

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

ANTI-DUMPING APPEAL NO. 52404 OF 2022

(Arising out of Customs Notification No. 13/2022 dated 11.05.2022 and Final Finding F.No. 7/29/2021-DGTR dated 15.02.2022)

Aurobindo Pharma Limited

Plot no. 2, Maitrivihar, Ameerpet,
Hyderabad-500038, Telengana, India

.....Appellant

VERSUS

1. The Union of India

Through the Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi-110001

**2. Designated Authority, Directorate
General of Trade Remedies**

Department of Commerce & Industry
Parliament Street, Jeevan Tara
Building, 4th Floor, New Delhi-110001

3. China Embassy

50-D, Shantipath, Chanakyapuri
New Delhi – 110 021

4. M/s Inner Mongolia Changsheng Co. Ltd.

Tuoketuo Industry Zone Hohhot,
010206 China

**5. M/s Sinobright Pharmaceutical
Industries Limited**

503 Zhongguan Building, Liuxian Road,
Nanshan District, Shenzhen, China
Shenzhen, Guangdong, China

**6. Centrient Pharmaceuticals India
Private Limited**

Sir Winston Churchilllan 299
2288 DC Rijswijk
The Netherlands

7. Penam Laboratories Limited

F-223, Block-5, Old Rajinder Nagar,
New Rajinder Nagar, New Delhi,
Delhi 110060

.....Respondents

APPEARANCE:

Ms. Reena Asthana Khair, Shri Rajesh Sharma, Ms. Shreya Dahiya, Shri Subham Jaiswal, Shri Nikhil Sharma, Ms Vrinda Bagaria, Advocates for the Appellant

Shri Ameet Singh and Ms. Bhavana Varsha, Advocates for Designated Authority

Shri Rakesh Kumar, Authorized Representative for the Central Government

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

Date of Hearing/Decision: 20.02.2023

Final Order No. 50203/2023

JUSTICE DILIP GUPTA:

The grievance raised by Aurobindo Pharma Limited ¹, is that despite a recommendation having being made by the designated authority in the final findings notified on 15.02.2022 for imposition of anti-dumping duty under section 9A of the Customs Tariff Act 1975², the Central Government did not issue the Notification for imposition of anti-dumping duty within three months from the date the final findings were notified by the designated authority. The relief, therefore, that has been claimed in this appeal is that the Notification dated 11.05.2022 issued by the Central Government rescinding the Notification dated 16.05.2017 imposing anti-dumping duty be set aside and a direction be issued to the Central Government to issue a Notification for imposition of anti-dumping duty, based on the recommendation made by the designated authority.

2. During the pendency of the appeal, Miscellaneous Application No. 50738 of 2022 was filed by the appellant with a prayer that two

1. the appellant
2. the Tariff Act

additional grounds and one additional prayer may be added. The application was allowed by order dated 17.01.2023. The two additional grounds that have been added are:

“FF. The Appellant submits that the impugned order of the Respondent no. 1 is non-speaking and deserves to be aside side. This Hon'ble Tribunal under Rule 41 also has the inherent powers to pass such orders so as to secure the ends of justice. The Rule 41 of the CESTAT (Procedure) Rules, 1982, are extracted below for ease of reference:

“RULE 41. Orders and directions in certain cases-
The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.”

The Appellant submits that the Rules 41 of the CESTAT (Procedure) Rules have been made applicable to proceedings under Anti-dumping Rules through Rule 7 of CEGAT (Countervailing Duty and Anti-Dumping Duty) Procedure Rule, 1996, and therefore, apply to the present case.

