

AD/52959-52963/2016 and 53043/2016-AD(CUS)

IN THE CUSPTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:04.07.2017

Date of Decision :18.08.2017

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(Arising out of Final Finding No.15/25/2011-DGAD dt.28.3.2016 and Notification No.24/2016-Cus dated 7.6.2016 passed by the Designated Authority (DA), Directorate General of Anti-Dumping and Allied Duties, Ministry of Commerce & Industry, Udyog Bhawan, New Delhi)

M/s.Heyuan Romantic Ceramics Co.Ltd.

M/s.Foshan Beyond Import & Export Co.Ltd.

M/s.Thai Impex Malaysia SDN BHD

Appellants

M/s.Ashique Exports Pvt.Ltd.

M/s.Thai Impex P.Ltd.

M/s.Foshan Shansui Romantic Ceramics Co.Ltd.

Vs.

DA/MOF

Respondent

Appearance:

Rep. by Shri Alwan R. , Advocate for the appellant.

Rep. by Shri Amit Singh, Advocate for Designated Authority.

Rep. by Shri Govind Dixit, AR for the Revenue.

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President

Hon'ble Shri S.K. Mohanty, Member (Judicial)

Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Orders NOs.55954-55959/2017

Per B. Ravichandran:

These six appeals are against final finding dated 28.03.2016 of the Designated Authority (DA), Directorate General of Anti Dumping and Allied Duties, Ministry of Commerce and Industry. In the said final findings, the DA held that the applicants therein cannot be treated as 'New Shippers' in terms of Rule 22 of Customs Tariff (Identification, Assessment and

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Collection of AD Duty on Dumped Articles and for Determination of Injury) Rules, 1995 and therefore, he held that they are not entitled to individual dumping margin. He recommended that export of subject goods produced/exported by the applicants during the period from the date of initiation of the New Shipper Review (NSR) Investigation recommending provisional assessment i.e. 18.05.2012, may be subjected to levy of AD @ 155/-per sq. mt., as imposed earlier on the imports of subject goods, originating in or exported from China PR, until the date of validity of the said duty notified earlier vide notification no.82/2008-Customs dated 27.06.2008.

2. The NSR in terms of the above said AD Rules was with reference to AD duty imposed on the vitrified/porcelain tiles imported from China PR, under notification no.73/2003-Cus ADD dated 1.5.2003 and notification no.82/2008-Cus AD dated 27.06.2008. The period of investigation (POI) was 1.5.2012 to 31.10.2012. The DA initiated NSR on 18.05.2012. On 10.07.2012, the Ministry of Finance issued notification no.35/12 for provisional assessment of goods exported by the applicants until the completion of review. On completion of NSR, the DA recommended imposition of ADD duty, as applicable to other imports of subject goods originating in or exported from China PR, in respect of applicants also. Based on the said recommendation, the Ministry of Finance issued notification no.24/2016-Cus ADD dated 7.6.2016 ordering for final assessment of the imports on payment of AD duty in terms of notification no.82/2008-Cus ADD dated 27.06.2008.

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3. The applicants, aggrieved by the final findings dated 28.03.2016 and Customs Notification no.7.6.2016, filed appeals before the Tribunal under Section 9 C of the Customs Tariff ACT, 1975.

4. The Tribunal heard the appeals and passed final orders no.50478-50483/2017 dated 25.01.2017. By the said final order, the Tribunal dismissed the appeals. The appellants filed writ petition no.WP(C) 2540 of 2017 in the Hon'ble Delhi High Court. The High Court vide their order dated 20.03.2017 set aside the final order of the Tribunal and remanded the case back to the Tribunal to decide the appeals on merits after dealing with all the submissions of the parties including the period of limitation etc, as discussed in para 11 and 17 of the order. The said paragraphs of the order are as below:-

“11. The impugned order refers to the Final Findings of the DA which had concluded that producers had a much wider relationship network than what was declared by them in this regard; that the petitioners did not appear for oral hearing when the case was posted. It also records that the petitioner neither cooperated in the proceedings nor on the spot verification and that the petitioners had failed to submit the relevant documents to make full and complete declaration regarding their period of existence and the relationship between them and the related companies. However, the said conclusion of the Tribunal is not supported by any reasoning except for mere reference to paras 25 to 27 of the Final Findings. Indeed, there is no reference to the contentions of the petitioners. For example, in para 5 of their Appeal before the Tribunal, the petitioners had pleaded that they had not exported during the earlier investigation period and were not related to any of the companies/producers, which had

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exported the subject goods to India during the investigation period.

