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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. AD/7/2008 WITH AD/S/1023/08, AD/8/2008 WITH AD/S/1025/08, AD/10 /2008 - CU[DB] WITH AD/S/1103/08, AD/16 /2008 - CU[DB] Date 30/04/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
BASF SOUTH EAST ASIA PTE LTD
7 TEMASEK BOULEVARD # 35-01,
SUNTEC TOWER 1 SINGAPORE

BASF SOUTH EAST ASIA PTE LTD. & OTHERS Appellant

Vs

DESIGNATED AUTHORITY/MINISTRY OF FINANCE Respondent

I am directed to transmit herewith a certified copy of **Final order No. AD/1-4/2010 CU[DB]** dated 30.04.2010 passed by the Tribunal under Section 35-C(1) of the Central Excise Act, 1944/Section 129 B of the Customs Act 1962 Finance Act 1994 relating to Service Tax and Customs Tariff Act, 1975.

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent

THE DESIGNATED AUTHORITY,
MINISTRY OF COMMERCE,
UDYOG BHAWAN, NEW DELHI-110 011.

SECRETARY (REVENUE),
DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE,
NORTH BLOCK, NEW DELHI.

2. Adv. / Consult

MR.V. LAXMIKUMARAN, ADV.,
B-6/10, SAFDARJUNG ENCLAVE,
NEW DELHI-110029

MR. UDAY N. TIWARY, ADV.
1003, SHIVALIK TOWER,
KAUSHAMBI, GHAZIABAD, U.P.

3 S.D.R
4 J.C.D.R.
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
10 Taxmann Allied Service Pvt Ltd., 59/32. New Rohtak Road. New Delhi - 110005
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Assistant Registrar
(Customs Appeal Branch)

List of Interested parties received from Director (PT), DGAD, MOC, New Delhi

1) M/s. Strategic Law Group,
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2) The US Embassy,
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   New Delhi-110021

3) Singapore High Commission
   E-6 Chandragupta Marg, Chanakyapuri
   New Delhi-110021.

4) The Embassy of Japan,
   Plot No.4&5, 50-G
   Shantipath, Chanakyapuri,
   New Delhi-110021.

5) The Delegation of European Commission to India, Bhutan & Nepal,
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6) M/s Manali Petrochemicals Ltd,
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7) M/s. Shell Eastern Petroleum (Pte) Ltd. (Appellant)
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10) BASF India Ltd.
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    New Delhi-110 048

11) M/s. DP Foam Private Ltd.,
    'Seethala', 7, Jawaharlal Nehru Street,
    P.B. No. 130, Pondicherry 605 001

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI

PRINCIPAL BENCH,

COURT NO.1

ANTI-DUMPING APPEAL Nos. AD/ 07, 08, 10 & 16/2008

[Arising out of Final Findings dated 26th December, 2007 issued by the Designated Authority and Customs Notification No. 15/2008 dated 5th February, 2008 issued by the Ministry of Finance]

For approval and signature:

Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Dr. Chittaranjan Satapathy, Technical Member
Hon'ble Mr. D.N. Panda, Judicial Member

1	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
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

1) M/s. BASF South East Asia Pte Ltd.,
2) M/s. Shell Eastern Petroleum (Pte) Ltd.,
3) M/s. D.P. Foam Pvt. Ltd.,
4) M/s. Manali Petrochemicals Ltd., Appellants

Vs.

Designated Authority/ MoF, Respondents

Appearance

Shri R. Parthsarthy, Advocate and Shri S.Seetharaman, Advocate for the Appellants No. 1and 2

Shri Uday Tiwari, Advocate for Appellant No. 3

Shri Subham Yogi, Advocate for Appellant No. 4

Shri Ameet Singh, Advocate and Shri M.K. Anand, Director for the Designated Authority, respondent

CORAM

Mr. Justice R.M.S. Khandeparkar, President

Dr. Chittaranjan Satapathy, Technical Member

Mr. D.N. Panda, Judicial Member

Date of hearing : 21st April, 2010
Date of decision: 30.4.2010

FINAL ORDER NO. AD/1 to 4/10

Per: Dr. Chittaranjan Satapathy

This appeal is directed against Ministry of Finance Notification No. 15/2008-Cus dated 5.2.2008, which has been issued pursuant to the Final Findings dated 26th December, 2007, of the Designated Authority (D.A.) in the Ministry of Commerce and Industry in the Sunset Review recommending continuance and revision of the Anti-dumping duty on Flexible Slabstock Polyol originating in/exported from Singapore in so far as the present appellants are concerned.

