FAX : 011-26108426

REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **15/09/2016**

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. **C/A/53371-53373/2016-AD [DB]** dated **05/09/2016**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **129-A(4) of the Customs Act, 1962.**

Deputy/Asstt. Registrar (CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	C/127/2004	**HINDUSTAN LEVER LTD.** Through Managing Director, 165/166,Backbay Reclamation Mumbai
2	C/521/2003	**ALKALI MANUFACTURERS ASSOCIATION** Through Executive Director, 3rd Floor , Pankaj Chambers, Preet Vihar Commercial Complex, New Delhi -110092
3	C/616/2003	**NATIONAL ALUMINUM CO.LTD.** Through Managing Director, NALCO Bhavan , P/1 , Nayapalli , Bhubaneshwar, Orissa -751013

Name and Address of Respondent

4 Designated Authority,
Directorate General of Anti-Dumping and
Allied Duties/ Ministry of Finance

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Other Appellants and Respondents as per Annexure

Copy To
7 Advocate(s) / Consultant(s):

8 Additional Party's Name & Address :
9 Bar Association, CESTAT, Delhi

10 Director Publications, Customs, Excise. I.P. Estate, Delhi

11 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence colony New Delhi-3

12 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

13 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

14 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

15 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

16 TaxIndiaOnline.com Pvt. Ltd., B-XI/8183, Vasant Kunj, New Delhi - 110070

17 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

18 The ICFAI society , 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

19 MS Knowlegde Processing Pvt. Ltd.(Taxmanagementindia.com),FF-19, 1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

20 C.D.R.   21 Office Copy   22 Guard File

15/09/14

Deputy/Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 23.08.2016
Date of decision: 05.09.2016

Customs Appeal Nos. 521 & 616 of 2003 and
Customs Appeal No. 127 of 2004- AD

(Arising out of Final Finding No. 14/10/2002-dgad dated 04.08.2003 issued vide Customs Notification No. 142/2003-Cus dated 23.09.2003 issued by the Ministry of Finance, Department of Revenue).

M/s Alkali Manufacturers Association of India Appellant
M/s National Aluminium Co. Limited
M/s Hindustan Lever Limited

Vs.

Designated Authority, DGAD, MoF. Respondent

Appearance:

For Appellant

Ms. Reena Khair, Sh. Rajesh Sharma and Ms. Rita Jha, Advocates for the Appellant in AD Appeal No. 521 of 2003 (Alkali)

Sh. Gopal Jain, Sr. Advocate, Sh. Suhail Nathani, Sh. Somnath Shukla, Ms. Kriti Awasthi & Ms. Ashwani Chandrasekharan, Advocates in AD Appeal No. 127 of 2004 (HLL)

None for AD Appeal No. 616 of 2003 (NALCO)

For Respondent

Sh. Amit Singh, Advocate for the D.A.
Sh. Govind Dixit, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order Nos. 53371–53373/2016

Per: **B. Ravichandran**:

These appeals were remanded back to the Tribunal for a fresh decision by the Hon'ble Supreme Court vide order dated 20.01.2016. The brief facts of the case are that M/s Alkali Manufacturers Association of India (AMAI) filed an application for imposition of Anti Dumping duty on caustic soda (subject goods) originating in or exported from China P.R. and Korea R. P. in accordance with the provisions of Customs Tariff Act, 1975. The Designated Authority (DA) proceeded to investigate the matter by issuing Notification dated 14.05.2002. The Period of Investigation (POI) was 01.04.2001 to 31.03.2002. After following the procedure set out in Customs Tariff (Identification, Assessment and Collection of Duty or Additional Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (AD Rules), the DA recommended AD duty on subject goods originating in or exported from the above said countries vide Final Finding dated 04.08.2003. Earlier, based on preliminary finding dated 21.09.2002 provisional AD duty was imposed vide Notification No. 142/2002-Cus. dated 26.12.2002. Based on Final Finding Customs Notification No. 142/2003-Cus dated 23.09.2003 was issued imposing definitive AD duty on the subject goods.

