CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No.II

Customs Appeal No.70423 of 2025

(Arising out of Order-in-Appeal No.523-Cus/APPL/LKO/2024 dated 30/08/2024 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

Commissioner of Customs (Pre.), Lucknow .....**Appellant**

(Apratyaksh Kar Bhawan, 7th Floor,
Vibhuti Khand, Gomti Nagar, Lucknow-226010)

VERSUS

M/s Vishal Impex, ...**Respondent**

(306, Krishna Tower, Civil Lines, Kanpur-208001)

APPEARANCE:

Shri Santosh Kumar, Authorised Representative for the Appellant
Shri Ashish Kumar Bansal, Advocate for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER NO.70717/2025

DATE OF HEARING & DECISION : 14 July, 2025

SANJIV SRIVASTAVA:

This appeal filed by the revenue is directed against Order-in-Appeal No.523-Cus/APPL/LKO/2024 dated 30/08/2024 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow. By the impugned order, Commissioner (Appeals) has allowed the appeal filed by the party filed against Order-in-Original No.46/ADC/2023-24 dated 29.05.2023 wherein following has been held:-

"ORDER

(i) I confirm the demand of Anti-dumping Duty amounting to Rs. 6,07,043/- (Rupees Six lakh seven thousand and forty-three only) and order for its recovery under Section 28(4) of the Customs Act, 1962, along with Interest under Section 28AA of the Customs Act, 1962.

(ii) I impose a Penalty of Rs. 6,07,043/- (Rupees Six lakh seven thousand and forty-three only) on M/s Vishal Impex

306, Krishna Tower, 15/63, Civil Lines, Kanpur (U.P)-208 001, under Section 114 A of the Customs Act, 1962."

2.1 Respondent has imported the New Radial Truck Tyres & Flaps Goods Tyers made from China vide Bill of Entry No.2065593 dated 13.06.2017 filed at ICD Panki. The goods were declared under the CTH-40112010 of First Schedule to Customs Tariff Act, 1975.

2.2 Revenue was of the view that new/nused pneumatic Radial tyres (Including Tubeless) with or without tubes and/or flap of rubber, having nominal rim dia code above 16" used in buses and lorries/trucks, when imported into India, attract Anti-dumping duty in terms of Notification No.12/2010-ADD dated 19.10.2010. Whereas respondent had on the bill of entry, fail to assess the Anti-Dumping Duty on the goods imported.

2.3 A show cause notice dated 04.06.2022 was issued to the respondent asking them to show cause as to why-

"(i) The Anti-dumping Duty amounting to Rs. 6,07, 043 (Rupees Six lakh seven thousand and forty-three only) should not be confirmed and recovered from them under Section 28 of Customs Act, 1962.

(ii) Interest should not be demanded from the importer under Section 28AA of the Customs Act, 1962.

(iii) Penalty should not be imposed on the party under Section 114A of the Customs Act, 1962."

2.4 The said show cause notice was adjudicated as per the Order-in-Original dated 29.05.2023 referred in para 1 above.

2.5 Aggrieved party has filed appeal before Commissioner (Appeals) which has been allowed by the impugned order.

2.6 Aggrieved revenue has filed this appeal on the following grounds:-

"a. That, the Commissioner (Appeals) has erred in appreciating the findings of the Original Authority and details of facts mentioned in the SCN.

b. That, the Importer failed to justify their contention as the said notification No. 12/2010-Customs dated 19.02.2010 was not rescinded which is evident from year-wise index to Notifications in force as on the date of issuance of SCN/O10.

c. That the BoE filed by the party reveals that the notification regarding Anti-dumping duty relevant for the said consignment was not mentioned in the said BoE resulting in non-payment of Anti-dumping duty. It is important to note that the filing of BOE correctly is legally required for any import as the same is required for deciding the import policy as well as duty on the concerned import. Section 46 imposes legal requirement on Importer not only to file Bill of Entry in prescribed form, but also to subscribe to the truth of the contents of BoE.

