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REGISTERED / AD

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

Dated: **30/08/2016**

To

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

Final Order No. **AD/A/53159-53161/2016-CU[DB]** dated **23/08/2016**

I am directed to transmit herewith a certified copy of order passed by ~~the~~ Tribunal under section **9C of the Customs Tariff Act,1975.**

Deputy/Asstt. Registrar (CUSTOMS Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	AD/Stay/90/2012	AD/3/2012	**RISHIROOP POLYMERS PVT. LTD.** A COMPANY DULY REGISTERED UNDER THE COMPANY LAW OF SOUTH KOREA HAVING ITS OFFICE AT KUMHO ASIANA BUILDING, 57, SHINMUNNO 1-GA, JONGNO-GU SEOUL, KOREA RP
2	AD/Stay/91/2012	AD/4/2012	**KUMHO PETROCHEMICALS CO. LTD. (FORMERLY KOREA KUMBHO CO. LTD.)** A COMPANY DULY REGISTERED UNDER THE COMPANY LAW OF SOUTH KOREA HAVING ITS OFFICE AT KUMHO ASIANA BUILDING, 57, SHINMUNNO 1-GA, JONGNO-GU SEOUL, KOREA RP
3	AD/COD/248/2012	AD/14/2012	**National Organic Chemical Industries Ltd** Mafatlal House, H.t.parekh Marg, Backbay Reclamation, Churchgate, Mumbai.400020

Name and Address of Respondent

4 -DESIGNATED AUTHORITY DIRECTORATE GENERAL OF ANTI-DUMPING AND ALLIED DUTIES, 1. MINISTRY OF COMMERCE AND INDUSTRIES. GOVERNMENT OF INDIA UDYOG BHAWAN, NEW DELHI 110001 2. UNION OF INDIA MINISTRY OF FINANCE SECRETARY - REVENUE GOVERNMENT OF INDIA NORTH BLOCK, NEW DELHI

Other Appellants and Respondents as per Annexure

Copy To

5Advocate(s) / Consultant(s):

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Rajesh Sharma, Adv
trm, solicitors & consoltants,
k-3/a, saket,
New Delhi,

6 Additional Party's Name & Address :

KOREA KUMHO PETROCHEMICALS CO LTD
21-24F KUMHO ASIAN MAIN TOWER #115, SINMUNNO 1-GA, JONGNO-CU, SEOUL 110-857, KOREA.

RISHIROOP POLYMERS PVT LTD
65 ATLANTA, NARIMAN POINT, MUMBAI-21

AUTOMATIVE TYRE MANUFACTURERS ASSOCIATION
PHD HOUSE(4TH FLOOR),OPP ASIAN GAMES VILLAGE, SIRI FORT INSTITUTIONAL AREA, NEW DELHI-110016

7 Bar Association, CESTAT, Delhi

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

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

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

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

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

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

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

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18 C.D.R. 19 Office Copy 20 Guard File

31/8/16

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: 16.08.2016
Date of decision: 23 .08.2016

For Approval and Signature:

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

1	Whether Press Reporter may be allowed to see the Order for publication as per Rule 26 of the CESTAT (Procedure) Rules, 1982?	No
2	Whether it should be released under Rule 26 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3	Whether their Lordships wish to see the fair copy of the Order?	Seen
4	Whether Order is to be circulated to the Departmental authorities?	Yes

Anti Dumping Appeal Nos. 3, 4 and 14 of 2012 with
Anti Dumping Stay Nos. 90 – 91 of 2012 & COD No. 248 of 2012

(Arising out of Notification No. 92/2011-Cus. dated 20.09.2011 and Final Findings dated 05.08.2011 passed by the Ministry of Finance, Department of Revenue).

M/s Rishircop Polymers Pvt. Ltd., Appellant
M/s Kumho Petrochemicals Limited
M/s National Organic Chemical Industries Ltd.

Vs.

Designated Authority, DGAD Respondent
Ministry of Finance

Appearance:

Sh. Dhruv Gupta and Sh. Ankur Sharma, Advocates for the Appellants
Sh. Amit Singh, Advocate for the DA
Sh. Govind Dixit, AR for the Revenue

Sh. Rajesh Sharma and Ms. Rita Jha, Advocates for the Domestic Industry

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. 53159 - 53161/2016

Per: **B. Ravichandran**:

Notification No. 92/2011-Cus. dated 20.09.2011 of Ministry of Finance and Final Findings on Mid Term Review dated 05.08.2011 of the Designated Authority (DA), Directorate General of Anti Dumping and Allied Duties, Ministry of Commerce and Industry are challenged in these three appeals by the appellants. M/s Kumho Petrochemical Co. Limited, Korea are manufacturers and exporters of rubber chemicals known as PX13 (6 PPD) falling under chapter 29 and 38 of the Customs Tariff Act (subject goods), M/s Rishiroop Polymers Pvt. Limited legal representatives in India of the said Korean company in India and M/s National Organic Chemical Industries Limited (NOCIL), Mumbai representing domestic industry have filed these appeals against the said impugned findings and notification.