GG. This Hon'ble Tribunal had earlier in similar cases, notably in **Jubilant Ingrevia Limited vs. Designated Authority** dated 27th October 2021 and **Apcotex Industries Ltd. & Others vs. Union of India** dated 30th August, 2022, remanded the matter to the Respondent No. 1 to reconsider the recommendations issued by the Respondent No. 2 in those cases. In **Apcotex** case, the Hon'ble Tribunal had additionally

directed the Respondent no. 1, that if it is of the prima-facie opinion that the recommendations of the Respondent No. 2 are not required to be accepted, tentative reasons for the same must be recorded and conveyed to the domestic industry therein, so as to give them an opportunity to file their submissions on the said grounds. The appellant understands that the Respondent No. 1 has however, till date, not implemented the said orders of the Hon'ble Tribunal, despite them not being stayed or set-aside. The Hon'ble High Court has not granted any interim relief to the Central Government in writ petition filed by the Central Government. Further, the Hon'ble High Court was pleased to pass an interim relief order in favor of the domestic industry concerned in all those writ petitions, vide order dated 05.09.2022. The appellant submits that pending final decision by Respondent No. 1, the Hon'ble Tribunal may kindly direct that the imports of the article under investigation pursuant to Final Finding Notification No. 7/29/2021-DGTR dated 15th February 2022 shall be cleared on provisional assessment basis."

3. The prayer that has been added is:

"(b-1). Pending final decision by Respondent No. 1, direct that imports of the article under investigation pursuant to Final Finding Notification No. 7/29/2021-DGTR dated 15th February 2022 shall be cleared on provisional assessment basis."

4. It transpires from the records that earlier, based on recommendation made by the designated authority in the final findings dated 03.04.2017 for imposition of the definitive anti-dumping duty on the imports of Amoxycillin Trihydrate³, the Central Government issued a Notification dated 16.05.2017 imposing anti-dumping duty for a period of five years. A sunset review investigation was carried out by the designated authority and a recommendation was made in the final findings dated 15.02.2022 for imposing of anti-dumping duty for a period 5 years. After the final findings were submitted by the designated authority on 15.02.2022, the Central Government issued a Notification dated 11.05.2022 revoking the anti-dumping duty imposed on the subject goods originating in or exported from China PR⁴ and rescinded the Notification dated 16.05.2017 but did not issue any Notification for imposing anti-dumping duty on the basis of the final findings submitted by the designated authority. It is, therefore, clear that by issuance of the Notification dated 16.05.2017 the Central Government decided not to impose anti-dumping duty on the basis of final findings dated 15.02.2022 submitted by the designated authority.

5. As the contention of the appellant is based on the recommendation made by the designated authority in the final findings dated 15.02.2022, it would be appropriate to reproduce the relevant portions of the conclusion and the recommendations made in the said final findings and they are as follows:

3. **subject goods**
4. **subject country**

"N. CONCLUSION

109. Having regard to the contentions raised, information provided and submissions made and facts available before the Authority as recorded in the above findings and on the basis of the above analysis of the likelihood of continuation of dumping and recurrence of injury to the domestic industry, the Authority concludes that:

- a. There is continued dumping of the subject goods from the subject country.
- b. There is high export orientation of the Chinese producers.
- c. The Chinese producers of the subject goods hold huge idle capacities with them, which account for more than double of total Indian demand.
- d. Almost entirety of Chinese exports to third countries, accounting for more than twice the Indian demand of subject goods, are at dumped prices.
- e. Significant proportion of Chinese exports to third countries are at injurious prices.
- f. More than 90% of Chinese exports to third countries are at prices below export prices to India.
- g. All these factors of third country dumping huge idle capacities, price attractiveness of the Indian exports and significant exports despite prevailing existence of anti-dumping duty clearly demonstrate likelihood of continuation of dumping and aggravation of injury to the domestic industry in case of withdrawal of the anti-dumping duty.
- h. Factors such as no demand-supply gap, no participation of users, minimal impact of anti-dumping duty on end products and inter-se competition among Indian producers establish that there may not be any adverse effect of duties on the consumers or downstream industry.

O. RECOMMENDATION

110. The Authority notes that the investigation was initiated and notified to all the interested parties and adequate opportunity was given to the applicant, exporters and other interested parties to provide

information on the aspects of dumping, injury and the causal link. Having concluded that there is likelihood of continuation/recurrence of dumping and injury to the domestic industry in the event of cessation of existing anti-dumping duty on imports of subject goods from China PR, the Authority is of the view that continuation of anti-dumping duty is required on the imports of subject goods from China PR.