d. That, under the self-assessment scheme made applicable w.e.f 08.04.2011, the faith is bestowed on the Importer. As part of the self-assessment, it was the duty of the importer to present correct facts and declare to the Customs Authorities. The onus lied solely on the Importer. In the instant case, it was importer's responsibility to ensure that correct notification regarding ADD be mentioned while filing said BOE and that correct amount of ADD be paid consequently. Thus, there is sufficient element of suppression with intent to evade payment of Anti-dumping duty necessitating to invoke the provisions of Sections 28(4) of Customs Act, 1962. Had the Post Clearance Audit not been done by the jurisdictional officers, this fact would not have been surfaced.

e. That, by filing wrongly self-assessed Bill of Entry at the time of import, Importer has willfully contravened the provisions of Section 17, Section 46 of the Customs Act, 1962 read with Sl. No. 6 of the Notification no. 12/2010-ADD dated 19.02.2010 as the said notification was not rescinded. Since the goods under reference were imported without the payment of Anti-Dumping Duty, the same is liable to be recovered from them under Section 28 of Customs Act, 1962 along with interest by invoking the extended proviso of limitation. Due to the contravention of the said provisions, the Importer has also made themselves liable to penalty as proposed in the SCN which was subsequently confirmed during adjudication.

f. That the Article 265 ordains that no tax shall be levied and collected except by authority of law. The expression 'Law' in terms of Article 265 means an act of the legislature. Parliament through Section 9A has delegated the power to impose an ADD by issuance of a Notification in the official gazette to the Central Government. Thus, said function is a legislative Act and cannot be categorized as a quasi-judicial function. Further, A three-judge bench of the Supreme Court in Haridas Exports v. All India Float Glass Mfrs. Association and Ors. [AIR 2002 SC 2728] had held that levy or non-levy of Anti-Dumping duty is a legislative act. This view was also expressed by the Rajasthan High Court in J.K. Industries Ltd. v. Union of India [2005 (127) ECR 274 (Rajasthan)]. Thus, contention of the party is not acceptable.

g. That, the Hon'ble Supreme Court in the case of Automotive Tyre Mfr. Assn. Vs. Union of India has only admitted the appeal against the order of CESTAT in Bridge stone Tyre Manufacturing (Thailand) vs. Designated Authority, however, it is noticed that neither the case is decided against revenue nor any such order/ injunction has been passed by the Hon'ble Supreme Court and that the said Notification has also not been rescinded. Therefore, the Customs Notification No.12 /2010-Customs dated 19.02.2010 (Anti-dumping) was in force on the date of filing the said Bill of Entry. Therefore, the case law cited by the Importer is not applicable in his case as the facts and circumstances are entirely different.

h That the importer presented the said Bills of Entry under self-assessment which means no examination of the goods were carried. Thus, the importer wrongfully self-assessed the goods under Customs Tariff Heading 40112010 i.e., without levy of Anti dumping duty as provided in the SI. No. 6 of the Notification no. 12/2010-ADD dated 19.02.2010. Thus, it is evident that there was sufficient element of suppression on the part of the importer with an intent to evade payment of correct amount Anti-Dumping

Duty necessitating invoking of the provisions of Section 28(4) of Customs Act, 1962 and also rendering them for penal action under Section 114 A of the Customs Act."

3.1 We have heard Shri Santosh Kumar learned Authorized Representative appearing for the revenue and Shri Ashish Kumar Bansal learned Counsel appearing for the respondent.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 Impugned order records the findings as follows for allowing the appeal of the party:-

"5.1 I have carefully gone through the case records and found that sole issue to be decided in the case is whether the demand of Anti-dumping duty under Section 28(4) of the Customs Act, 1962, alongwith Interest under Section 28AA of the Customs Act, 1962and imposition of penalty under Section 114A of the Customs Act, 1962 is proper in terms of the Sl. no. 6 of the Notín. No.12/2010-ADD dated 19.02.2010; and also in light of Hon'ble Tribunal vide Final Order No. AD/18-24/2011(PB) dated 02.08.11 in case of Bridgestone Tyre Manufacturing (Thailand) Vs. Designated Authority 2011 (270) ELT 696 (TRI-DEL)

5.2 Now, coming to the issue, I find that the said demand originated on the basis of Sl. No. 6 of the Notfn. No. 12/2010-ADD dated 19.02.2010. I further find that the said Notification is based on the Final Findings dated 01.01.2010 of the 'Designated Authority (D.A.) pursuant to Anti-dumping investigations initiated on 21.10.2008. The said notification was challenged along with Final Findings dated 01.01.2010 of the Designated Authority (D.A.)in the case of Bridgestone Tyre Manufacturing (Thailand) Vs. Designated Authority 2011 (270) ELT 696 (TRI-DEL) and the Hon'ble Tribunal set aside the 'Final Findings' dated 01.01.2010 and the Customs Notín. No. 12/2010 dated 19.02.2010 in the said judgement.

