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 : 27/03/2017.
DATE OF DECISION : 07/04/2017.

Anti Dumping Appeals No. 50377-50378 of 2017 with Stay Applications No. 50189-50190 of 2017

[Arising out of the Notification No. 53/2016-Customs (ADD) dated 25/11/2016 based on Final Findings of the Designated Authority, No. 14/9/2015-DGAD dated 20/10/2016.]

M/s Kalyani Steels Limited] Appellants
M/s Association of India Mini Blast Furnaces]

Versus

Union of India/DA Respondent

Appearance

S/Shri Adarsh Ramanujan and Ankur Sharma, Advocates – for the appellant.

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

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. 52735-52736/2017 Dated : 07/04/2017

Per. B. Ravichandran :-

These two appeals are filed against the final findings dated 20/10/2016 of the Designated Authority (DA), Directorate General of Anti Dumping and Allied Duties, Department of

Commerce, Ministry of Commerce and Industry,and Customs Notification No. 53/2016 – CUS (ADD) dated 25/11/2016 issued by the Ministry of Finance, Department of Revenue. The first appellant is an importer of low ash metallurgical coke (subject goods) and appellant number two is an Association of Indian Mini Blast Furnace. Both the appellants are aggrieved by the recommendations of the Designated Authority resulting in the imposition of anti-dumping duty through Customs Notification dated 25/11/2016, on the subject goods, when imported from specified countries. The amount of anti-dumping duty leviable per metric tons of goods is specified in the said customs notification.

2. The appellants made identical submissions and prayed for setting aside both, the final findings of the DA and the customs notification, mentioned above.

3. Shri Adarsh Ramanujan, learned Counsel for the appellants submitted elaborately on various grounds to contest the imposition of anti-dumping duty on the subject goods. His arguments can be summarized as below :-

(i) the DA has not properly examined the adequacy and correctness of information filed by the Domestic Industry (DI). The DI have not submitted various required details for consideration, details like sales volume, investment, networth, capital employed; methodology to arrive at normal value were not provided. There is no clarity on various details submitted by the DI regarding the categorization of domestic producers and as to how the FOB prices are arrived at for calculation ;

(ii) the DA has not properly defined the scope of product for anti-dumping investigation. The product scope should have excluded metallurgical coke with ash content of more than 15%. The DA has wrongly accepted the argument of DI that metallurgical coke with ash content between 15-18% is technically and commercially substitutable with metallurgical coke with ash content of below 15%. The ash content of metallurgical coke from China is only around 10.5 to 13.5%. The subject goods should have excluded grade/variety that are not imported into India from subject countries. The subject good should exclude metallurgical coke having ash content of higher than 15%. The input/output norms as laid down by DGFT should not have been disregarded by the DA. In the previous investigations the said norms were considered by the DA. The import of subject goods cannot cause injury to the Domestic Industry if the like products are not manufactured by the DI. There cannot be any injury to the DI from import of metallurgical coke having ash content less than 12.5% as the DI barely produces any metallurgical coke in such category ;

(iii) The DA has wrongly determined the scope and standing of the DI. The captive producers and users cannot be excluded to determine the standing of DI. There is no specific reason for exclusion of captive users. Rule 2 (b) of AD Rules has not been correctly applied by the DA. The appellate body report of the WTO in the case of U.S. Cotton Yarn and U.S. Hot Rolled Steel should have been considered while determining the scope of DI. India in its representation before the WTO, submitted that even captive consumers should be regarded as domestic producers for the purpose of determining whether injury has been suffered by DI. Reliance is specifically placed on the decision of the Appellate Body on U.S. Hot Rolled Steel products to reiterate the submission that captive producers cannot be excluded from the scope of DI for injury analysis. Exclusion of Bengal Energy and Visa Sun Coke from DI is not correct. In the absence of complete information from these two industry, the appellant is not able to contest the finding.

(iv) The various economic parameters available on DI clearly indicate that the DI suffered no injury caused by alleged dumped imports of subject goods. The non-injurious price calculated by DA is not correct. The parameters by one of the DI (Gujarat NRE) have not been properly analyzed by the DA. The trend in the investment, capacity utilization of the DI indicate that the import of subject goods had no adverse impact on the DI. There is always import of subject goods. Loss of DI has not been properly assessed by the DA. There is no causal link between the injury to the DI and alleged dumped imports of subject goods. The DI suffered due to various reasons not attributable to import of subject goods. The global price of coking coal, which is the main raw material for metallurgical coke, are falling. As such, the reduction in the price of metallurgical coke is not due to dumping, but it is due to reduction in raw material price. The DI had inefficient production process, resulting in losses. There are various other contributory factors affecting the performance of DI and the same cannot be linked to import of subject goods.