111. Under these circumstances, the Authority considers it appropriate to recommend continuation of anti-dumping duty on the imports of subject goods from China PR. Anti-dumping equal to the amount indicated in Col. 7 of the duty table below is recommended to be extended from the date of notification to be issued in this regard by the Central Government for a period of five (5) years on all imports of the subject goods mentioned in Column 3 of the duty table from China PR.”

6. It would be seen from the aforesaid final findings that it was on the basis of a detailed analysis carried out by the designated authority on the aspect of likelihood of continuation of dumping and consequent injury to the domestic industry that the designated authority found as fact that there was continued dumping of the subject goods from the subject country and more than 90% of the Chinese exports to third countries were at prices below export prices to India which would clearly demonstrate likelihood of continuation of dumping and aggravation injury to the domestic industry in case of withdrawal of anti-dumping duty.

7. The main contention that has been advanced by the Ms Reena Asthana Khair, learned counsel appearing for the appellant assisted by Shri Rajesh Sharma, Ms. Shreya Dahiya, Shri Subham Jaiswal, Shri Nikhil Sharma and Ms. Vrinda Bagaria is that despite the recommendation having been made by the designated authority in

the final findings to impose anti-dumping duty, the Central Government kept quiet and did not issue the consequential notification for imposition of anti-dumping duty. The submission is that under rule 18 of the 1995 Rules⁵, the Central Government has to take a decision within three months of the publication of final findings, and as the Notification was not issued for a long period of time it should be presumed, particularly when the Central Government issued the Notification dated 11.05.2022 revoking the imposition of duty that the Central Government had decided not to impose anti-dumping duty on the subject goods from the subject country. Learned counsel also submitted that in case the Central Government had decided not to impose anti-dumping duty, a reasoned order should have been passed but in the present case such an order has not been passed by the Central Government. The contention of the learned counsel for the appellant, therefore, is that a direction should be issued to the Central Government to issue a Notification for imposition of anti-dumping duty on the basis of the recommendation made by the designated authority in the final findings dated 15.02.2022. Learned counsel for the appellant further submitted that till such time as the Central Government takes a decision, the Tribunal should issue a direction for provisional assessment, as was done by the Delhi High Court on 05.09.2022 in WP (C) 5185/2022 filed by the Union of India against the decision of the Tribunal in **Jubilant Ingrevia Limited vs. Union of India and 5 others**⁶, in which also a direction had been issued by the Tribunal to the Central Government to take a reasoned decision

5. **1995 Anti Dumping Rules**

6. **Anti-Dumping Appeal No. 50461 of 2021 decided on 27.10.2021**

because despite the recommendation of the designated authority for imposition of anti-dumping duty, the Central Government had not issued a Notification for imposition of anti-dumping duty.

8. Shri Rakesh Kumar, learned authorized representative appearing for the Central Government submitted that appeal itself is not maintainable under section 9(C) of the Tariff Act and the exercise of power by the Central Government under section 9A of the Tariff Act read with rule 18 of the 1995 Rules is legislative in nature and so neither the principles of natural justice are required to be complied with nor a reasoned order is required to be passed.

9. In order to examine these submissions it would be useful to first examine the relevant provisions of the Tariff Act and the 1995 Rules.

10. Anti-dumping duty is imposed by the Central Government under section 9A of the Tariff Act. It provides that where any article is exported by an exporter or producer from any country to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by Notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. The margin of dumping, the export price and the normal price have all been defined in section 9A(1) of the Tariff Act.

11. Sub-section (5) of section 9A provides that anti-dumping duty imposed shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

12. Sub-section (6) of the section 9A of the Tariff Act provides that the margin of dumping has to be ascertained and determined by the Central Government, after such enquiry as may be considered

necessary and the Central Government may, by Notification in the Official Gazette, make rules for the purpose of this section.

13. In exercise of the powers conferred by sub-section (6) of section 9A and sub-section (2) of the section 9B of the Tariff Act, the Central Government framed the 1995 Rules.

