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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/6 /2007 - CU[DB] Date **07/04/2011**

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

To :
M/S HYOSUNG CO.
450, GONGDEOK-DONG, MAPO-GU,
SEOUL, KOREA 121720

M/S HYOSUNG CO. Appellant

Vs

THE DESIGNATED AUTHORITY & ORS. Respondent

I am directed to transmit herewith a certified copy of **Final order No. AD/7/ 2011 CU[DB]** dated 01.04.2011 passed by the Tribunal under Customs Tariff Act, 1975.

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
DESIGNATED AUTHORITY DIRECTORATE GENERAL,
ANTI-DUMPING & ALLIED DUTY, UDYOG BHAWAN,
MINISTRY OF COMMERCE,
NEW DELHI.

SECRETARY - REVENUE
MINISTRY OF FINANCE,
NORTH BLOCK, NEW DELHI.

2. Adv. / Consult
MR. DGS ASSOCIATES, ADV.
55, COMMUNITYCENTRE,2ND FLOOR,
EAST OF KAILASH, NEW DELHI.

MR. NAZMI WAZIRI, ADV.
A-10, GULMOHAR PARK,
NEW DELHI – 110 049.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise, I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI

ANTI-DUMPING BENCH

Anti Dumping Appeal No. 06 of 2007

[Arising out of Final Finding dated 26.12.2006 issued by the Designated Authority and Customs Notification No. 15/2007-Customs dated 20.2.2007 issued by the Ministry of Finance]

For approval and signature:

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

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?	No
3	Whether Their Lordships wish to see the fair copy of the Order?	
4	Whether Order is to be circulated to the Departmental authorities?	

M/s. Hyosung Corpn. Appellants

Vs.

Designated Authority
Ministry of Finance Respondent

Present for the Appellant :Shri Nazmi Waziri, Advocate
Present for the Respondent :Ms. Ameeta Verma Duggal & Shri Rakesh Sarmah, Advocates

Coram: Hon'ble Mr. Justice R.M.S. Khandeparkar, President
Hon'ble Dr. Chittaranjan Satapathy, Member (Tech.)
Hon'ble Mr. D.N. Panda, Member (Judicial)

Date of Hearing: 31st March, 2011
Date of Decision: 31st March, 2011

Final **ORAL ORDER NO.** AD/07/11

Per Justice R.M.S. Khandeparkar:

Heard.

2. The present appeal has been filed against Final Finding issued by the Designated Authority on 26th December, 2006 and Notification No. 15/2007-Cus dated 20.2.2007, which is challenged on various grounds. Learned Advocate highlighted two of the grounds namely:

"(i) Because the change in the injury margin from negative to positive can happen only where there has been a decrease in the landed value or an increase in the Non-Indjurious Price of the domestic industry determined by the Designated Authority between the Disclosure Statement and the Final Findings. There could not have been any change in the landed value of the Appellant in this case after the verification report and the disclosure statement. Similarly there could not have been any change in the non-injurious price of the domestic industry after the disclosure statement. The Designated Authority only took into consideration the cost data of M/s. Reliance Industries Ltd., and Iandorama from other sources after the Disclosure Statement. In spite of this, if there was actually an increase in the Non-Injurious Price, this would mean that there is a premium on non-cooperation by domestic industry. Instead of drawing an adverse inference for non-cooperation, the Designated

Authority apparently has rewarded the domestic industry for non-cooperation.

(ii) Because as per the Preliminary Findings, the range of price underselling (difference between the Non-Injurious Price and the landed value) from various countries was lower than the range of price undercutting margin (difference between the Net Sales Realisation of the Domestic Industry and the landed value). This implies that the Net Sales Realisation of the Domestic Industry was more than the Non-Injurious Price the Designated Authority should have terminated the investigation after the Preliminary Findings on this ground alone. The Appellant craves leave of this Hon'ble Tribunal to place in written and/or tabular form the calculations to establish this and other grounds at the time of hearing.

(iii) Because as per the Disclosure Statement, the range of price underselling (difference between the Non-Injurious Price and the landed value) from various countries was lower than the range of price undercutting margin (difference between the Net Sales Realisation of the Domestic Industry and the landed value). This implies that the Net Sales Realisation of the Domestic Industry is more than the Non-Injurious Price. If the Domestic Industry could realise a price more than the

Non-Injurious Price till the Disclosure Statement, without prejudice to the need for a hearing, the Designated Authority was required to give an explanation of how it changed its conclusion in the Final Findings. However, no such explanation is forthcoming in the Final Findings.

(iv) Because the Designated Authority was required to give a hearing or an opportunity to the Appellant to give fresh comment/written submissions after issuing a fresh disclosure statement if it was going to fundamentally alter the basis of its findings in the Disclosure Statement with respect to the Net Sales Realisation of the Domestic Industry being greater than the Non-Injurious Price. In the absence of such an opportunity, the final findings are required to be set aside.