2. On the basis of an application filed by the domestic industry, the D.A. initiated Anti-dumping investigation on 21.9.2001 on imports of Flexible Slabstock Polyol originating in/exported from the European Union, Japan, Singapore and United States of America. The provisional Anti-dumping duty was imposed by Customs notification No. 17/2002-Cus dated 11.2.2002 based on preliminary findings dated 14.12.2001. Definitive Anti-dumping duty was imposed by Customs notification No. 120/2002-Cus dated 31.10.2002 based on final findings dated 19.9.2002. Subsequently, sunset review was initiated on 27.12.2006

and Anti-dumping duty was extended for a period of one year up to 10.2.2008 under Notification No. 12/2007-Cus dated 6.1.2007. Period of investigation for sunset review was 1.4.2005 to 30.6.2006. The sunset review has resulted in the final findings dated 26.12.2007 and Customs notification No. 15/2008-Cus dated 5.2.2008, leading to the present appeals.

3. Shri Parthsarthy, learned Advocate appearing for the appellant foreign exporters, argues as follows:-

(i) Though a negative dumping margin has been determined in respect of the appellant exporters from Singapore, the Anti-dumping duty has not only continued but has been enhanced upwards without any justification.

(ii) The D.A. has failed to determine whether there was ikelihood of recurrence of dumping by the appellants nor the D.A. has determined likelihood of recurrence of dumping for Singapore as a whole.

(iii) The determination done by the D. A. is highly speculative, unreasonable and arbitrary.

(iv) There is no reasonable ground for the D.A. to come to the conclusion that should there a shift in the direction of trade occur in the exporting country, growing domestic demand would attract greater share of imports. No basis has been provided in the finding to support such conclusion.

(v) The determination of recurrence of injury to the domestic industry has no basis.

(vi) Levy of Anti-dumping duty on export by the appellants without determining a positive dumping margin is in violation of section 9A(1) and 9A(6) of the Act.

(vii) No determination of the likely dumping margin for the appellants has been done.

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(viii) The injury analysis conducted by the designated authority was improper and contrary to rules.

4. Learned Advocate for the appellant exporters relies upon the decision of the Larger Bench of the Tribunal in the case of Indian Graphite Mfrs. Asscn. Vs. D.A., reported in 2006 (199) ELT 722 (Tri.-Del.) in support of his argument that the D.A. can only recommend Anti-dumping duty equal to the margin of dumping to remove the injury for continued protection of domestic industry.

5. Shri Uday Tiwary, learned Advocate appearing for the appellant importer, states that section 9A(5) of the Customs Tariff Act does not talk about the rate of Anti-dumping duty which is covered under Section 9A(1). In view of the provision of Section 9A(1) the Anti-dumping duty should not be continued in the absence of positive dumping margin.

6. Learned Advocate for the appellant importer also states that the D.A. cumulated both dumped and un-dumped imports for determining dumping margin and injury margin which is illegal in view of Annexure-II to the Anti-dumping Rules in terms of clause (i) and (iii) thereof. In this connection, he also cites decision of the Tribunal in the case of Forum of Acrylic Fibre Ltd. vs. Designated Authority/Ministry of Finance and Ors. – 2006 E.C.R. 13.

7. Shri Ameet Singh, learned Advocate appearing for the D.A. reiterates the findings of the said authority and states that Section 9A(5) permits variation in the Anti-dumping duty after sunset review. He also states that cummulation is provided in Annexure-II to the Anti-dumping Rules for determination of injury.

