

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi**

COURT NO. I

DATE OF HEARING : 12/01/2017.
DATE OF DECISION : 24/01/2017.

Anti Dumping Appeal No. 52803 of 2016

[Arising out of the Notification No. 34/2016-Customs (ADD) dated 14/07/2016 based on Final Findings of the Designated Authority, No. 14/23/2014-DGAD dated 05/05/2016.]

M/s Greenply Industries Ltd.

Appellant

Versus

Union of India/DA

Respondent

Appearance

Ms. Reena Khair and Shri Rajesh Sharma, Advocates – for the appellant.

S/Shri Amit Singh, Advocate for DA and Govind Dixit, Authorized Representative (DR) – for the Respondent.

For I.P. :

Shri Sharad Bhansali, Advocate for respondent

Shri Jitendra Singh, Advocate for CO

Shri Rathish M., Advocate for respondent No. 3 & 4.

CORAM : Hon'ble Shri Justice Dr. Satish Chandra, President
Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 50460/2017 Dated : 24/01/2017

Per. B. Ravichandran :-

The appellant is challenging the levy of anti dumping duty on import of Plain Medium Density Fibre Board having thickness

of 6 mm and above (subject goods) from Indonesia and Vietnam. The anti dumping duty was levied vide Customs Notification 34/2016 – CUS (ADD) dated 14/07/2016 as per the final findings dated 05/05/2016 of the Designated Authority, Directorate General of Anti Dumping and Allied Duties, Ministry of Commerce and Industry, New Delhi (DA). The appellant alongwith M/s Mangalam Timber Products Ltd. filed request with the DA for initiation of investigation with reference to import of subject goods from subject countries. M/s Rushil Décor Ltd. supported the request. After conducting the investigation the DA issued final findings dated 05/05/2015 recommending imposition of AD duty in the range of US \$ 14.71 to 64.35 CBM.

2. The learned Counsel appearing for the appellant submitted that the DA failed to examine the vital issues raised by the appellant on merits. VRG Donghwa MDF Joint Stock Company, Vietnam had increased the export operations and profitability of the company increased enormously over the period. This was possible only with Government support. The ex-factory export price shall be U.S. \$ 200 per CBM. The cost of production for the exporting company has not been properly arrived at. The analysis of balance sheet, share holding pattern, borrowing etc. indicates that the cost of production/export price have not been duly verified by the DA resulting in improper fixation of dumping margin.

3. The learned Counsel further submitted that the DA failed to provide non-confidential version of the verification report to the appellant, claiming confidentiality. While the appellant is not seeking confidential information like cost data etc. they are entitled for a general summary on the basis of fixation of normal value, export price, dumping margin with reference to subject goods imported from subject countries. The learned Counsel relied on certain decided cases to emphasis that Rule 7 of AD Rules did not empower the DA to claim confidentiality in respect of reasons for arriving at the finding. The DA should have made available the reasons for his finding to arrive at a particular dumping margin and recommending a specific AD duty.

4. The learned Counsel appearing on behalf of respondent No. 3 and 4, who were also party in the investigation by the DA, as producer/exporter of subject goods from Vietnam, submitted that the DA found that these two respondents were not dumping the subject goods in the Indian market and as such no AD duty was recommended against them. The learned Counsel submitted that the DA has elaborately examined all the relevant data and arrived at the correct decision. The claim of the appellant that the respondents claimed excessive confidentiality and the dumping margin determined by the DA was incorrect and understated is not factually correct. The learned Counsel drew our attention to paras 51 to 59 of the final findings to reiterate his submissions. It was further submitted that verification report is an internal communication to the concerned exporters the non-confidential

version of the responses filed by the exporter has been provided to the appellant. All the data submitted by the appellant were also verified by the DA. However, the respondents were not provided any information on such verification. He, prayed for dismissal of the appeal as without merit.

5. There is a cross appeal by M/s VRG Donghwa MDF JSC. They have, in the said cross appeal, prayed for setting aside the final finding dated 05/05/2016 of the DA and Customs Notification No. 34/2016-CUS (ADD) imposing AD duty on the subject goods.

6. The learned Counsel appearing for the appellant Domestic Industry strongly opposed the cross appeal filed by respondent No. 6 on the preliminary legal objection that there is no provision to file cross appeal in anti dumping matters. A regular appeal, as affected party, should have been filed under Section 9C of Customs Tariff Act, 1975. It was submitted that in terms of the said section any party aggrieved by the imposition or determination of AD duty can prefer an appeal to the appellate Tribunal. The anti dumping duty in the present case was imposed vide notification dated 14/07/2016. The cross appeal filed on 24/11/2016 is liable to be dismissed as legally non-maintainable. The cross appeal provisions in terms of Section 129 A (4) of Customs Act, 1962 has no application for the proceedings before subject anti dumping Bench of the Tribunal. There is no provision of filing Cross appeal in terms of Section 9C of the Customs Tariff

Act, 1975. Reliance was placed on certain decided case laws in this regard.