2. The brief facts of the case are that the domestic industry approached the DA with a plea for imposition of AD duty on exports of subject goods from, inter alia, Kumho Petrochemical Co. Limited, Korea. The DA after following the procedure prescribed in terms of Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 gave his findings which resulted in provisional AD duty for imports of subject goods from PR China and Korea RP vide Customs Notification No. 61/2008-Cus. dated 05.05.2008. The Final Finding was notified on 01.10.2008 and definitive AD duty on the subject goods were notified vide Notification No. 133/2008-Cus. dated 12.12.2008. The DA received an application from

NOCIL pleading for the need of a Mid Term Review of the AD duty on the subject goods originating in or exported from Korea RP for enhancement. The DA initiated action for such Mid Term Review in terms of Rule 23 and after following the procedure set out in the said Rules arrived at the final findings dated 05.08.2011 which is under challenge. The said Final Finding resulted in the Customs Notification No. 92/2011 dated 20.09.2011 which is also under challenge.

3. Shri Dhruv Gupta, ld. Advocate appearing on behalf of appellant No. 1 and 2 submitted that they are contesting the enhancement of AD duty consequent upon Mid Term Review by the DA. His submission may be summarised as below:

(i) DA has no jurisdiction to revise the AD duty before its expiry. Section 9A(5) provides for period for which such duty can be imposed. The proviso to the said section grants powers to the Central Government to review for extension of such duty and DA has no power.

(ii) The AD duty imposed on a definite finding cannot be increased in a review.

(iii) Rule 23 of the AD Rules only refers to continued imposition of AD duty. Even the Customs Act provides for only withdrawal of existing duty not for its enhancement.

(iv) The determination of normal value for the applicant is incorrect. In a multi-product company the records may not reasonably reflect the cost of production and sale of subject goods. The comparison of raw material cost from other market economy country is not correct. The cost of production in the country of origin is relevant.

(v) The finding on injury analyses is incorrect. The domestic sales of the subject goods have increased as well as the profit margin and cash flow has also improved over the injury period with reference to domestic industry.

(vi) The determination of DA on price under cutting/ price under selling has no consequence. The investigation and analyses in Mid Term Review is different from that of sun-set review. In sun-set review likelihood of recurrence of injury is examined for extension of AD duty for further period. The DA has erred in enhancing AD duty as there is no injury at all to the domestic industry during the relevant period.

4. Shri Rajesh Sharma, ld. Advocate appearing on behalf of NOCIL submitted that the present appeal was preferred by them in continuation of their earlier appeal against the Final Finding recommending for definitive AD duty on import of subject goods. They have preferred this appeal during the pendency of the above mentioned appeal. He further submitted that the said appeal was disposed of by Final order No. 54808 – 54810/2014 dated 26.12.2012 of the Tribunal. The Tribunal remanded the matter to the DA to re-determine the export price, normal value and the dumping margin with reference to the subject goods which has been complied with by the DA. The Mid Term Review now the subject matter of the present appeals has resulted in the increase in AD duty on the subject goods. This Mid Term Review has been initiated on the application of NOCIL. Ld. Advocate submitted that as of now they have no points to press in the present appeal in view of the development in the case during the intervening period as narrated above.

5. Ld. Advocate Sh. Amit Singh for DA and Sh. Govind Dixit, ld. AR for Revenue defended the impugned findings and the Customs notification. They have submitted that the DA has followed the prescribed procedure and arrived at the findings on Mid Term Review with categorical reasons. The DA has powers as per the AD Rules to initiate such Mid Term Review. The submission of appellants No. 1 and 2 that the DA has no such power is devoid of any merit. Rule 23 empowers the DA to conduct such review. Regarding the correctness of the finding of DA on the raw material cost and export price, it is submitted that the DA has followed the correct procedure by comparing the raw material cost of international by accepted price. The data relating to domestic industry during the relevant period has been examined and it has been recorded by the DA in his finding. The fact that the domestic industry earned profit or had some increase in profit has no relevance to indicate that the AD duty cannot be varied if the requirements for such variation were found to exist.

6. We have heard all the parties and examined the appeal records. Appellant No. 1 and 2 are aggrieved by the findings of DA on Mid Term Review regarding AD duty imposed on subject goods originating in or exported from Korea RP. A perusal of Rule 23 of Anti Dumping Rules will indicate the powers of the DA to review the need for continued imposition of any AD duty on its own initiative or upon request by any interested party. In the present case, M/s NOCIL has approached the DA with information to substantiate the need for Mid Term Review and for appropriate action by DA in terms of the above said Rules. We have perused the findings of DA. He has exercised the powers under Rule 23 and followed the procedure as stipulated which are substantially as applicable to the initial investigation as

mentioned in Rule 23(3) stipulating the application of various Rules for such review.