8. Shri M.K. Anand, Director in the Anti-dumping Directorate states that it is generally noticed that the exporters increase the price of export to the reference price level during the period of sunset review and, therefore, lack of positive dumping margin during the period of review

may not warrant withdrawal of duty, if there is a finding regarding recurrence of dumping or injury. He cites the decision of the Hon'ble Supreme Court in the case of Rishiroop Polymers (P) Ltd. vs. Designated Authority - 2006 (196) ELT 385 (S.C.), which approves continuance of Anti-dumping duty after review.

9. He also states that apart from disclosing necessary details to the appellant exporters, the Anti-dumping Authority reviewed the data given by the exporters themselves which is available with the exporters themselves and, therefore, they cannot complain that the data was not given to them.

10. He, however, confirms that segregation of dumped and un-dumped imports has not been done by the D.A. but states that such non segregation is not material to the outcome of the final finding which is based on likelihood of recurrence of dumping and injury.

11. In reply, learned Advocate for the appellant exporters states that analysis of price, volume and production capacity does not support the conclusion of the D.A. regarding recurrence of dumping or injury and, hence, imposition of Anti-dumping duty should be set aside.

12. It has been submitted by the appellant domestic industry as follows:

-(i) The impugned final findings are wrong and have been issued without appreciation of facts.

(ii)The submissions of the domestic industry have not been taken into consideration.

(iii) Sufficient non-confidential information was not provided to the domestic industry nor was it provided with an adequate opportunity to present its case. In this connection, the decision of the Hon'ble Supreme Court in the case of Reliance Industries Ltd. Vs. D.A. - 2006 (202) E.L.T. 23 was cited.

(iv) The D.A. has relied on fresh data collected during verification for which no non-confidential version has been given either to the domestic industry nor placed in public record for verification

(v) The D.A. did not consider the request of the domestic industry to recommend imposition of anti=dumping duty in Rupee terms.

13. The domestic industry has also challenged the removal of antidumping duty on exports originating in/ from EU but we do not find the same substantiated or pressed. Similarly their challenge in regard to determination against exports originating in/ from Japan is also unsubstantiated and not pressed. Hence, we confine ourselves to the challenge in these appeals to the determination made by the D.A. in respect of exports originating in/ from Singapore only, which was argued before us.

14. This appeal relates to a case of sunset review by the D. A. We have considered at length issues relating to such review in our Final order in the case of M/s. Thai Acrylic Fibre Co. Ltd. Vs. D.A. in Appeal No AD/ 4/ 2009. Our findings therein are extracted below: -

"10. We are dealing in this case with the final findings arising out of a sunset review. As provided under Article 11.3, a sunset review can be initiated:

- *on the D.A.'s own initiative; or*
- *upon a duly substantiated request made by or on behalf of the domestic industry, and filed within a reasonable time prior to the five-year anniversary of the imposition of anti-dumping duties.*

In the context of sunset reviews, two important questions have arisen in the course of arguments which require to be answered first. These are: -

(i) Whether the D.A. is required to determine, for the purpose of sunset review, dumping margin and injury in the same manner as required for the initial determination and whether the duty imposed should be limited by the dumping margin and injury so determined?

(ii) Whether the Government has the power to vary the antidumping duty upwards or downwards while continuing the same after a sunset review under Section 9A (5) of CTA?

11. We have carefully considered submissions made before us in this regard. We note that Section 9A (1) of CTA authorises levy of the antidumping duty. Once imposed, it can remain in force for 5 years unless revoked earlier as provided under Section 9A (5). The first proviso to Section 9A (5) provides for extending the period if in the sunset review, the Government is of the opinion that the cessation of the antidumping is likely to lead to continuation or recurrence of dumping and injury. Article 11.3 similarly provides that anti-dumping duty shall be terminated on a date not later than five years from its date of imposition unless the D.A. determines in a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

12. The provisions under the national law and the international agreement thus provide for continuation of the anti-dumping duty beyond five years on a sunset review. We note that the Honourable Delhi High Court in the case of Kalyani Steels Ltd. Vs. Revenue Secretary, M. F. - 2008(224) E.L.T.47 (Del.) has held that there is no conflict between the national law and the international agreement while observing in paragraph 30 of its judgement as follows: -

