant any right to the importer to file an appeal against the final findings of the authority. It was further submitted that this tribunal in the case of *AIIGMA*, reported at has held that the importer cannot challenge findings on normal value and export price.

4. The learned advocate submits that the preliminary objection raised by the respondent is a non-starter as the appellant being an importer of the goods has been defined as an "interested party" and has every right to prefer an appeal against the final findings. It was submitted that the appellant had participated in the investigation and filed reply to the importers' questionnaire, which in itself would indicate that they are interested party and the final findings have adversely affected them. It was argued that the ratio of the decision in the case of *AIIGMA* (*supra*) would not be applicable in this case as the facts are different, in as much that in this case the exporter has co-operated and the appellant is a subsidiary of the exporter. It was also further argued that in the case of *AIIGMA* the tribunal was considering the issue from the point of the records to be maintained as per Annexure I to the ADD rules, hence does not preclude the appellant from agitating the issue in this appeal.

4.1. The learned advocate appearing for the appellant submits that the basis of the imposition of the anti-dumping duty on the imported products is faulty. It was submitted that the authority initiated the investigation of all Mica Pearl Pigments imported from the subject countries but later on, after being pointed out, excluded from the scope of the investigation the Mica Pearl Pigment of cosmetic and automotive grades. The current investigation is restricted to the industrial grade. It is his submission that the price of the pigment in the industrial grade will also depend upon the contents of the pigment in relation to the particle size of the mica, quality of the titanium dioxide used and the micron size of the pigment. It was submitted that the authority in its final findings has noted this point but the product under consideration was not correctly defined by the authority, which though being agitated was not considered while arriving at the conclusion of imposition of anti-dumping duty. It was submitted the imports made by the appellant is of 'off spec' grade i.e. the quality of the imported goods could not be compared with the like products manufactured by the domestic industry as the quality difference is very wide and the imports could not be equated with the first grade of material manufactured by the domestic industry. It was further submitted that the authority has worked out the normal value of all the imported products separately but applied the principle of weighted average for arriving at the conclusion of dumping, which is incorrect, as it would vitiate the findings. It was his submission that even within the broad category of Mica Pearl Pigment of industrial grade all the products are distinct and differ in essential characteristics, cost and price. It is submitted that 92% of the imports of the appellant is in respect of 'Iriodin 100' and 'Iriodin 111' and the equivalent to these imports, manufactured by the domestic industry are '4179, and 4191', and the authority should have considered the data only of these grades and imposed anti-dumping duty, if any, only on these imports and not on all the imported Mica Pearl Pigment across the board. It was his submission that the domestic industry does not manufacture all other grades on which anti-dumping duty has been imposed. It was submitted that the exporter/importer had agitated this point while commenting on the disclosure statement. It was submitted that the authority admits in his final findings that there could be some differences in the quality of the imported goods and that being sold in the domestic market of the exporters but has not arrived at a correct findings.

It was further argued that the technical and commercial substitutability was not examined by the authority in as much that the micron size of the imported article differs from the one manufactured by the domestic industry. It was submitted that the conclusion of domestic industry having suffered injury is based on the incorrect appreciation of the data in as much that the sales volume, production capacity and export sales etc. has shown a significant increase during the period of investigation. It was also submitted that the return on investment is wrongly calculated and the injury is self inflicted by domestic industry despite the sluggish market conditions, the domestic industry has increased the production capacity without analyzing the consequences.

5. The learned advocate appearing for the respondent submits that the imported article directly competes with the products manufactured by the domestic industry and the market has been eaten away by dumped imports. It was her submission that the exporter/importer has not at any time during the investigations brought on record that the dumped articles were of 'off-spec' quality i.e. they were not like the products manufactured by the domestic industry. It was also argued that the exporter had given data only for the two types of the Mica Pearl Pigments to enable the authority to arrive at the normal value and export price hence, the appellant is precluded from challenging the findings of the authority.

6. The learned advocate appearing for the designated authority submits that the authority has concluded the findings of dumping based on the verification of the data submitted by the domestic industry and exporter. It was submitted that the co-operating exporter has filed information in respect of only two of the articles imported, which comprised of bulk of the imports in to India. It was his submission that authority has verified the information and has correctly worked out the non-injurious price of the products manufactured by the domestic industry and has correctly allocated the cost.