4. Shri Suhail Nathani, the learned Counsel representing the Domestic Industry of subject goods, defended the action of DA and the customs notification imposing the anti-dumping duty on the subject goods. His submissions can be summarized as below:-

(a) the DA has applied correct parameters while determining the scope of DI and the scope of subject goods while conducting the investigation. The captive producers of subject goods have been correctly excluded from the scope of DI. The reliance placed on the decision of Appellate Body of WTO is inappropriate and not relevant to the facts of the present case. The submissions made by India is as a third party with reference to a dispute which pertained in the provisions of Agreement on Textile and Cloth which was terminated on 01/01/2005. The issue dealt with in WTO proceedings was not relating to imposition of AD duty. In US Cotton Yarn case, Pakistan claimed that US did not properly consider the state of its DI. The appellate body was examining the scope of DI under Article 6.2 of ATC which is different from scope of DI under AD Rules. Rule 2(b) of AD Rules is clear and specific on the scope of DI and the same is not peri-materia to the terms of Article 6.2 of ATC. In US Hot Rolled case also the appellate body never considered the issue whether captive production must be considered while determining the standing of an applicant. No ratio was laid down on this principle by the appellate body. The Tribunal’s decision in **Pig Iron Manufacturers Association vs. DA** reported in **2000 (116) E.L.T. 67 (Tribunal)** is clear. It is categorically held that captive consumption producers and producers for marketing constitute different categories for AD Rules ;

(b) the DA has correctly determined the scope of subject goods. The reference made by the appellants to the earlier investigations are not relevant to the present case. It is clearly recorded that metallurgical coke having ash content upto 15% is commercially substitutable with metallurgical coke of ash content above 15%. In fact, manufacturers are using coke of higher ash content and documentary evidences for the same are submitted. On the issue regarding DI cannot manufacture metallurgical coke with ash content less than 12.5%, it is submitted that documentary evidences will clearly show one of the major domestic manufacturer continued to procure metallurgical coke with ash content of 12.5% from domestic sources.

(c) DI suffered injury due to dumping of subject goods in India. The financial losses and bankruptcy of Gujarat NSE is not relevant. It accounts for only about 20% of DI and around 10% of total Indian production, excluding captive producers. The imports from non-subject countries has no relevance for determining the injury due to dumped imports from subject countries. The share of import from subject countries with reference to total demand has increased over a period to reach more than 40% during POI.

(d) The fall in coking coal price did result in fall of metallurgical coke price, however, the price fall in metallurgical coke is very steep. The imports, on such price is under cutting and puts increased pressure on Domestic Industry, to further reduce the prices to match the dumped prices.

5. Shri Ameet Singh, learned Counsel for the DA supported the final findings and the customs notification imposing AD duty on the subject goods. He drew our attention to various points recorded in the final findings by the DA, to answer the grounds raised by the appellant. Overall, he reiterated the arguments of the respondent Domestic Industry on the issues raised by the appellant. The scope of the subject goods was correctly considered by the DA. Substitution of various types of metallurgical coke with varying ash content has been specifically

recorded as the reason for final determination of the scope of subject goods for anti-dumping. These findings are based on recorded evidences and cannot be disputed. Regarding captive producers having been treated as separate category, the DA has examined the relevant data regarding domestic production and it was concluded that the production of petitioners was around 48% of total Indian production. When taken together with supporting domestic producers, the production will be around 63%. The conclusion of the DA regarding the ambit and scope of DI is based on sound reasoning and accepted principles. The volume and price analysis of imported goods during investigation clearly indicated that increased imports from subject countries was not on account of replacement from other than subject countries. There was not only sudden raise in the import of subject goods, it is also recorded that the same were on substantially lower price causing serious injury to the DI.

6. Shri Govind Dixit, the learned AR appearing for Revenue, supported the final findings of the DA and the customs notification imposing anti-dumping duty on the subject goods. He reiterated the submissions made by the learned Counsels for the DI and the DA.

7. We have heard all the parties involved in the present dispute and examined the appeal records carefully. The written submissions made by the parties were also scrutinized. The appellants challenged the imposition of AD duty on subject goods

imported from specified countries. We have examined each one of the points submitted in support of their challenge.

8. Rule 5 of AD Rules provides for the power of DA to initiate investigation to determine the existence, degree and effect of dumping, only upon receipt of a written application by or on behalf of the Domestic Industry. The petition should be supported by clear evidence of (a) dumping (b) injury and (c) a causal link between such dumping and injury. The DA is mandated to examine the correctness and sufficiency of evidence produced, in the application before initiating the investigation. Admittedly, such satisfaction is based on prima facie analysis of all the relevant data submitted. No detailed enquiry or definitive finding is drawn during such initial examination. Having satisfied, prima facie, about the evidence submitted by the applicants the DA issued a notification dated 30/12/2015 initiating the anti dumping investigation concerning import of the subject goods in accordance with AD Rules. After completion of the investigation in terms of AD Rules and other regulations applicable, the final findings dated 20/10/2016 was issued by the DA.