"We are of the view that there is no conflict between Article 11 of the Anti-Dumping Agreement and the municipal law. Both contemplate an initial imposition of anti-dumping duty, a review from time to time (or a mid-term review) to determine whether the said imposition should be continued or withdrawn and a final review (or sunset review) at the end of five years from the initial imposition to determine whether the anti-dumping duty should cease or should continue for a further period of five years. The parameters laid down by the municipal law as well as Article 11.3 of the Anti-Dumping Agreement are the same, namely, that the cessation of anti-dumping duty would lead to continuation or recurrence of dumping and injury to the domestic industry. The error that the Central Government has made in its interpretation of the municipal law is that it has given a very restricted meaning to Section 9A(5) of the Act read with Rule 23 of the Rules."

13. Unlike original investigations, sunset reviews are prospective in nature, as they focus on the likelihood of the continuation or recurrence of dumping and injury, in case antidumping duties are removed. With respect to the question whether dumping is likely to occur in the event that the antidumping duties are removed, the D.A. has to consider relevant economic facts which might indicate that in the event the anti-dumping duty is removed, dumping will recur. With respect to the injury determination, if the anti-dumping duty has had the desired effect, the condition of the domestic industry would be expected to have improved during the period the anti-dumping duty was in effect. Therefore, the assessment whether injury will continue, or recur, would entail a counter-factual analysis of future events, based on projected levels of dumped imports, prices, and impact on domestic producers. Thus the D.A. has to address the question as to whether the domestic industry is likely to be materially injured again, if duties are lifted.

14. Sunset review entails a likelihood determination in which present levels of dumping is obviously not so relevant as is the likelihood of continuance or recurrence of dumping. Moreover, during the investigation period, the anti-dumping duty would be in force and hence, the current level of dumping may be non-existent or minimal. The exporters under investigation may also sell at a non-dumped price during this period knowing fully well that a sunset review would be in progress. Hence, the criteria under Section 9A (1) that the anti-dumping duty should not exceed the dumping margin would have no practical application for continuance of the duty under Section 9A (5). There is also no such warrant in law under the said Section 9A (5) to do so.

15. However, we find no such difficulty in determining the non injurious price to the domestic industry, that is the price at which the domestic producers would not suffer any injury. Moreover, India has also adopted the lesser duty rule like the EC (and unlike the US) under which the anti-dumping duty is pegged at a level with reference to the non-injurious price to remove the injury rather than hike it to the full extent of the dumping margin. Hence, determination of the current injury level is a practical option before the D.A., while the requirement under Section 9A (5) is a likelihood determination for the future.

16. Thus we find that while the requirement under Section 9A (5) is continuance of the antidumping duty earlier imposed under Section 9A (1) upon a likelihood determination, there may be a need to increase or decrease the duty level to eliminate the current or likely injury. We are of the view that when under the statute the Government has the power to continue or the purpose for which the statute authorises the lea levy; it also has the incidental and ancillary power to increase or reduce the

same to make it fully effective against dumping. It is settled law that any statutory authority not only has all the powers conferred expressly by the statute, but also it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognised as incidental and ancillary, not because they are inherent, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. While laying down the above principles, in UOI vs. Paras Laminates (P) LTD. - 1990 (49) E.L.T. 322 (SC), the Honourable Supreme Court has quoted from Maxwell on Interpretation of Statutes, (eleventh edition) to the effect that 'where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution'.

17. We thus conclude with reference to the two questions raised in the course of hearing that the Government has the power to vary the anti-dumping duty while continuing the same on conclusion of a sunset review under Section 9A (5) of CTA. However, there is no warrant under the said Section 9A (5) to determine the current dumping margin and limit the antidumping duty to such limit as under Section 9A (1). However, if the Government wants to vary the antidumping duty under Section 9A (5) instead of merely continuing the duty initially imposed under Section 9A (1), it must be for a good and sufficient reason to be indicated in the D.A.'s findings on sunset review. One such reason as indicated earlier can be the current or anticipated non - injurious price to the domestic producers."