14. The duties of the designated authority are contained in rule 4 and the relevant portion is reproduced below:

"4. Duties of the designated authority.-

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(d) to recommend to the Central Government-

(i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and

(ii) the date of commencement of such duty;"

15. Rule 5 deals with initiation of investigation to determine the existence, degree and effect of any alleged dumping.

16. Rule 6 deals with the principles governing investigation and it is reproduced below:

"6. Principles governing investigations.-

(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate information on the following:-

- (i) the name of the exporting country or countries and the article involved;
- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;

- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed; and
- (vi) the time-limits allowed to interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to–

- (i) the known exporters or to the concerned trade association where the number of exporters is large, and
- (ii) the governments of the exporting countries: Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefor in writing.

(4) The designated authority may issue a notice calling for any information, in such form as may be specified by it, from the exporters, foreign producers and other interested parties and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation: For the purpose of this sub-rule, the notice calling for information and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant

to the investigation regarding dumping, injury where applicable, and causality.

(6) The designated authority may allow an interested party or its representative to present the information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented to it by one interested party to the other interested parties, participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances."

17. Rule 10 deals with determination of normal value, export price and margin of dumping and it is reproduced below:

"10. Determination of normal value, export price and margin of dumping-

An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules."

18. Rule 11 deals with determination of injury and it is reproduced below:

"11. Determination of injury. –

(1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or

materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

- (i) there is a concentration of dumped imports into an isolated market, and
- (ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market."

19. Rule 17 deals with final findings. It is reproduced below:

"Final findings.-

(1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding-

(a) as to, -

- (i) the export price, normal value and the margin of dumping of the said article;
- (ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

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(b) Recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry after considering the principles laid down in the Annexure III to rules."

20. Rule 18 deals with levy of duty and the relevant portion is reproduced below:

"18. Levy of duty.-

(1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17."

21. **Annexure-I** to the 1995 Anti-Dumping Rules deals with the principles governing the determination of normal value, export price and margin of dumping. It provides that the designated authority while determining the normal value, export price and margin of dumping shall take into account the principles contained in clauses (1) to (8) of the Annexure.

22. **Annexure-II** to the 1995 Anti-Dumping Rules deals with the principles for determination of injury. It provides that the designated authority while determining the injury or threat of material injury to domestic industry or material retardation of the establishment of such an industry, and causal link between dumped imports and such

injury, shall inter alia, take the principles enumerated from (i) to (vii) of Annexure II under consideration.

23. **Annexure-III** to the 1995 Anti-Dumping Rules deals with the principles for determination of non-injurious price.

24. It is keeping in mind the aforesaid legal provisions that the submissions advanced by the learned counsel for the appellant and the learned authorized representatives appearing for the respondent Union of India have to be considered.

**Whether Central Government has taken a decision not to
impose anti-dumping duty**

25. Section 9A of the Tariff Act provides that where any article is exported by an exporter or producer from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose anti-dumping duty not exceeding the margin of dumping in relation to such article. It is under rule 17 of the 1995, Anti-Dumping Rules that the designated authority is required to, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit its final findings to the Central Government. Under rule 18, the Central Government may, within three months of the date of publication of the final findings by the designated authority under rule 17, impose by a notification in the Official Gazette, upon importation into India of the article covered by the final findings, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.

26. In the present case, it is not in dispute that the final findings of the designed authority were published on 11.01.2021. In the appeal, the appellant has stated that an office memorandum was not issued by the Central Government. Learned counsel appearing for the Central Government has also not stated or placed such an office memorandum.

27. The issue that arises for consideration is whether a presumption can be drawn that the Central Government has taken a decision not to impose anti-dumping duty as a decision was not taken within three months by the Central Government from the date of publication of the final findings by the designated authority and infact the notification dated 11.05.2022 was issued rescinding the notification dated 16.05.2017. On a consideration of the provisions of the Tariff Act and the 1995 Anti-Dumping Rules, it is clear that a presumption can safely to be drawn that the Central Government, by keeping silent for a long period of time, shall be deemed to have taken a decision not to impose anti-dumping duty and such a case would also fall in the category of cases where an office memorandum has actually been issued conveying the decision of the Central Government not to impose anti-dumping duty. This is what was held by the Tribunal in **Apcotex Industries**. The same view has been taken by this Bench in **Chemical and Petrochemicals Manufactures Association vs. Union of India and 55 others**⁷.

28. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that it has to be presumed that the Central Government has taken a decision not to impose anti-dumping

7. **Anti-Dumping Appeal No. 51668 of 2022 decided on 19.12.2022**

duty despite a recommendation having been made by the designated authority for imposition of anti-dumping duty. This presumption also finds support from the fact that the Central Government issued a notification dated 11.05.2022, after the final findings were submitted by the designated authority on 15.02.2022, rescinding the notification dated 16.05.2017 earlier issued by the Central Government imposing anti-dumping duty for a period of five years. The matter has, therefore, to be remitted to the Central Government for taking a decision on the recommendation made by the designated authority.

Maintainability of appeal under section 9C

29. The maintainability of the appeal under section 9C of the Tariff Act was examined at length by this very Bench in **M/s. Apcotex Industries Limited vs. Union of India and 38 others**⁸ and it was held that the appeal would be maintainable against the decision of the Central Government contained in the office memorandum not to impose anti-dumping duty.

30. In **Balaji Amines Ltd. vs. The Union of India**⁹, the Bench also held that an appeal under section 9C of the Tariff Act would be maintainable even if the Central Government does not issue a notification for imposition of anti-dumping duty for a long period of time after the designated authority has made a recommendation for imposition of anti-dumping duty and the observations are as follows:

"30. Learned counsel for the appellant, however, contended that non issuance of the notification by the Central Government pursuant to the recommendations made by the designated authority, in view of the

8. **Anti-dumping Appeal No. 51491 of 2021 decided on 30.08.2022**

9. **Anti-dumping Appeal No. 51151 of 2022 decided on 20.12.2022**

provisions of rule 18 of the 1995 Rules, would mean that the Central Government has taken a decision not to impose any anti-dumping duty. It has been held in **Apcotex Industries** that the appeal would be maintainable. The present appeal would, therefore, clearly be maintainable.”

Whether the Central Government exercises legislative power

31. The Bench in **Apcotex Industries** also examined whether the determination by the Central Government was legislative in character or quasi-judicial in nature and after examining the relevant provisions of the Tariff Act, the 1995 Anti-Dumping Rules and the decisions of the Supreme Court and the High Courts observed that the function performed by the Central Government would be quasi-judicial in nature. The Bench also, in the alternative, held that even if the function performed by the Central Government was legislative, then too the principles of natural justice and the requirement of a reasoned order have to be complied with since the Central Government would be performing the third category of conditional legislation contemplated in the judgment of the Supreme Court in **State of Tamil Nadu vs. K. Sabanayagam and another**¹⁰. The relevant observation of the Bench in **Apcotex Industries Limited** are as follows:

“75. Thus, even if it is assumed that the Central Government exercises legislative powers when it imposes anti-dumping duty or has taken a decision not to impose anti-dumping under section 9A of the Tariff Act, it would still be a piece of conditional legislation falling under the third category of conditional legislations pointed out by the Supreme Court in **K. Sabanayagam**. This is for the reason that in the scheme of the Tariff Act and the 1995 Anti-Dumping Rules, the Central Government has necessarily to examine all the relevant factors prescribed

10. (1998) 1 SCC 318

in the Tariff Act and the Rules for coming to a conclusion whether anti-dumping duty has to be levied or not. It cannot be that it is only the designated authority that is required to follow the procedure prescribed under the Tariff Act and the Rules framed thereunder for making a recommendation to the Central Government, for while taking a decision on the recommendation made by the designated authority in the final findings the Central Government would have to examine whether the designated authority has objectively considered all the relevant factors on the basis of the evidence led by the parties. This would be more clear from the provisions of section 9A(6) of the Tariff Act which provide that the margin of dumping, which is a relevant factor, has to be ascertained and determined by the Central Government, after such inquiry as it may consider necessary. Rules may have been framed by the Central Government under which the designated authority has to carry out a meticulous examination, but nonetheless when the Central Government has to take a decision on the recommendation made by the designated authority in the final findings such factual aspects cannot be ignored. There is a clear lis between the domestic industry on the one hand and the foreign exporter and importers on the other hand since the domestic industry desires anti-dumping duty to be imposed for which purpose investigation is carried out by the designated authority, but the foreign exporters and importers resist the imposition of anti-dumping duty. For exercise of such power, a detail procedure has been provided in the Tariff Act, the 1995 Anti- Dumping Rules or the 1997 Safeguard Rules.