2. AMAI challenged the recommendation of the DA on the ground that he had not recommended AD duty on M/s Hanhwa Chemical Corporation. M/s National Aluminium Co. Limited (NALCO) and M/s Hindustan Lever Limited (HLL) have opposed the imposition of AD duty on the subject goods. All these appeals were taken up together for hearing and decided by the Tribunal vide Order No. 26 – 28/2005-AD (PB) dated 23.12.2015. The

Tribunal after examining rival contentions concluded that the principle of taking chlorine as co-product for the purpose of arriving at manufacturing cost as adopted in case of M/s Hanhwa Chemical Corporation should have been adopted by the DA in case of domestic industry also. The Tribunal held during the POI, the cost of chlorine was varying and it has been treated as by-product by the DA. When cost of chlorine is substantial then it should not be taken as by-product but should have been treated as co-product as per para 12 of Annexure –III of Cost Accounting Records (Caustic Soda) Rules, 1967. Two different methods, one for M/s Hanhwa Chemical Corporation and another for domestic industry should not have been followed for arriving at the cost. The Tribunal set-aside the Customs Notification No. 142/2003 dated 23.09.2003, as also the Final Finding of the DA on non injurious price and injury margin. The matter was remanded to the DA for a fresh determination of NIP and injury margin by reasonably and equitably distributing the cost of production between chlorine and caustic soda and to issue Final Finding on that basis, afresh, in accordance with law.

3. Two Civil Appeals were filed against the said order of the Tribunal before the Hon'ble Supreme Court. AMAI contested the Final Order of the Tribunal on the ground that the Tribunal was not justified in comparing the normal value of foreign exporter with the NIP of Indian producers. There is no warrant to direct the DA to determine the cost of production for foreign exporters and of Indian Producers following the same methodology when both follow different accounting practices as permissible. It was also contested that the concept of "Equal Economic Importance" for the joint products has not been properly appreciated by the Tribunal. The DA challenged the Tribunal's order for remanding the matter back to the DA. It

was urged that chlorine has been correctly considered as by-product and the remand order by the Tribunal for re-determination of NIP was not correct.

4. The Hon'ble Supreme Court after considering both the Civil Appeals, passed order dated 07.01.2016. The Hon'ble Supreme Court set-aside the above mentioned order of the Tribunal and remanded the matter for a fresh decision. The Hon'ble Supreme Court directed the Tribunal to specifically examine the concept of "Equal Economic Importance" in a rational basis to decide the status of chlorine – whether a by-product or a co-product. The Tribunal has been directed to take into account the generally acceptable accounting principle and keep in view the statutory concept and commercial use "Equal Economic Importance" and determining the controversy. It will be permissible to look at any other material to determine the same.

5. In line with the directions of the Hon'ble Supreme Court as above, the matter was listed before this Tribunal and the submissions of all involved parties were heard elaborately.

6. Ms. Reena Khair, and Sh. Rajesh Sharma, ld. Counsels appearing on behalf of AMAI submitted that electrolysis of solt solution (brine) results in generation of three products simultaneously, namely caustic soda, chlorine gas and hydrogen. Chlorine gas cannot be stored or transported to long distance as it is a hazardous product. It should be consumed immediately for further process or converted into liquefied chlorine for the purpose of limited storage / transportation. Ld. Counsel elaborately submitted that during the POI, chlorine cannot be considered as a product of "Equal Economic Importance" as caustic soda. It was submitted that the total realisation from chlorine was in the range of 5.46% to 26.76%. It was

clarified that during POI none of the parties in domestic industry had used chlorine for the manufacture of downstream products – PVC resin. However, considering the hazardous nature of chlorine and consequent difficulty in marketing the product some of the parties in domestic industry have processed a part of chlorine to produce certain value added products/ derivatives like chloride paraffin, benzyl alcohol etc. None of the parties in domestic industry have the same level of integration as achieved by the producers in subject countries investigated by the DA. In such countries chlorine has got very valuable use in integrated PVC resin plants. The chlorine consumed in domestic industry is not to significant level to categorise the same as product of "Equal Economic Importance".