(v) Because the Designated Authority ought to have intimated the Appellant if there was a change in its Injury Margin after the Disclosure Statement so that it could have commented on the same. This violates the principles of natural justice to the extent that no such opportunity was provided to the Appellant. Rather the Appellant was kept under an impression that, in its case, the Injury Margin in negative as per the Disclosure Statement. In the Disclosure Statement, a negative injury margin indicates that the landed value of exports by the appellant is above the Non-Injurious Price and hence an inference was drawn that no Anti-dumping Duty would be applicable to him. The Designated Authority should have explained reasons for changes in its conclusions made in the Disclosure Statement at least to the affected party prior to the Final Findings and allowed it to offer its comments. Such reasons were at least required to be disclosed in the Final Findings but this has not been done by the Designated Authority.

(vi) In fact, the reasons for a change in the Appellant's Injury Margin after the Disclosure Statement were never provided to the Appellant even in the Final Findings. As a quasi-judicial authority, the Designated Authority was bound to give reasons. To the extent that it has failed to do so, its final findings must be set aside in this regard.

Landed value of Appellant Hyosung is above the Net Sales Realisation and Non-Injurious Price of the Domestic Industry. No price undercutting or underselling by Appellant.

(vii) Because as per the Final Findings, the difference between the landed cost of Korea and (a) the net sales realisation of the Domestic Industry ranges between 25-35% (undercutting margin and (b) the Non-Injurious price is 40-50% (underselling margin). However, a comparison of the landed cost for Korea as a whole with the landed value of Appellant Hyosung shows that the landed cost of the Appellant is about 52% higher than the landed cost assessed by the Designated Authority for Korea as a whole. This indicates that the landed cost of the Appellant is not only higher than the net sales realisation of the Domestic Industry but also higher than the Non-Injurious Price determined by the Designated Authority for the Domestic Industry. Clearly, exports from the country as a whole may be undercutting the domestic industry but not from the exporter concerned. Under no circumstances can it be concluded that the exporter is undercutting the prices of the Domestic Industry and causing injury to the Domestic Industry. The Appellant has worked out the upper limit of –Non-Injurious Price based on the data given in the table. Based on this table, the landed cost of Hyosung is more than the Non-Injurious Price of the Domestic Industry. Accordingly the conclusion that the Injury margin in case of Hyosung is $ 64 is incorrect.

(viii) Because Article 3.2 of the Anti dumping agreement and para (ii) of Annexure II of the Anti dumping Rules clearly lay down that with regard to the effect of dumped imports on prices the Designated Authority shall consider the price effect, in particular, whether there has been a significant price undercutting by the dumped imports as compared to the like product in India. The landed value of the exports by Hyosung is almost certainly equal to or above the Non-Injurious Price worked out by Designated Authority and much above the Net Sales Realisation. So it cannot be concluded that the imports from Hyosung are significantly undercutting the prices of the Domestic Industry. If the landed value is above the Net Sales Realisation of the Domestic Industry, it can be concluded that there is no price undercutting and no Anti-dumping Duty should be imposed on exports made by Hyosung. There is no casual link between the imports from Hyosung and the injury to the Domestic Industry.

(ix) Because the Non-Injurious Price has been calculated by taking 22% Return on Capital Employed (ROCE). This is abnormally high keeping in view the past experience of the Domestic Industry. If the ROCE is fixed at a more reasonable level taking into consideration the real profitability of the industry when no dumping was taking place, it would be clear that the imports from Hyosung are not causing injury to the Domestic Industry. From the Final Findings, it is clear that in the past when there was no allegation of dumping, the Domestic Industry earned about 4.67 return on capital employed. The same can be considered as normal earning by the Domestic Industry. The Designated Authority has added an arbitrary rate of ROCE to work out the Non-Injurious Price. This has inflated the Non-Injurious Price to unreasonable levels. If the ROCE earned by the Domestic Industry in the past, when there was no allegation of dumping, is adopted, the Non-Injurious Price so worked out will be much lower than what has been assessed now by the Designated Authority."

3. Undisputedly the Sunset Review has already commenced. The period of notification expires on 20th August, 2011. We are already at 31st March, 2011. In the circumstances, no fruitful purpose will be served dealing with the issues sought to be raised in the appeals at this stage. The grievance sought to be made in the matter can very well be agitated by the appellants in the Sunset Review. Granting liberty to the appellants to that effect and leaving all the issues open, we dispose of these appeals.

(JUSTICE R.M.S. KHANDEPARKAR)
PRESIDENT

(DR. CHITTARANJAN SATAPATHY)
MEMBER (TECHNICAL)

01.04.2011

(D.N. PANDA)
MEMBER (JUDICIAL)

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