7. We find the appellants challenge on lack of power by DA is without legal basis. Hon'ble Punjab & Haryana High Court in ***Merino Panel Products Limited vs. Designated Authority – 2011 (271) ELT 336 (P&H)*** held as under:

> "7. *It is well known that provisions for anti-dumping duty have been incorporated to safeguard the domestic industry against practice of exporting countries dumping their goods at less than normal value resulting in injury to the domestic industry. To achieve this object, the Central Government has been authorised to impose anti-dumping duty not exceeding the margin of dumping. If it is proved that anti-dumping duty has been imposed in excess of margin of dumping, the importer is entitled to refund under Section 9AA. The Rules provide for manner in which the effect of dumping and margin of dumping are determined. Designated Authority is to be appointed by Central Government not below the rank of Joint Secretary to investigate as to existence and effect of dumping and to make recommendations about the amount of anti-dumping. The said authority also has to review the need for continuance of anti-dumping. Procedure and principles governing investigation have been laid down. Rule 23 provides for review from time to time. There is guidelines in the form of purpose for which anti-dumping duty is provided and the Designated Authority has to act on the principles laid down for determining the injury and also to review the need for continuance of anti-dumping duty from time to time. Order of determination or review is appealable under Section 9C. The Rules have stood the test of time. The petitioner never felt aggrieved by the levy of anti-dumping duty and no appeal is stated to have been filed. Moreover, dumping margin in exports from different countries could be different. There is, thus, nothing in the rules which may go against the mandate of the statute. Conferment of such power is necessary for effectuating the object for which the provisions have been enacted. It cannot be held that the Rules are arbitrary and without any guideline. Mere fact that power under Rules may not be exercised properly cannot be a ground to set aside the Rules. There is no presumption that power under the rules will not be exercised to carry out its objectives*".

Further, the Tribunal in ***Grauer & Weil (I) Ltd. vs. DA – 2011 (271) ELT 112 (Tri. Del.)*** held as below:

> "*The DA on being satisfied that a review can be called for the need for continued imposition, mid term review of enhancing Anti-dumping duty can be initiated. In this case, it is seen that the final findings were issued in the initial investigation on 19.3.2007 and mid term review was sought in February, 2008 which was more or less within a year after the imposition of Anti-dumping duty. In the absence of any specific time period indicated in Rule 23 of the anti-dumping rules, the mid term review in the case in hand cannot be held as faulty*".

8. The Hon'ble Supreme Court in ***Rishiroop Polymers Pvt. Ltd. vs. Designated Authority & Addl. Secretary - 2006 (196) ELT 385 (SC)*** examined in detail the scope of power with DA for review. It was held if there is significant change in the facts and circumstances that it is considered necessary either to withdraw or modify appropriately the AD duty which has been imposed the DA can act accordingly. As such, we find no legal infirmity in the Mid Term Review by the DA.

9. Considering the methodology adopted by the DA in arriving at the recommendations for modifying the imposition of AD duty consequent upon such Mid Term Review. We find that the procedure envisaged has been followed by the DA. The DA has considered volume effect of dumped margin, price effect, price under selling, price suppression and depression and other economic parameters relating to domestic industry before reaching the conclusion. We have perused the said analyses and found no merit in the appellant's challenge to the same. Regarding the substantial change and circumstances, we find the authority followed adjusted cost of production and sale of the subject goods. The DA recorded that the main appellant (Korean manufacturer) continued to source their main input 4ADPA from same non market economy company and as such the DA constructed the cost of production of 4ADPA. We find no merit in the appellant's contention regarding the arrival of normal value. In respect of non cooperating exporters from Korea RP the lowest import price based upon IBIS import data has been taken into account. It is also recorded that the domestic industry have provided positive information in terms of Article 11.2 of WTO Agreement and Rule 23 of Anti Dumping Rules. Based on all the relevant data the DA concluded that subject goods are entering the Indian market from Korea RP at

a dumped prices and dumping margin is significant and above the de-minimis limits prescribed. It has been recorded that though the situation of domestic industry has improved due to existing Anti Dumping duties, the price under cutting and price underselling are significant from Korea. Accordingly, it is concluded that the injury to the domestic industry is likely to recur in case the present AD duties are not modified. The definitive AD duty has been revised based on such recommendation by the DA. We take note that the initial finding of definitive of AD duty was also challenged before this Tribunal by the appellants. The Tribunal vide Final order dated 26.12.2014 upheld the decision of DA regarding cost of procurement of main raw material 4ADPA. The matter was remanded to the DA only for providing certain data to the interested parties. Accordingly, a decision has been taken by the DA on such remand. As such, we find the imposition of AD duty *per-se* cannot be challenged. The present appeals challenging the Mid Term Review have not brought out any serious infirmity in the methodology or procedure followed by DA. Upon careful consideration of all the points raised and the findings of the DA we hold that there is no merit in the appeals filed by the appellants No. 1 and 2 and the same are dismissed. The appeal filed by M/s NOCIL is also disposed of. CoD application disposed of accordingly.

(Pronounced on 23 .08.2016).

(Justice (Dr.) Satish Chandra)
President

(Archana Wadhwa)
Member (Judicial)

(B. Ravichandran) 18816
Member (Technical)

Pant