78. It will be evident from the aforesaid judgments that the Central Government, while acting as a delegated legislative body, performs two distinct and separate functions in the context of the levy of antidumping and safeguard duty. The first is the function of framing Rules such as the Anti-Dumping Rules 1995 or the 1997 Safeguard Rules, which function is clearly legislative. The second function is the making of a determination under rule 18 of the Anti-Dumping Rules 1995 or rule 12 of the

1997 Safeguard Rules, which function is quasi judicial in nature. While the exercise of the legislative function of framing Rules is not appealable before the Tribunal, the second function of making a determination is expressly made appealable under section 9C of the Tariff Act. The function of making a determination in individual cases by applying the broad legislative framework and policy already set out in the Statute is not at all legislative in character, but clearly a quasi- judicial function requiring the Central Government to follow the principles of natural justice by affording an opportunity to the party likely to be adversely.

82. In view of the judgments of the Supreme Court in **K. Sabanayagam, Cynamide India Ltd.** and **Godawat Pan Masala**, and the decision of the Tribunal in **Jubilant Ingrevia Limited**, it has to be held that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty."

(emphasis supplied)

Principles of natural justice and reasoned order

32. The Bench also examined the requirements of compliance of the principles of natural justice and a reasoned order and held as followed:

"82. In view of the judgments of the Supreme Court in **K. Sabanayagam, Cynamide India Ltd.** and **Godawat Pan Masala**, and the decision of the Tribunal in **Jubilant Ingrevia Limited**, it has to be held that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty."

(emphasis supplied)

33. The Bench thereafter observed:

"84. In view of the aforesaid decision of the Supreme Court in **Punjab National Bank**, the submission advanced by learned counsel for the appellant deserves to be accepted. Thus, if the Central Government forms a prima facie opinion that the final findings of the designated authority recommending imposition of anti-dumping duty are not required to be accepted then tentative reasons have to be recorded and conveyed to the domestic industry so as to give an opportunity to the domestic industry to submit a representation. Though the Tariff Act and the 1995 Anti-Dumping Rules or the 1997 Safeguard Rules do not provide for such an opportunity to be provided to the domestic industry, but the principles of natural justice would require such an opportunity to be provided."

(emphasis supplied)

34. Learned counsel for the appellant has also placed a decision of the Gujarat High Court in **Realstripes Limited & 1 other(s) vs. Union of India & 1 other(s)**¹¹. The High Court repelled the contention advanced on behalf of the Central Government that the issuance of the notification was legislative in character and the relevant observations are as follows:

"6.5 It was another submission in vain on behalf of respondents seeking to assert that notification rescinding the countervailing duty is of legislative character and amounts of exercise of legislative power by the Central Government and therefore, not amenable to judicial review. 6.5.1 The submission is devoid of substance, if we examine the decisions on this score.*****"

35. After considering the decisions of the Supreme Court in **PTC India Ltd. vs. Central Electricity Regulatory Commission**¹², **National Thermal Power Corp. vs. Madhya Pradesh State**

11. R/Special Civil Application No. 4495 of 2022 decided on 02.09.2022
 12. (2010) 4 SCC 603

Electricity Board¹³ and Reliance Industries vs. Designated Authorities¹⁴, the Gujarat High Court also observed:

“6.5.4 Under Section 9-C of the Customs Tariff Act, appeal lies against the order of determination or review of the countervailing duty before the Customs, Excise and Service Tax Appellate Tribunal, constitution under Section 129 of the Customs Act, 1962. In view of this, the Notification necessarily takes a quasi-judicial colour.”