15. We were also guided in that case by the following observations contained in the decisions of the Honourable Supreme Court and the WTO Panel and Appellate Body: -

"18. The scope of a review, albeit in the context of midterm review, was considered by the Hon'ble supreme Court in the case of Rishiroop Polymers vs. D.A. – 2006 (196) E.L.T. 385 (SC) as follows: -

***"35.** Otherwise also, we are of the opinion that scope of the review inquiry by the Designated Authority is limited to the satisfaction as to whether there is justification for continued imposition of such duty on the information received by it. By its very nature, the review inquiry would be limited to see as to whether the conditions which existed at the time of imposition of anti-dumping duty have altered to such an extent that there is no longer justification for continued imposition of the duty. The inquiry is limited to the change in the various parameters like the normal value, export price, dumping margin, fixation of non-injury price and injury to domestic industry. The said inquiry has to be limited to the information received with respect to change in the various parameters. The entire purpose of the review inquiry is not to see whether there is a need for imposition of anti-dumping duty but to see whether in the absence of such continuance, dumping would increase and the domestic industry suffer.*

***36.** It is of vital importance to note that in the initial imposition of duty, the appellant has accepted the position that determination of injury by the Designated Authority was proper and in conformity with the requirements of Annexure-II of the Anti-Dumping Rules. The appellant did not challenge the final finding of the Designated Authority before the Tribunal that parameters mentioned in para (iv) of Annexure-II had not been considered or satisfied. We have declined the permission to the appellant to raise this point before us in Civil Appeal Nos. 773 and 774 of 2001 which were directed against the final findings recorded by the Designated Authority based on which the Government of India had imposed the anti-dumping duty for a period of five years. Under Section 9A(1), the said initial imposition of anti-dumping duty is ordinarily contemplated to be continued and remain in effect for a full period of five years, at the end of which it would be subject to sunset review, the* *possible consequence of which would be the extension of the operation of the period of anti-dumping duty for another period of five years. This is subject to the provisions of sub-rule (1) of Rule 23 of the Anti-Dumping Rules, under which the Designated Authority is empowered to review the anti-dumping duty imposed from time to time. Having regard to the scheme of the above mentioned provisions of the statute, once anti-dumping duty has been initially imposed, it would be ordinarily continued for five years unless on a review it is found by the Designated Authority that there has been such a significant change in the facts and circumstances, that it is considered necessary either to withdraw or modify appropriately the anti-dumping duty which has been imposed. It is, therefore, clear that unless the Designated Authority suo motu or the applicant for review is in a position to establish clearly that there has been a significant change in the facts and circumstances relating to each of the basic requirements or conditions precedent for imposing duty, the finding given by the Designated Authority at the time of initial imposition of anti-dumping duty must be considered to continue to hold the field.*

37. *The final findings recorded by the Designated Authority at the time of initial imposition of anti-dumping duty on the existence of injury to the domestic industry must be considered to continue to remain valid, unless it is proved to be otherwise, either by the Designated Authority in suo motu review or by the applicant seeking review. In the present case, the review had been initiated by the Designated Authority. Neither the Designated Authority nor the appellant had placed any material on record which could possibly displace the findings given by the Designated Authority at the stage of initial anti-dumping duty. In the absence of any new material, the Designated Authority is not required to apply afresh all parameters or criteria enumerated in para (iv) of Annexure-II, which had already been done at the initial stage of imposition of anti-dumping duty. There is no material on record to show that there was a change in the parameters or the criteria relating to the injury which would warrant withdrawal of anti-dumping duty. Nevertheless, the Designated Authority has still analysed the issue of injury in detail in the Mid Term Review findings and has considered all the criteria or parameters enumerated in Annexure-II. There is, therefore, no merit or substance in the appellant's contention regarding non-compliance with Annexure-II."*

The following decisions of the WTO Appellate Body also provide guidance regarding scope of sunset review: -

(i) US – Sunset Reviews of Anti-dumping Measures on OCTG from Argentina: WT/DS268/AB/R dated 29.11.2004:

"279. The lack of a sufficient textual basis to apply Article 3 to likelihood-of-injury determinations is not surprising given "the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand," which the Appellate Body emphasized in US-Corrosion-Resistant Steel Sunset Review. Original investigations require an investigating authority, in order to impose an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to maintain an anti-dumping duty, to review an anti-dumping duty order that has already been established—following the pre-requisite determinations of dumping and injury—so as to determine whether that order should be continued or revoked.

280. Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination."

(ii) US – Sunset Reviews of Anti-dumping Measures on CRCS Flat Products from Japan: WT/DS244/AB/R dated 15.12.2003:

"149. We turn first to Article 11.3, which is the main provision of the Anti-Dumping Agreement addressing sunset reviews. As discussed above, Article 11.3 requires the termination of an anti-dumping duty after five years unless investigating authorities determine in a sunset review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping. We reiterate that Article 11.3

does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review. In particular, Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping by each known exporter or producer concerned. In fact, Article 11.3 contains no express reference to individual exporters, or interested parties. This contrasts with Article 11.2, which does refer to "any interested party" and "interested parties". We also note that Article 11.3 does not contain the word "margins", which might implicitly refer to individual exporters or producers. On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make "company specific" likelihood determinations in the manner suggested by Japan."

Earlier the WTO Panel in the aforesaid case of CRCS Flat Products from Japan vide WT/DS244/R dated 14.8.2003 had held as follows: -

"7.168. We thus do not believe that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a determination of dumping apply in making a determination of likelihood of continuation or recurrence of dumping under Article 11.3. To hold otherwise would mean that a new and full determination regarding the existence of dumping since the imposition of the order would be necessary in a sunset review. We find no such obligation in the text of Article 11.3 nor in Article 2 of the Anti-dumping Agreement."

16. In this case, the D.A. has found the dumping margin to be negative for the appellant exporters from Singapore in para 54 of his findings. While examining the volume effects of dumped imports on domestic industry, the D.A. has noted as follows in para 73 of his findings: -

"73. The Authority noted that though the demand increased over the injury period, the domestic industry's installed capacity remained unaltered. Capacity utilisation (indexed) declined in the POI marginally by 4 after increasing to 130 in 2004-05, reflecting the trend in production. Despite the decline, capacity utilisation during the injury period rose by 18% from the base year. The Authority noted the

domestic production was about half the domestic demand so that imports are necessary to meet the shortfall in supply."

While examining the price effects of dumped imports, the D.A. has come to the conclusion that there is no price depression vide para 77 of his findings. The D.A. examined several other injury factors, many of them do not indicate injury to the domestic industry. This is reflected in the following conclusions of the D.A. : -

"G.4 Overall assessment

89. The above analysis of the factors shows that despite the large volume of imports, the domestic industry has been able to maintain its share in the market and has not suffered injury over the relevant period since a majority of the parameters have shown improvement over the base year. There is no price undercutting, price suppression or price depression caused by subject country imports, but price underselling of 19% is seen.

G.5 Conclusions on injury

90. The Authority noted that the volume effect of subject country imports has been relatively insignificant despite their increase in absolute terms and the price effect is restricted to price under-selling. Most parameters of the domestic industry do not reflect injury. Therefore, the Authority concludes that the domestic industry has not continued to suffer material injury. "

17. In view of the above findings, the analysis of likelihood of continuation or recurrence of dumping and injury assumes more significance in the case of a sunset review under Section 9A (5). Unfortunately, the D.A. has only recorded the following in this regard in his findings under para 103: -

"In the case of Singapore, the Authority notes that the current dumping margin of the cooperating exporters have been determined to be negative on the basis of a single country specific normal value determined in pursuance to Supreme Court Judgment. The residual dumping margins determined on the above basis also works out to be negligible. However, the price of imports from Singapore indicates that the CIF price moved from 100 to 170 and the landed value from 100 to 150 during the injury period. But the landed value was below the reference price in the first two years of the injury period, and the prices have moved up above the reference price in 2004-05 and the POI only. As far as the raw material rates are concerned, in the POI, the PO imports from Singapore shows abnormal trend. The price trends of the subject goods during the POI and the basic raw material export price from the same country indicates that the price trend during the POI may not be sustainable or is not of permanent nature. The Authority further notes that the growth of imports from Singapore has been from 100 in 2002-03 to 3000 in the POI. Also the production

capacities of the subject product of the co-operating producer/exporter are huge and should a shift in the direction of trade in the subject product occur in the exporting country, the growing domestic demand would attract a greater share of imports. Therefore, the Authority is of the view that there is a likelihood of recurrence of dumping, from this country once the duties are removed."