7.1 The advocate for the respondent has raised a preliminary objection regarding the maintainability of the appeal by the appellant an importer in this case. An appeal lies to the Tribunal against the final findings and the notification issued thereof by the Government. Section 9C of the Customs Tariff Act, 1975 provides

for the appellate remedy in anti-dumping matters, and it reads as under: SECTION 9C. Appeal. - (1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and [Service Tax] Appellate Tribunal constituted under Section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal).

[(1A) An appeal under Sub-section (1) shall be accompanied by a fee of fifteen thousand rupees.

(a) in an appeal under Sub-section (1), for grant of stay or for rectification of mistake or for any other purpose ; or (b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.].

(2) Every appeal under this Section shall be filed within ninety days of the date of order under appeal: Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

(4) The provisions of Sub-section (1), (2), (5) and (6) of Section 129C of the Customs Act, 1962 (52 of 1962) shall apply to the Appellate Tribunal in the discharge of its functions under this Act as they apply to it in the discharge of its functions under the Customs Act, 1962 (52 of 1962).

(5) Every appeal under Sub-section (1) shall be heard by a Special Bench constituted by the President of the Appellate Tribunal for hearing such appeals and such Bench shall consist of the President and not less than two members and shall include one judicial member and one technical member.] From the plain reading of the above section it can be seen that the statute provides for the remedy of the appeal to any one, aggrieved by the order of determination of existence, degree and effect of any subsidy or dumping in relation to import of any

article. Section 9C of the Customs Tariff Act, 1975 does not indicate who can be an appellant and who is aggrieved by the order of final findings of the authority recommending the anti-dumping duty. In plain sense, it can be construed that any person whose is affected by the final findings recommending the imposition of the anti-dumping duty would be eligible to file an appeal before the appellate authority, if he has participated before the authority during the investigation proceedings. In this case the appellant is a importer of the article who filed responses to the importers questionnaire and also represented before the authority during investigation and is affected by the imposition of the antidumping duty. Hence we hold that the appellant has a right to seek redressal of his grievances against the final findings before this appellate forum. *AligMA v. Designated Authority Before* proceeding with the above contentions, it may be mentioned here that the learned Counsel representing the appellants tried to challenge the normal value fixed by the Designated Authority in the final order. Argument was that since normal value was not correctly fixed, dumping margin arrived at by the Designated Authority is incorrect. Consequently, it was contended that anti-dumping duty imposed is unsustainable. As stated earlier, these appeals are at the instance of importers of calcium carbide from the People's Republic of China and Romania, subject countries. Appellants are not manufacturers or exporters from subject countries. They are the Indian importers. They seek to question the correctness or otherwise of the normal value fixed by the Designated Authority. Are they persons entitled to question the correctness of the normal value? Annexure 1 to Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as the Rules) lay down the principles governing determination of normal value, export price and margin of dumping. Clause (1) of that Annexure specifically states that determination of normal value should be based on the records kept by the exporter or producer of the article in question. Those records which kept in accordance with the generally accepted accounting principles of the exporting company need alone be relied on. It further states that those records should reasonably reflect the cost associated with the production and sale of that article. From this it is clear that in determining the normal value, Designated Authority is to take into consideration the records kept by exporter or the producer of the article in question. Documents

maintained by others are not relevant. In the instant case, manufacturers and exporters from subject countries did not cooperate. Consequently, the Designated Authority resorted to the procedure allowed by the Rules. Fixation of normal value, so made, cannot be challenged by anyone other than the exporter or manufacturer of that article. Annexure to the Rules supports this conclusion. It therefore follows that the appellants herein are not entitled to question the correctness or otherwise of the normal value of calcium carbide fixed by the Designated Authority.