7. Ld. Counsel for AMAI reiterated that none of the major domestic producers have consumed any substantial portion of chlorine generated during the manufacture of caustic soda. M/s Gujarat Alkali Chemical Limited have sold 78% of chlorine produced during POI. A small portion of derivative chemicals of chlorine were manufactured by this unit during POI. M/s Grasim Industries sold 92% of chlorine produced during the POI. M/s DCW Limited, though had a PVC resin plant, have not consumed chlorine for the said purpose. As per records of the company for production of PVC resin the company utilised VCM as a raw material. Though VCM can be made using chlorine the company has not utilised chlorine for this purpose. As such mere existence of PVC resin in the product list of M/s DCW Limited did not imply consumption of chlorine gas captively. It was also reiterated that as per Cost Auditors report of this company chlorine has been treated as by-product. Chlorine has been deducted from the total cost to arrive at the cost of caustic soda. M/s Indian Rayon and Inds. Limited

have sold their entire production of chlorine during POI. The price shown is Rs. 2.34 per kg. whereas caustic soda has been sold at Rs.10.60 per kg. Though this manufacturer has not been considered for analysing the injury, the data is submitted only to highlight the treatment of chlorine as by-product by the said industry.

8. Ld. Counsels for AMAI sought to demonstrate by illustrative calculations as to how the treatment of chlorine as a by-product or co-product will impact the quantification of injury and thereby AD duty leviable. To sum up, it is the case of AMAI that chlorine cannot be considered as a co-product or product of "Equal Economic Importance" for the domestic industry in order to arrive at the NIP for domestic industry.

9. Sh. Sohail Nathani, ld. Counsel appearing on behalf of M/s Hindustan Lever Limited (HLL) submitted that the DA has erred in considering the chlorine as a by-product for domestic industry. The determination of "Equal Economic Importance" is to be done by taking into account (a) statutory concept, (b) commercial use and (c) any other material. In terms of 1967 Rules dealing with costing of caustic soda, only in cases where chlorine gas is not fully utilised for production of other products or for sale, the company instead allocating joint cost could credit the sales value of the quantities actually utilised. A reference was also made to Cost Accounting Standards, CAS-19 on joint cost. When two or more products produced by the same process, each having a sufficiently high saleable value to merit recognition as a main product, these are to be considered as joint products.

10. Ld. Counsel further submitted that commercial use of chlorine in India will justify it's treatment as co-product. Various value added products are manufactured in the domestic industry using chlorine. During POI the price of subject goods were at all time low whereas the price of chlorine was at all time high. This was noted by the Tribunal when they have remanded the matter to the DA for a fresh decision on treatment of chlorine for arriving at NIP. Further, the injury to domestic industry should be considered by taking into account the effect of import of total realisation of both chlorine and caustic soda in the domestic market as both have distinct economic importance. To sum up, it is the case of HLL that chlorine has significant economic importance and NIP of caustic soda has to be determined by treating chlorine as a co-product.

11. NALCO in the written submission explained the process of manufacture of caustic soda. It was contended that two third of chlorine produced is consumed in further production vinyl chain. The production of chlorine and caustic soda is inter-related with downstream business including manufacture of PVC and other derivatives. It was contended that the volume effect arrived at by the DA is not based on correct data. The imports by EOU, SEZ and Advance License Holders was not considered by the DA. It was pleaded on behalf of NALCO that there is a built in disparity in the Foreign Trade Policy as well as Customs Notification No. 5/94-Cus dated 18.01.1994 as no AD duty is leviable when EOUs are importing the subject goods. There is unreasonable restriction as unequal treatment was given to SEZ, EOU on the one side and NALCO on the other side which is violative of Article 19 as well as Article 14 of the

Constitution. NALCO prayed for setting-aside the imposition of AD duty on the subject goods.

12. Ld. Counsel for the DA submitted that the impugned finding by the DA and the consequent customs Notification imposing AD duty has been made strictly in accordance with the provisions of AD Rules and the applicable Standards of Accounting. The accounting method for costing of caustic soda will have direct link with the industry profile and the nature of usage of chlorine. The DA has examined the status of DI with reference to treatment of chlorine and correctly arrived at the decision considering chlorine as a by-product. There is no large scale integration of downstream manufacturing using chlorine in India.