5.3 I further find from the impugned Order-In-Original dated 29.05.2023 that the Hon'ble Supreme Court has admitted Civil Appeal nos. 8125-8131 of 2011 against the

CESTAT Final Order No. AD/18-24/2011(PB) dated 02.08.11, but it is also on record that as of now no injunction/ stay has been granted by the Hon'ble Apex court against the said order of CESTAT.

The Adjudicating Authority in the impugned order has observed that the Notfn. No.12/2010-ADD dated 19.02.2010 is being reflected on departmental website i.e. cbic.gov.in, in the list of Notifications in force as on 30.06.2022, and that the Article 265 ordains that no tax shall be levied and collected except by authority of law. The expression 'law' in terms of Article 265 means an act of the legislature. Parliament through Section 9A has delegated the power to impose an ADD by issuance of a notification in the official gazette to the Central Government. Thus, said function is a legislative Act and cannot be categorized as a quasi-judicial function.

Now, I find from the Principles of Judicial discipline that orders passed by the Hon'ble Tribunal are binding on all adjudicating and appellate authorities and that orders of appellate authority are to be followed unreservedly unless operation thereof suspended by a competent court- Mere fact of appeal having been filed against the order of Tribunal is no ground for not following it.

On examining the facts of the present case and the above finding helps me to conclude that judgment of the Hon'ble Tribunal is squarely applicable in the instant case."

4.3 We find that for allowing the appeal, Commissioner (Appeals) has relied upon the decision of M/s Bridgestone Tyre Manufacturing 2011 (270) ELT 696 (Tri-Del.) wherein following has been held:-

"These seven appeals have been filed against Notification No. 12/2010-Cus., dated 19-2-2010 imposing Anti-dumping duty on bus and truck radial tyres from China and Thailand. Such imposition is based on the final findings of the Designated Authority (D.A.) issued under Notification dated 1-1-2010 pursuant to Anti-Dumping Investigations initiated on 21-10-2008. The challenge in these appeals is

to the final findings as well as to the imposition of Anti-dumping duty based on such final findings.

2-24 …………………………..

25. *We have considered the above submissions from both sides on the D.A's determination of injury to the domestic industry. For the purpose of determining demand and consumption of the impugned goods in the country, the D.A. has relied on the sum of domestic sales of Indian producers and imports from all sources. As such, the D.A. has actually computed the quantities supplied in the domestic market indigenously as well as from abroad. The actual demand could be much more as there may be a gap in supply. Therefore, the figures computed under paragraph 119 of the impugned final findings can be more appropriately called quantity consumed or consumption rather than demand. This figure shows that the sale by domestic industry increased from 9999 MTs in 2004-05 to 24159 MTs during the POL The imports from subject countries have also increased during the same period from 1361 Mts to 28386 MTs. No doubt the increase is more in respect of imports from the subject countries than the increase in respect of the domestic industry. If there had been only an increase in respect of imports and there was no increase in respect of domestic sales or there was a decline in domestic sales, it could be concluded safely that the imports showed an adverse volume effect over the domestic sales. But when the domestic sales have also grown by about 142%, it is difficult to conclude that the imports have given rise to an adverse volume effect on sale of subject goods domestically produced. From paragraph 128 of the D.A.'s report, it is revealed that the domestic industry is producing much more than what it is selling domestically and the production has gone up from 18622 MTs in 2004-05 to 27364 MTs in the POI Presumably, the domestic industry is exporting the excess quantity. The capacity utilization of the domestic industry as seen from paragraph 128 of the final findings was*