7. As a rejoinder, the learned Counsel for M/s VRG Donghwha MDF JSC further submitted that the provisions of Section 9A (8) of the Customs Tariff Act, 1975 provides for application of provisions of Customs Act, 1962 with reference to appeals. As such, he prayed that the cross appeal has to be admitted and should be treated as an appeal against the findings of the DA, for a decision on merit by the Tribunal.

8. The learned Counsel for the DA reiterated the final findings of the DA. He submitted that full disclosure of non-confidential information has been made to the interested parties and there is no violation of any provisions of AD Rules during the course of investigation by the DA. The cost of production, normal value, export price, dumping margin with reference to the performance of DI etc. were examined in detail as per the said norms and the claims made by the appellant regarding excessive confidentiality is baseless. He referred to specific reasons recorded in the final findings of the DA.

9. The learned AR supported the customs notification imposing AD duty on the subject goods. Regarding the maintainability of cross appeal, it was submitted that the claim of the respondent No. 6 regarding maintainability of cross appeal is without valid legal basis. There cannot be two parallel provisions – one under Customs Act and another under Customs Tariff Act

for appeal proceedings with reference to anti dumping duty. The appeal in the case of anti dumping duty has been clearly provided under Section 9C of the Customs Tariff Act. The reliance placed by the Counsel for the respondent No. 6 on the provisions of Section 9A (8) is not appropriate as the said section only provides for application of various provisions of Customs Act, Rules etc. for the anti dumping duty "as far as may be apply to the duty chargeable under Section 9A".

10. We have heard the learned Counsels for all the interested parties as above and perused the appeal records including written submissions. First, we take up the issues raised by the appellant/ Domestic Industry against improper fixation of rate for anti dumping duty by the DA. The grievance of the DI is that the rates fixed are understated and do not properly mitigate the injury due to dumping from subject countries. The primary objection appears to be that the cost of production, export price etc. of VRG Donghwa MDF JSC has been not properly arrived at by the DA. The learned Counsel for the appellant submitted certain data based on cost calculation arrived at by them to plead that the constructed normal value has been incorrectly arrived at by the DA for export goods from Vietnam. We have perused the said data furnished by the appellant. We note that wood and timber constitute the main raw material and necessarily contributes to the substantial cost of the subject goods. We cannot take up the raw material cost of a domestic producer to arrive at the constructed raw material value of Vietnam exporter.

The parameters which go into determining the cost of raw material, more so when the material is a natural product like wood and timber, it is necessary that the location of the unit, the transport cost etc. are to be factored in. We note that the DA had conducted detailed verification of the data with reference to various exporters of subject goods. In fact he had recorded findings separately for each one of the parties who had submitted data to arrive at the weighted average of normal value, weighted average of export price and dumping margin. With specific reference to VRG Donghwa MDF JSC the DA has recorded detailed findings from para 60 to 66. We note that the producer exporter had filed questionnaire response, additional information for further clarification and there was an on-the-spot verification by the officers of DA. The data was verified and there upon normal value was arrived at. We note that the average cost of production of subject goods was determined based on verified cost data and additional information called for from the purchaser. The domestic sales or profitable sales in subject country for the purpose of determination of normal value was also considered. The said sales were to unrelated producers. Only profitable sales were considered. We also note that in their post disclosure submission, this exporter has submitted verified interest rates for adjustment of export price. Accordingly, the DA arrived at the ex-works export price and thereafter dumping margin. The grievance of the appellant is that full particulars of the document verification have not been made available to them.

We note that the DA cannot make available sensitive cost data of the exporting company. The same is protected by the provision of Rule 7 of AD Rules. We have noted that the non-confidential version of general summary and verification details have been made available to the interested parties. We find that there is no excessive confidentiality or non-disclosure of any fact prejudicing the appellant.