36. The Gujarat High Court also examined whether quasi-judicial process was involved in issuance of the notification by the Central Government and after analyzing the decision of the Supreme Court in **Indian National Congress vs. Institute of Social Welfare¹⁵**, the Gujarat High Court held that the notification issued by the Central Government would be quasi-judicial in nature.

37. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty. The matter, therefore, would have to be remitted to the Central Government for taking a decision on the recommendation made by the designated authority for imposition of anti-dumping duty on the import of the subject goods from the subject countries.

Provisional Assessment

38. In the end, learned counsel for the appellant also urged that the Tribunal may protect the interest of the appellant in the same manner

13. (2011) 15 SCC 580
 14. (2006) 10 SCC 368
 15. (2002) 5SCC 658

as was protected by the Delhi High Court in the writ petition filed by the Union of India against the decision of the Tribunal in **Jubilant Ingrevia**.

39. The Tribunal had set aside the office memorandum issued by the Under Secretary conveying the decision of the Central Government not to impose anti-dumping duty despite a recommendation made by the designated authority for imposition of anti-dumping duty. The order passed by the Delhi High Court on 05.09.2022 in W.P(C)5185/2022 filed by the Union of India against the decision of the Tribunal in **Jubilant Ingrevia**, is reproduced below:

"W.P.(C) 5185/2022& CM No.15389/2022 [Application filed on behalf of the petitioner seeking interim relief]

5. The respondent before us is the domestic industry. It is not in dispute that the Designated Authority [in short "DA"] via notification dated 25.08.2020 has recommended the imposition of anti-dumping duty [in short "ADD"].

6. It is also not in dispute that the Government of India has disagreed with the recommendation made by the DA.

7. This decision forms part of the Office Memorandum (OM) dated 14.12.2020.

8. Given this position, we are of the view that as an adinterim measure, the following direction would suffice, as the need to impose ADD would arise only if the respondent were to succeed in the instant writ petition.

(i) The provisional assessment of imports concerning the product in issue will be made for the time being. The importers would, thus, be put to notice of the possibility of ADD being imposed, albeit as per law, if, as noticed above, the respondent were to succeed in the instant writ petition.

(ii) It is, however, made clear that the aforesaid direction will not create any equities in favour of the respondent.

(iii) Furthermore, this direction will not have an impact on the merits of the writ petition.

9. CM No.15389/2022 is disposed of in the aforesaid terms.

10. List the matter on 02.03.2023.”

40. A similar interim order was passed by the Delhi High Court in W.P(C) No. 6758/2022 on 05.09.2022 in the writ petition filed by the Union of India to assail the decision of the Tribunal rendered in **Association of Synthetic Fibre Industry vs. Union of India and 4 others**¹⁶ in which the office memorandum was set aside.

41. Though the present appeal is being disposed of but a decision has yet to be taken by the Central Government in the light of the observations made in the order. It is, therefore, considered appropriate to pass a similar order, as was passed by the High Court, which will remain operative till a decision is taken by the Central Government on the recommendation made by the designated authority for imposition of anti-dumping duty. The directions are as follows:

- (i) The provisional assessment of imports concerning the subject goods from the subject countries will be made for the time being;
- (ii) It is, however, made clear that the aforesaid direction will not create any equities in favour of the domestic industry; and
- (iii) This direction will not have any impact on the decision to be taken by the Central Government pursuant to the directions issued for reconsideration of the recommendation made by the designated authority.

Conclusion

42. Thus, for all the reasons stated above, the matter is remitted to the Central Government to consider the recommendation made by the designated authority in the final findings dated 15.02.2022 in the light of the observations made above. The directions contained in paragraph 41 of this order shall continue to operate till such time as a decision is taken by the Central Government. The appeal is allowed to the extent indicated above. The learned authorized representative appearing for the Department shall send a copy of this order to all the concerned zones where the imports of the subject goods are likely to be made and also ensure that necessary and effective steps are taken by all concerned for due compliance of this order.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(BINU TAMTA)
MEMBER (JUDICIAL)