It can be seen that the tribunal in the order of AIIGMA (supra) was dealing with a situation wherein none of the manufacturer and exporter had co-operated and the authority had constructed the normal value and export price based on the facts and figures. On these factual findings, the tribunal restricted the importers from challenging the normal value and held that the findings based on the records maintained by the exporter could, at best, be assailed by the exporter only. In this case we find that the importer is subsidiary of the co-operating exporter from EU. Being a subsidiary of the exporter, to preclude importer from filing an appeal would be denial of justice. Since we find that the appellant importer can file an appeal, it would not be appropriate if it is not allowed to raise the challenge against the determination of normal value and export price, as these two are the main elements which determine the "margin of dumping" of the article and go to the root of imposition or non-imposition of the anti-dumping duty. Hence we hold, that, as the importer is a subsidiary of the co-operating exporter, it would be well within his rights to file an appeal and challenge the final findings recommending the anti-dumping duty.

8.1 The next question that arises for consideration is whether the articles imported by the appellant would be covered for the impost of the antidumping duty as per the final findings of the authority. In this case the authority initiated the investigation against "certain inorganic pigments/colouring agents giving lustrous/shining/frosted effects, such pearl scents effects, metallic effects, commercially known in the market place as Titanium Dioxide or Iron Oxide coated Mica Pearl Pigment or Pearl Luster Pigments or Pearl Pigment". After considering the representation and views of the exporter the authority excluded the automotive and cosmetic grades of the Mica Pearl Pigments from the scope of investigation.

In other words the scope of the investigation was restricted to the Mica Pearl Pigments of Industrial grade. It was submitted before us that the Mica Pearl Pigments of industrial grades are also of different characteristics and each one of them should be considered as a distinct product. We find from the record that this point was never taken up before the authority either in the response to the initiation nor in the comments in response to the disclosure statement. We find that the exporter had from the beginning of investigation was harping on the tune that 92% of their exports comprised of only two varieties and the authority should work out the non-injurious price of the equivalent products manufactured by the domestic industry and come to conclusion about imposition of anti-dumping duty. On perusal of the record as produced by the authority we find that the authority has worked out cost of production of the equivalent products (as indicated by the exporter) and struck a weighted average for arriving at non-injurious price. In the case of Mica Pearl Pigment, the particle of Mica size is considered as an important factor for deciding the grade. We find that, in this case the importer has tried to assail the findings on this point by submitting that the authorities has not considered this aspect. On perusal of the record we find that the exporter chose to remain quiet on the characteristics of the exported article during the investigation. It would be a vain effort on the part of the importer to take up this issue for the first time in the appellate forum, as this was not taken up before the authority during the course of the investigation. In the absence of the any information, the authority could not have given its findings. The authority, could not have verified the information that was not submitted to it by the exporter, and to assail the findings on this point would be an incorrect proposition on the part of the appellant importer.

8.3 It was argued that the imported articles can never be considered as technically and commercial substitute for the products manufactured by the domestic industry for the reason that the articles imported were 'off spec'. It was submitted that 'off spec' means sub-standard quality. We find that this issue is a non-est in as much that the exporter while responding to the designated authority's questionnaire, never indicated that the exports were of 'off spec' quality. If the exporter himself has indicated that the quality of the exported article is of a regular quality, it would be futile for the importer appellant to argue that the article imported is of 'off spec'

quality. When we perused the records we found there was no indication in the invoices as to the quality of the product being off spec'. In the absence of the any such indication it cannot now be said that the article imported was not technically substitutable. Nevertheless, the authority examined this point and on verification found that the articles imported were in fact technically and commercially substituting the products manufactured by the domestic industry.

8.4 It is also noticed from the records produced before us that the designated authority has considered the fact that the domestic industry being a multi-product industry, the allocation of cost to the product under consideration has to be done as per the accepted norms of the industry. We find that the designated authority has worked out separately the sales, cost of production, capacity utilization of the inorganic pigments, by verifying the data of the domestic industry. The designated authority has called for all the information from the domestic industry and subjected the information to a thorough scrutiny and then only came to a conclusion that there is injury to the domestic industry due to dumped imports. We find ourselves in full agreement with the reasoning and findings of the Designated Authority and there is no warrant for any interference with the impugned final findings and the notification on any of the contentions urged.

For the foregoing reasons, the contentions raised on behalf of the appellant against the impugned notification are misconceived and cannot be accepted. The appeal is, therefore, dismissed.

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