11. We have also perused the decided case laws relied upon by the appellant. In **Meghmany Organics Ltd. and others** SLP No. 1679 of 2010, the Hon'ble Supreme Court held on 07/10/2016 that the power of the DA to treat an information as confidential must be within the confines of Rule 7. The Hon'ble Supreme Court further observed the DA can treat the information as confidential only when a claim is made to that effect by the provider. If it is not possible to accept the confidentiality, Rule 7 gives no option, but to ignore such information in case the said information is not confidential but still claimed to be so by the concerned person. We find no application for such ratio to the facts of the present case. The DA has examined the data furnished by the exporter during the course of investigation and made known the background of the investigation to all the interested parties. Hence, there is no breach of provisions of Rule 7 in the present case. As already noted the cost of production by a foreign manufacturer cannot be arrived at by illustrative assumed figures of a Indian manufacturer, as suggested by the appellant. As we have noted, the cost of raw materials especially

product wood and timber, power and fuel will widely vary depending upon various parameters. Hence, it may not be tenable to have the data taken from entirely different circumstances and apply to arrive at a reasonable conclusion. We have perused the confidential version of the final finding, made available by the learned Counsel for the DA during the course of hearing. The sensitive data relating to costing, apparently cannot be made available for disclosure. The disclosure of non-confidential information cannot indirectly aid interested parties getting the confidential data. In other words, if the DA has formed a opinion regarding correctness of the claim made by the party about confidentiality then he is within his rights to withhold such information and make available only the general non-confidential summary relevant for investigation. We find no infirmity in the proceedings by the DA in arriving at the quantum of definitive anti dumping duty on subject goods.

12. On the admissibility of cross appeal in anti dumping duty matters we note that the Tribunal had occasion to consider similar issue in **Apar Industries vs. Designated Authority** reported in **2003 (153) E.L.T. 213 (Tri. – Del.)**. It was held that for the purpose of escaping from the provisions of limitation, the appeal filed in the name of cross appeal cannot be considered. In this connection, we have examined the detailed submissions made by the respondent No. 6 for admitting their cross appeal and for a decision on merit. It is the submission of the learned Counsel, defending the maintainability of cross

appeal, that the decision of the Tribunal in **Ahimsa Mines and Minerals Ltd. vs. Designated Authority** reported in **2002 (142) E.L.T. 71 (Tri. – Del.)** is *per-incurium*. The Tribunal did not consider the legal position of applicability of Section 9A (8) and the decision was ex-parte. We have considered the said submission of the learned Counsel carefully. The provisions of Section 9A (8) are as below :-

“(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of the rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties, shall, as far as may be, apply to the duty chargeable under this Section as they apply in relation to duties leviable under that Act.”

13. The above said provision seeks to apply the machinery provisions of Customs Act, 1962 relating to determination of rate of duty, assessment, collection thereof and any appeal, interest refund in relation to these assessments and collection of anti dumping duty as is applicable to the duties of customs. There is no reference to investigation or determination of levy of anti dumping duty. We note that if the submissions of the learned Counsel in support of cross appeal is considered, then the party aggrieved by determination of anti dumping duty shall have a right to file an appeal, both under Section 9C of the Customs Tariff Act, 1975 as well as under Section 129A of the Customs Act, 1962. Such proposition is legally untenable. Section 9C (5) of Customs Tariff Act, provides for constitution of special Bench

of three Members headed by the President, to decide the cases of anti dumping duty. Whereas appeal under Section 129A of Customs Act is heard by a single or a division Bench. The court fee applicable for the appeal under Customs Act as well as under Customs Tariff Act for anti dumping duty are different. The appeal against determination of anti dumping duty is clearly provided under Section 9C of the Customs Tariff Act. There is no provision which allows filing of cross objection by other party and to treat such cross objection as a regular appeal in the proceeding before the special Bench. We cannot infer that regular appeal shall be filed by the one or more aggrieved party under Section 9C and cross objection, to be considered as a regular appeal can be filed by another party against the same impugned findings under provisions of Section 129A of Customs Act. It is apparent such interpretation will be fundamentally fallacious. We hold that, as already held by the Tribunal in **Apar Industries** (supra) and **Ahimsa Mines and Minerals Ltd.** (supra), an appeal under Section 9C of Customs Tariff Act is required to be filed within the time prescribed to challenge the determination or imposition of anti dumping duty. There is no provision of filing cross objection to be treated as a separate appeal under the said section. The provisions of Section 9A (8) only applies "as far as may apply". When there is a specific provision under Customs Tariff Act for filing appeal against anti dumping duty, the provisions of said section should only apply. Accordingly, we find that the cross appeal filed on 24/11/2016 by M/s VRG Donghwha

MDF JSC against the final findings dated 05/05/2016 and Customs Notification dated 14/07/2016 is not maintainable both on time limit and on legality.

14. In view of the above discussion and finding, we hold that there is no merit in the present appeal by the appellant. Accordingly, the same is dismissed. The cross objection also is dismissed as not maintainable.

(Order pronounced in the open court on 24/01/2017.)

(Justice Dr. Satish Chandra)
President

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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