

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH : COURT NO – 3

Customs Appeal No. 368 of 2011-DB

(Arising out of OIA 156/2011/CUS/COMMR-A-/KDL dated 26/04/2011 passed by Commissioner of CUSTOMS-Kandla)

CJ Shah & Co.

Appellant

105, 10th Floor,
Bajaj Bhavan, Nariman Point,
Mumbai,
Maharashtra, 400021.

-VERSUS-

C.C., Kandla

Respondent

Custom House,
Near Balaji Temple,
Kandala
Gujarat

Present For the Appellant : Ms. Shamita J Patel, Adv.

Present For the Respondent : Shri S.N. Gohil, Supdt.(AR)

CORAM:

HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

HON'BLE MEMBER (TECHNICAL), MR. RAJU

ORDER NO. AI 11048 / 2019

Date of Hearing: 25/06/2019

Date of Decision: 25/06/2019

RAMESH NAIR

The brief facts of the case are that the appellant have imported two consignments of Propylene Glycol from USA and filed two Bills of Entry dated 12/10/2009 and 13/10/2009. In respect of the said import, the anti dumping duty was levied as per the notification no. 117/2009-Cus dated 13/10/2009 extending the notification no. 105/2004-Cus dated 08/10/2004. The appellant, being aggrieved with the demand of anti dumping duty, filed the present appeal.

2. Ms. Shamita J. Patel, Ld. Counsel appearing on behalf of the appellant submits that the original notification no. 105/04-Cus dated 08/10/2004 imposed an anti dumping duty. This notification was valid for 5 years and it had expired on 08/10/2009 as provided in section 9A(5) of the Customs Tariff Act, 1975. Only after expiry of the notification on 13/10/2009 by notification 117/09-Cus, the notification no. 105/2004-Cus was extended up to 07/07/2010. She submits that once the original notification no. 105/04-Cus has come to an end on expiry of 5 years the

said notification cannot be extended. The extension of the notification imposing anti dumping duty can be done only during the recurrence of the notification 105/04-Cus. In support of her submission, she placed reliance on the Hon'ble Supreme Court judgment in the case of Union of India & Anr. v/s M/s Kumho Petrochemicals Co. Ltd. 2017 (6) TMI 526 (SC).

3. On the other hand, Shri S.N. Gohil, Ld. Supdt. (AR) appearing for the Revenue reiterates the findings of the impugned order. He submits that as per first and second proviso to sub section (2A) of section 9A, even after expiry of the 5 years, anti dumping duty may continue to remain in force pending the outcome of such a review for a further period not extending one year. Therefore, in view of the said proviso, the anti dumping stands extended. The levy of anti dumping notification has been extended even after expiry of 5 years. He placed reliance on the following judgments:

1. C.C.(Import), Mumbai vs. Samarth Industries 2014 (311) ELT 28 (Bom)
2. Nitco tiles Ltd. Vs. Designated Authority 2006 (193) ELT 17 (Tri- Del.)
3. C.C., Bangalore, Vs. GM Exports 2015 (324) ELT 209 (SC)
4. Motiram Tolaram Vs. Union of India 1999 (112) ELT 749 (SC)

4. We have carefully considered the submission made by both the sides and perused the records. We find that in the identical facts and on the legal issue, the Hon'ble Supreme Court in the case of Union of India & Anr. v/s M/s Kumho Petrochemicals Co. Ltd. (supra) decided. The relevant part of the order is reproduced below:

31. *After giving due consideration to the arguments advanced by the learned counsel for the parties, we are inclined to agree with the High Court that proviso to sub-section (5) of Section 9A of the Act is an enabling provision. That is very clear from the language of the said provision itself. Sub-section (5) of Section 9A gives maximum life of five years to the imposition of anti-dumping duty by issuing a particular notification. Of course, this can be extended by issuing fresh notification. However, the words 'unless revoked earlier' in sub-section (5) clearly indicate that the period of five years can be curtailed by revoking the imposition of anti-dumping duty earlier. Of course, provision for review is there, as mentioned above, and the Central Government may extend the period if after undertaking the review it forms an opinion that continuation of such an anti-dumping duty is necessary in public interest. When such a notification is issued after review, period of imposition gets extended by another five years. That is the effect of first proviso to sub-section (5) of Section 9A. However, what we intend to emphasise here is that even as per sub-section (5) it is not necessary that in all cases anti-dumping duty shall be imposed for a full period of five years as it can be revoked earlier. Likewise, when a review is initiated but final conclusion is not arrived at and the period of five years stipulated in the original notification expires in the meantime, as per second*

proviso 'the anti-dumping duty may continue to remain in force'. However, it cannot be said that the duty would automatically get continued after the expiry of five years simply because review exercise is initiated before the expiry of the aforesaid period. It cannot be denied, which was not even disputed before us, that issuance of a notification is necessary for extending the period of anti-dumping duty. Reason is simple. There no duty or tax can be imposed without the authority of 'law'. Here, such a law has to be in the form of an appropriate notification and in the absence thereof the duty, which is in the form of a tax, cannot be extracted as, otherwise, it would violate the provisions of Article 265 of the Constitution of India. As a fortiori, it becomes apparent that the Government is to exercise its power to issue a requisite notification. In this hue, the expression 'may' in the second proviso to sub-section (5) has to be read as enabling power which gives discretion to the Central Government to determine as to whether to exercise such a power or not. It, thus, becomes an enabling provision.

...

36. As noticed above, the High Court has held that once the earlier Notification by which anti-dumping duty was extended by five years, i.e. up to January 1, 2014, expired, the Central Government was not empowered to issue any Notification after the said date, namely, on January 23, 2014, inasmuch as there was no Notification in existence the period whereof could be extended. The High Court, in the process, has also held that the Notification extending anti-dumping duty by five years, i.e. up to January 1, 2014 was in the nature of temporary legislation and validity thereof could be extended, in exercise of powers contained in second proviso to sub-section (5) of Section 9A of the Act only before January 1, 2014.

...

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 2, 2009, which is clear from its language, and has been reproduced above. However, when Notification dated January 2, 2009 itself had lapsed on the expiry of five years, i.e. on January 1, 2014, and was not in existence on January 23, 2014 question of amending a non-existing Notification does not arise at all. As a sequitur, amendment was to be carried out during the lifetime of the Notification dated January 2, 2009. The High Court, thus, rightly remarked that Notification dated January 2, 2009 was in the nature of temporary legislation and could not be amended after it lapsed.

From the above judgment of the Hon'ble Supreme Court, we find that the Hon'ble Supreme Court observes that once a notification enforcing anti dumping duty is expired and non-existent, such non-existent notification cannot be extended. In the facts of the present case, the notification no. 105/04-Cus, admittedly expired on 08/10/2009. Thereafter, the said notification was extended vide notification no. 117/09-Cus dated 13/10/2009. Since the notification no. 105/04-Cus was expired on 08/10/2009, on 13/10/2009 the notification no. 105/04-Cus was not in existence. Accordingly, on 13/10/2009, it could not have been extended. Therefore,

the result is that no anti-dumping duty can be levied in view of notification no. 105/04-Cus which was extended vide notification 117/09-Cus during the period after 08/09/2009. Accordingly, the demand is not sustainable. Consequently, the impugned order is set aside. The appeal is allowed.

(Operative part of the order pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Diksha