9. We have perused the initiation notification dated 30/12/2015 and the final findings dated 20/10/2016 of the DA, carefully. The DA has examined the application for initiating the anti-dumping investigation and, upon prima facie satisfaction, commenced the investigation. Regarding the product under

consideration and like articles the DA recorded the following findings :-

> "8. The product under consideration (PUC) in the present investigation is Low Ash Metallurgical Coke (Met Coke). The product under consideration does not include other Metallurgical Coke with high ash content which is in excess of 18%.
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> 9. Low Ash Met Coke is produced by destructive distillation of coking coal in the absence/regulated presence of oxygen at high temperatures (ranging between 1100 to 1350 degree centigrade) causing the coal to soften, liquefy and then re-solidify into hard but porous lumps. Met Coke is a form of carbon along with some mineral and residual volatile material. Met Coke is used as a primary fuel in industries where a uniform and high temperature is required in kilns or furnaces.
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> 10. Met Coke is used in various industries including pig iron, foundries, ferro alloys, chemical, integrated steel plants and others. Met Coke is normally produced and sold in terms of weight expressed in KG or MT. The Met Coke imported into India is also with Low Ash content and that the ash content does not exceed 18%. Low Ash Metallurgical Coke is classified under Chapter Heading 27040030 of the Customs Tariff Act, 1975. The customs classification, however, is only for indicative purposes and is not binding on the present investigation.
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> 11. The interested parties have merely quoted from the investigation conducted for Met Coke in the past without advancing any justification for the exclusion as to how Met Coke with ash content of above 15% can be excluded from the purview of the current investigation. It is stated by the domestic industry that the Met Coke with Ash content

between 15%-18% is technically and commercially substitutable with the Met Coke below 15%. The impact of using Met Coke between 15%-18% in place of Met Coke below 15% would be reduction in productivity and that it would be compensated with the cost savings on account of lower price of Met Coke with ash content between 15-18% as compared to Met Coke of ash content below 15%. Further, the input-output norms laid down by the DGFT are not binding on the product definition in the anti-dumping investigations as they are prescribed for different purpose. With regard to the exclusion of Met Coke containing low ash (upto 12.5%), low phosphorous (up to 0.018%) and low sulphur (upto 0.65%) or with moisture content of upto 5% from the scope of the product under consideration, it is noted that the domestic industry has provided sufficient evidence to show that they have produced and supplied the subject goods of the above description. The Authority also notes that there is no case for exclusion of lump coke from the scope of the product under consideration. It is noted from the third party test reports supplied by the domestic industry that it manufactures Met Coke with ash content below 12.5%. The Authority also notes that it does not require any specific technology to manufacture Met Coke with low or high ash content. The production of Met Coke is dependent upon the ash contained in the coking coal. Lower the ash content of coking coal, the lower ash content would be there in Met Coke produced and vice versa. Therefore, there is no case of the interested parties for any exclusion from the product scope under the investigation.

12. With regard to like article, Rule 2(d) of the Rules provide as under:

> *"like article" means an article which is identical or alike in all respects to the article under investigation*

> *for being dumped in India or in the absence of such article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation."*
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> 13. After considering the information on record, the Authority has determined that there is no known difference in the subject goods produced by the domestic industry and that imported from the subject countries. The subject goods produced by the domestic industry and the subject goods imported from the subject countries are comparable in terms of their characteristics such as physical and chemical characteristics, manufacturing process and technology, functions and uses, product specifications, distribution and market & tariff classification of the goods. The users are using the dumped goods from the subject countries and the goods produced by the domestic industry interchangeably".

10. The appellants contested that the DA has wrongly considered the scope of subject goods and metallurgical coke having ash content of above 15% and less than 12.5% should have been excluded from the scope of subject goods. In this connection, we have carefully considered the submissions made by the DI and the findings recorded in the DA. During the course of argument and written submissions thereafter, the DI produced documentary evidences to show that steel companies used metallurgical coke with ash content above 15% in their blast furnace. Documents also show recent supply to the appellant units, of metallurgical coke with ash content below 12.5%. Documentary evidences submitted also indicated that user

industry of metallurgical coke received product with ash content of below 12.5% during the period of investigation. Supporting evidences were also submitted to show similar supplies during injury period and proof of import low ash coking coal by DI. We have perused these documentary evidences, which were claimed as confidential information, and we find that the findings of the DA on the scope of subject goods cannot be faulted either in law or on fact.