18. The above analysis apart from being sketchy, borders on conjecture. It does not support the conclusion drawn in para 104 of the impugned findings that there is likelihood of intensification of dumping from Singapore and consequential injury to the domestic industry or the conclusion in para 105 thereof that there is likelihood of intensification or recurrence of dumping from Singapore. It is not surprising that all parties to the dispute, namely the exporters, the importers and the domestic industry are aggrieved by the above finding as expressed through their appeals and arguments before us. The D.A.'s finding has to be reasoned and the same should speak for itself. By a proper analysis of all attendant factors he must come to a conclusion as to whether there is or not a likelihood of continuation or recurrence of dumping and injury, and whether the antidumping duty should continue and if so, whether at the same rate, enhanced rate or reduced rate. He can not be seen to be conjecturing "*should a shift in the direction of trade in the subject product occur in the exporting country, the growing domestic demand would attract a greater share of imports*" as he has done without indicating any basis. Moreover, he has cumulated both dumped and non-dumped imports in his finding which does not find support in the Anti-dumping rules, nor his counsel was able to show us any legal provision in support of such cumulation. Further, all parties to the dispute have complained before us that many of their submissions were not considered before issuing the final findings.

19. Under the circumstances, and for the reasons stated above, we set aside the impugned final findings and the impugned notification issued pursuant thereto insofar as the exports of the impugned goods originating in/ or from Singapore are concerned and remand the matter for fresh determination by the D.A., preferably within a period of 6 months from the date of pronouncement of this order, after giving an adequate opportunity of hearing to the appellants and other interested parties, if any. However, keeping in view the spirit behind the second proviso to Section 9A (5) of the Customs Tariff Act, 1975, we order that antidumping duty shall continue to be levied on such impugned goods at the same rates as applicable during the sunset review for a period starting from the date of the impugned notification till expiry of 6 months form the date of pronouncement of this order on a provisional basis and subject to the outcome of the fresh decision by the D.A.

20. All the four appeals are allowed in the above terms.

(Pronounced in Open Court on 30.4.2010).

(Mr. Justice R.M.S. Khandeparkar)

President

(Dr. Chittaranjan Satapathy)

Technical Member

30/4/2010
(D. N. Panda)

Judicial Member

AD/78, 10, 16/08

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST BLOCK – 2 R K PURAM NEW DELHI
PRINCIPAL BENCH

(ANTI-DUMPING MATER)
COURT NO – I

Ac/4 Allowed

DOH: 21-4-2010

CORAM 1 Hon'ble Mr. Justice R M S Khandeparkar, President

2 Hon'ble Dr. Mr. C. Satapathy Member (T)

3. Hon'ble Mr. D. N. Panda Member (J)

AD/Stay/Misc/COD/CO AD/Stay/1023/2008

In appeal No AD/07/2008

Appellant BASF South East Asia Pte Ltd

Respondent DA/MOF.

Present for Appellant Sh. R. Parthsarathy Adv. ~~Sh. Pankaj clerk of Sh. Jitender Singh Adv~~

Present for Respondent Sh. Ameet Singh Adv.

Ld. Counsel was present on previous date

Present for Interested Parties

964/Pre/10
21/04/10

ORDER

Heard.

Place for order on 24.6.2010.

Hon'ble Mr. Justice R. M. S. Khandeparkar
President.

" Dr. Mr. C. Satapathy Member (T)

" Mr. D. N. Panda Member (J)

30.4.10
For app

AD/07, 08, 10 & 16/2008
Resp- Sh. M K Anand Director for AD

Pronounced in the open court today on 30.4.2010.