13. Ld. AR supported the impugned customs Notification imposing AD duty on subject goods.

14. We have heard all the sides as above and perused the appeal records. We have also carefully examined the written submissions made by the parties. These appeals are considered afresh in line with the direction of the Hon'ble Supreme Court order dated 07.01.2016. The Hon'ble Supreme Court directed for a fresh consideration of the status of chlorine emerging during the manufacture of caustic soda. This is relevant to arrive at correct methods of costing having direct bearing on the NIP and thereafter on the AD duty. The central point of dispute is whether or not the chlorine emerging during the process of manufacture of subject goods has "Equal Economic Importance". In order to consider chlorine a joint product of the status equal to caustic soda we have to examine the guidelines as stipulated in para 12 of Schedule –III of 1967 Rules. The said para reads as under:

> "12. *Joint products- Where more than one product which is of equal economic importance arises from process, the cost up to the point of separation of products shall be apportioned to joint products on reasonable and equitable basis and shall be applied consistently. The basis on which such joint costs are apportioned to different products arising from the process shall be indicated in the cost records*".

15. We note that the term "Equal Economic Importance" has not been defined. The plain meaning of the same is that when more than one product emerge during the common manufacturing process, two or more those can be considered to have "Equal Economic Importance" if they give equal economic return or monetary benefit to the producer. In such situation these products can be considered as joint/ co-products. As per Dictionary of Accounting by Jonathan Law – 2010 (Oxford University Press) a main product is a product of a process that has the greatest economic significance. Other products of secondary economic importance are regarded as by-products. However, if all products have equal importance they are regarded as joint products. Keeping this in mind we examine the various submissions made by parties as above. Chlorine and caustic soda are two of the most important inorganic chemicals having industrial use. They are together normally referred to as chlor –alkali. Chorine is largely used in the synthesis of chlorinated organic compound. It is difficult to store and transport economically and hence, it is generally produced near the consumer industry. We note that the DI has not evolved a level of total integration for downstream usage of chlorine for manufacturing value added derivatives in the vinyl line or otherwise. The economic importance of chlorine for the DI cannot be considered equal to caustic soda. In other words, even if chlorine has fluctuating price, showing upward trend during certain times, cannot economically realise that much benefit to the producer

in India as equal to caustic soda. Admittedly, chlorine is of economic importance and the producers do realise significant benefit by sale or partly by captive consumption in making derivatives chemicals. However, it is clear, based on the evidence placed before us that the integrated downstream manufacture resulting in economic consumption of substantial quantum of chlorine in the DI has not reached a level which will make chlorine a product of "Equal Economic Importance" to the producer. This is mainly due to constraint in full usage of chlorine captively in the vinyl chain and the difficulty in storing and transporting the said product. It is also linked to the demand and capacity to obsorb the downstream products made by PVC etc. in the domestic economy. We note that various major units in DI, as submitted by the ld. Counsel for the DI, have been selling substantial portion of chlorine, not consuming the same for value added downstream products. Considering the constraints in storage and transport and also lack of integrated capacity to use, the realisation towards such sale only can be considered to fix the economic importance of chlorine. Based on the submissions made by the parties, admittedly, such realisation will not give chlorine the status of "Equal Economic Importance" when compared to the subject goods. Further, fluctuation in chlorine price even substantially increase during certain times do not make chlorine as a product of equal importance for DI.

16. We have perused the Cost Audit reports of units of some of the DI. Chlorine has been consistently treated as by-product and the Cost Accounting Standards applicable to such treatment have been applied. The realisation out of chlorine produced shows that the position of "Equal Economic Importance" cannot be given to chlorine in the Indian context.

After careful consideration of all the submissions made by the parties it is evident that chlorine was not of "Equal Economic Importance" to the DI as compared to caustic soda and thus cannot be treated as joint product. As such, we find that treating chlorine as a by-product in the analysis and to arrive at a finding by the DA is justified. As such, the appeals filed challenging the finding of the DA and consequent Notifications are dismissed.

(Pronounced on 5 . 09 . 2016).

(Justice (Dr.) Satish Chandra)
President

(Archana Wadhwa) 1/9/16
Member (Judicial)

(B. Ravichandran) 1.9.16
Member (Technical)

Pant