70,89% in 2004-05 which became 67.55% in 2005-06, 67.42% during 2006-07 but increased to 72.71% in the POI. As such, when the production, domestic sales and the capacity utilization of the domestic industry has increased, it is difficult to say that the increase in import volumes has adversely affected the domestic industry. Despite such growth in production, sales and capacity utilization by the domestic industry, the D.A seems to have concluded an adverse volume effect of imports merely by looking at. the rate of growth of the domestic industry. For example, the domestic industry increased its production from 21895 MTs in 2005-06 to 25190 MTs in 2006-07. Thus there was an increase in production by 3295 MTs which translates to a growth of 15.5%. But the D.A. looks at this adversely because in the previous year the growth has been to the extent of 17.58%. Such a view is debatable. When there is continuous growth by the domestic industry over the period selected as injury period, the D.A.'s conclusion on injury is based on consideration that domestic industry is not growing at a higher rate.

26. *We have heard appellant No. 6 pleading that they have an agreement with some of the domestic manufacturers to supply the subject goods for use in the original equipment and the price is determined by the cost plus agreed amount of profit. As such, supply under such agreements is not affected by the alleged dumped prices at which the imports have been made. Yet, according to the appellant No. 6, the domestic industry has failed to make supplies at such pre-determined prices to the extent of required quantity and the appellants had to source their requirement from abroad. Under such a circumstance, the domestic industry cannot claim injury on the ground of potential decline in sales apart from the fact that there has not been any decline in sales, rather the sales volume has grown from year to year.*

27. *The D.A. has noted in paragraphs 148 & 149 of his final findings that the cash profits for the domestic industry has increased from Rs. 260.17 lakhs in 2004-05 to Rs. 1101.45 lakhs in the POI, the latter amount is only Rs. 7 44 lakhs less than the cash profits of Rs. 1108.89 in the year 2006-07, but the growth during the injury period is quite high from the level of Rs. 260.17 lakhs in the base year 2004-05. As seen from the final finding in paragraph 130, the domestic industry has increased its capital employed from Rs. 12,923 lakhs in 2004-05 steadily during the injury period to Rs. 27,159 lakhs. The percentage return on investment has been indicated for 2004-05 as (0.62), for 2005-06 as (1.04), for 2006-07 as 1.80 and for the POI as 0.40. Despite increase in the capital employed, the return on investment has turned positive during 2006-07 and during POI. This cannot be taken as injury indicator especially considering the submissions by the All India Tyre Dealers' Federation before the D.A. that rate of return of capital in case of tyre industry world over is known to be low as a historical truth.*

28. *The D.A. has attributed increase in inventories from 1161 MT to 2846 MT in the POI as an indicator of injury to the domestic industry. However, the increase in inventories can also be due to increase in sales volume which the D.A. has not examined. For example, when the sales volume of domestic industry was 9999 MTs in 2004 -05, the inventory was 1161 MT which was about 11.6%. In the POI the sales volume was 24159 MTs and the inventory was 2846 MT which comes to about 11.8%. Compared to increase in sales volume, the level of inventory has almost remained the same percentage-wise and this cannot therefore be straightaway considered to be an injury indicator. While determining the injury to the domestic industry, the D.A. has assumed a profit margin of 22% which has been challenged by the appellants. Calculations done by the D.A. applying 2.2% return on* *capital has coloured the injury determinations. As stated earlier, it has been submitted by appellant No. 4 that their target return on capital is only 10% and that of Continental Tyres, a German entity which is the fourth largest tyre company in the world has a return on capital of 11% and Hangkok Tyres, which is in the top 10 league, has a capital return of 16% only. The domestic users of impugned products have also questioned the validity of assuming a high return of 22% on capital employed for the domestic tyre industry. Some of the determination, which have been made by the D.A. is based on assumption of such a high level of return on investment and therefore they do not appear to be correct determinants of injury to the domestic industry. For example, determination of the non-injurious price assuming a high level of 22% return on investment gives an inflated picture of price underselling which cannot be a true indicator of injury. In fact, the levels of price undercutting and price underselling assumed by the D.A. does not explain how on the face of such price undercutting and price underselling, the domestic industry managed to increase its sale from 9999 MTs in 2004-05 to 24159 MTs in the POI. If there was really such price undercutting and price underselling as determined by the D.A., the domestic industry would have been hard put to maintain its sales volume rather show such an increase in sales as recorded in paragraph 119 of the final findings and also increase in cash profit as recorded in paragraph 148 of the final findings.*