11. The appellants strongly contested the findings of the DA on the ambit and scope of Domestic Industry as considered by the DA. The main thrust of the argument is that captive consumption producers should not have been excluded from consideration. In this connection, we note that the DA recorded as below :-

> "16. The application has been filed by the Indian Metallurgical Coke Manufacturers Association (IMCOM) on behalf of the domestic producers of Low Ash Metallurgical Coke in India, namely, Saurashtra Fuels Pvt. Ltd., Gujarat NRE Coke Ltd., Carbon Edge Industries Ltd., Bhatia Coke and Energy Ltd. and Basudha Udyog Pvt. Ltd. Further, the applicant has stated the present application is filed by or on behalf of the manufacturers who are marketing / selling their production of Met Coke. It is stated that there are two different categories of producers of Met Coke in India, i.e., manufacture of Met Coke for captive use and manufacture of Met Coke for marketing / sales. The manufacturers who are producing Met Coke for their captive use are being excluded from the purview of the current investigation as their production is not in competition with the imported subject goods. Further, the economics of producers for

captive consumption and of producers for sale are very different. The former saves on the costs of marketing sales, inventory etc. The applicant has stated that there are some steel manufacturers who produce Met Coke for their captive consumption. The applicant has provided the details of the names of the steel producers as available having production of Met Coke for captive consumption, namely, Steel Authority of India Limited, Tata Steel Ltd., JSW Steel Ltd., Jindal Steel & Power Ltd., Bhushan Steel Ltd., Jayaswal Neco Industries Ltd., Rashtriya Ispat Nigam Ltd., Bhushan Power and Steel Ltd., Jai Balaji Industries Ltd. and Usha Martin Ltd. The applicant has also provided the details from their respective annual reports for the above companies that there are either no sales of Met Coke by the major captive producers or the sales are negligible by some of the producers as compared to their total production of captive Coke. In this regard, the Authority has seen from the evidence on record that these companies are primarily using Met Coke for their captive consumption and in some cases, their domestic sales are negligible as compared to their total production of captive Coke. In addition, it is noted that there is one more captive producer, namely, Neelachal Ispat Nigam Ltd. and it is seen that its sales are also not significant. Therefore, the captive producers are being treated as a separate category of producers and have been excluded from the purview of the current investigation while determining the domestic industry".

12. The DA also examined the decision of appellate body of WTO with reference to cases cited by the appellant. We have examined the decisions with reference to hot rolled steel products and combed cotton yarn dealing with export from Japan and Pakistan. We note that these aspects have been specifically

examined and commented by the DA. The decisions have no direct relevance to the dispute in the present case and we are in agreement with the submissions made by the learned Counsel for the DI regarding the scope of those decisions, recorded earlier in this order. We find no infirmity in the conclusion of the DA while determining the scope of DI in the investigation.

13. The appellants strongly contested that there is no injury to domestic industry due to import of subject goods from the specified countries. The loss or injury, if any, to the domestic industry is not relatable to import of subject goods but are due to other reasons. The AD duty is not legally sustainable as there is no causal link between the injury and the import. In this connection, we have examined the findings of the DA on the injury to the Domestic Industry. It is clearly recorded that import of subject goods, from subject countries, have significantly increased during POI. As compared to base year 2011-2012, the increase in import is almost 15 times. The import in relative terms has also increased by about 43%. It was concluded that the imports in relation to production and consumption have significantly increased over the injury investigation period. On careful analysis of the price under cutting and price under-selling, the DA recorded there is a high level of price under selling and there is positive price under cutting of import of subject goods from subject countries. The conclusion drawn was that the DI has suffered injury with regard to all parameters of injury. We are in

agreement with such detailed analysis and conclusion drawn by the D.A.

14. The appellants argued that the Domestic Industry (DI) suffered due to other reasons which are not relatable to import of subject goods. In this connection, we note that the import from subject countries has increased significantly and the market share of domestic sales has actually come down, in spite of increase in total demand. The magnitude of dumping has been examined by the DA. On the causal link, the point raised by the appellant, like high inland freight cost and poor performance of DI due to other factors, due consideration was given by the DA in his investigation. The DA also specifically taken note of the imports made by Gujarat NRE from related party and their financial performance. It was noted that Gujarat NRE stopped buying coal from Australia in October 2013. Hence, there is no basis in the submission, that the losses are because of high coal prices, when importing from relating party.

15. On careful examination of final findings, grounds of appeal and connected appeal papers, we are of the view that the appeals now under consideration are without any merit. Each one of the point raised by the appellants have been dealt with adequately on legal and factual basis by the DA. As such, we find no reason to interfere with the said final findings. Accordingly, the appeals

are dismissed. The miscellaneous applications for stay are also disposed of.

(Order pronounced in the open court on 07/04/2017.)

(Justice Dr. Satish Chandra)
President

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

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