29. *On the other hand, the following submission made by appellant No. 4 regarding increase in profits earned by the domestic industry is significant :-*

"The appellant submits that the motive behind any business operation is of earning profits and in the present case the impugned order holding that the domestic industry is suffering injury is based on facts that are pertinently contrasting from the findings and allegation in

the investigation. The trend of cash profit shows that the domestic industry is in pink of health and its cash profit is multiplying. There is only marginal dip, which is not even one percent, in the POI, which can by no stretch of imagination be termed as injury."

30. *The overall picture that emerges from examination of various injury parameters does not support the conclusion of injury drawn by the D.A. A number of parameters such as capacity, production, capacity utilization, sales, selling prices and profitability of return on investment, wages, employment, productivity etc. recorded an improvement during the periods chosen for injury analysis. It has also been submitted on behalf of the appellants that the domestic industry was suffering losses even before the period chosen for analysis and that the losses have in fact come down to the lowest level during the POI. Thus this case is in fact quite different from the kind of case dealt by the Hon'ble Supreme Court in the case of Rishiroop Polymers (supra) cited by the learned Advocate for the Domestic Industry, where there was a drastic decline in all the parameters during the POI.*

31. *Imposition of anti-dumping, duty is subject to a positive finding on (i) dumping, on (ii) injury as well as on (iii) causal link between the two. As examined by us above, the injury determination done by the D.A. for the domestic industry is faulty and not convincing. On that view of the matter, when the domestic industry cannot be said to have suffered injury, there cannot be any anti-dumping duty levied on the subject goods. In the absence of injury to the domestic industry, the anti-dumping duty merely increases the prices of the imported goods for the domestic consumer and also provides a cushion to the domestic industry to increase their prices. The ultimate sufferer is the domestic consumer and imposition of anti-dumping duty in such a scenario cannot also be considered to be in the public interest.*

__32.__ Since we have come to the conclusion that the injury determination done by the D.A. for the domestic industry is faulty and consequently there cannot be any anti-dumping duty on the subject goods, we do not feel it necessary to go into the other grounds raised by the appellants before us relating to determination of dumping etc.

33. In view of our finding as above, the Final Findings dated 1-1-2010 issued by the Designated Authority, Ministry of Commerce and the Customs Notification No. 12/2010 dated 19-2-2010 issued by the Government of India, Ministry of Finance, Department of Revenue, New Delhi imposing anti-dumping duty on the subject goods based on such finding are set aside."

4.4 Since the Notification under which this demand has been made is itself set aside by the order of this Tribunal and it is also noticed that the appeal filed by the revenue against the said order of the Tribunal has been admitted but no stay has been granted. Further we observe that Section 9A (5) of the Customs Tariff Act, 1975 reads 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 up to 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. Provided also that if the said duty is revoked temporarily, the period of such revocation shall not exceed one year at a time.*

4.5 Even if the submissions made in the appeal filed by the revenue are accepted, then also by virtue of the Section 9 A (5) of Customs Tariff Act, 1975, reproduced above anti dumping duty that has been imposed by notification No 12/2010-Customs dated 19.02.2010 will cease to have effect after expiry of five years from the date of imposition i.e. 19.02.2010, until further extended.

4.6 No subsequent notification to Notification No. 12/2010-Customs dated 19.10.2010, extending period of imposition of anti dumping duty after 19.02.2015 has been placed on records either in the appeal filed by the revenue or during the course of argument. In the present case the order in original records that the importer had made imports for which the Bill of Entry No 2065593 dated 13.06.2017 was filed. Thus in absence of any subsequent notification extending the imposition of anti dumping duty imposed by notification dated 19.02.2010, the anti dumping as per this notification could not have been levied, on the imports made against Bill of Entry dated 13.06.2017.

4.7 We do not find any merits in the appeal filed by the revenue.

5.1 Appeal is dismissed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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