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17. The impugned order has not examined either the specified procedure, the strict timelines or the matter or merits; especially the *de minimis* claim. Furthermore, when the DI's second SSR request was rejected by the DA and the subject goods were not more subject to anti-dumping duty, then what would be the effect of the NSR which was to be only for the remainder period of the five years of the 1st SSR anti-dumping duty levy? Could the NSR or its corollary provisional anti-dumping duty be sustained when the main anti-dumping duty itself was not payable after June, 2013? Furthermore, the written submission of the respondents could not have been taken into consideration by the Tribunal without a copy of the same being furnished on the petitioners. This deprived the latter of an opportunity for effective representation, hence, there was denial of natural justice. “

5. The appeals were again listed for hearing before the Tribunal, after due notice to all the parties. The arguments of the counsels for appellants, the DA and the Revenue were heard at length on 3.7.2017 and 4.7.2017. Shri Alwan, Id. Advocate for the appellants submitted a written note and elaborated on the points therein. He submitted that the appeals were remanded back to the Tribunal to adjudicate on merit with specific reference to certain issues.

6. Ld. Counsel submitted on two preliminary issues and thereafter on merits of the case. The two preliminary issues are (a) neither the final finding nor the customs notification could have been issued after lapse of 18

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months; and (b) no AD duty could be imposed in the present case as the dumping /injury margins had diminished i.e. less than 2 %. After elaborating on this preliminary issues, the Id. Counsel submitted that on merit, the finding of the DA that the rejection of New Shipper Status for the appellants by the DA is incorrect. The appellants were entitled for individual dumping margin when they were not exporting the subject goods during the earlier period. It is the contention of the Id. Counsel that the DA did not record a proper finding based on facts in this regard. He relied on the certain case laws in support of his submissions as above.

7. Ld. Counsel for the DA strongly opposed the submissions of the appellants challenging the final finding of the DA. He submitted that the appeals are without merit both on preliminary issues as well as on merits. Regarding the delay in issuing of final finding on NSR, he submitted that the DA followed up the matter and various constraints like non-response of the interested parties, initial refusal for spot verification and non-participants of interested parties during the hearing and certain administrative reasons like change of DA, contributed to the delay. He submitted that there is no statutory time limit, though the DA always endeavors to finalise the NSR at the earliest possible time. In any case, the delay has not jeopardized the interest of the appellants, as provisional assessment was ordered during the validity period of AD duty. The conclusion of the NSR and even this appeal proceedings will lead to the finalization of assessment based on the outcome on merit.

8. Regarding the degree of dumping/injury margin being less than 2% and also on merit regarding the status of the appellant as New Shippers, the

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ld. Counsel for the DA drew our attention to specific findings recorded in the final order. He further submitted that in the investigation relating to AD duty and NSR, the DA has to look into the relevant data and facts relating to the producers/exporters in subject countries. This involves a transparent and complete cooperation by the interested parties. In absence of such reliable particulars, the DA has to proceed on the basis of materials available for his findings. Regarding the status of the appellant, he submitted that when there were inter-connected units, change of owners of already existing units, the DA based his findings on the information available in public domain and also certain disclosures made by the appellants. He cannot be faulted on this account.

9. Ld. AR submitted that the closure of the matter on second sunset review and termination of AD duty thereafter by itself will not have any effect on the material period presently under consideration, as AD levy during that period was held to be valid and legally sustainable.

10. Ld. AR for Revenue supported the final findings of the DA and the Customs Notification ordering finalization of provisional assessment in respect of imports connected to the appellants. He submitted that the material facts and the speedy completion of investigation /review under AD Rules are interconnected to cooperation by various interested parties. The DA has to get reliable data and facts from the persons located in subject countries and in such circumstances, the DA can proceed only with data made available to him. In the present case, the analysis by the DA cannot be faulted.

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11. Before conclusion of the arguments of the interested parties, the Bench specifically sought clarification regarding appeal, if any, by domestic industry connected to this case. Shri Jitendra Singh, Id. Advocate filed a written note confirming that no appeal has been filed on behalf of DI against final finding or customs notification, now under consideration.

12. On careful consideration of the grounds of appeal and directions of the Delhi High Court and the submissions made by the Id. Counsel for all the parties, we proceed to examine the contentious issues one by one. The first points taken by the appellants is delay in finalizing the NSR. It is submitted that the NSR undertaken under Rule 22 of the AD Rules was initiated on 18.05.2012 for the period of investigation from 1.5.2012 to 31.10.2012. The appellants contested the legality of the final findings on NSR that there is an undue delay in this regard as the final finding was issued only on 28.3.2016 after more than 4 ½ years of initiation. The appellants relied on the Article 9.5 of the WTO Agreement, which states that such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing member. It is argued that the delay of 2½ years even to hear the parties will make the whole proceedings vitiated.

13. Admittedly, Rule 22 itself does not provide for any statutory time limit for completion of review. We also note that there has been delay in completion of the NSR. The question is whether such delay alone can be the reason for setting aside the final finding of the DA, without examining the merit. Here, the Id. Counsel for DA tried to explain the background of delay. Various reasons were cited, which contributed to the delay. It is to be noted

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that the appellants did not consent for on the spot verification in the first instance. It was only after the issue of disclosure statement by the DA that the appellants consented for on the spot verification. There was a change in the DA, which necessitated a second oral hearing. We also note that on the first oral hearing fixed, the appellant failed to participate. While we note that there is a delay in the proceedings, which concluded in the final finding now under challenge, what is to be considered is whether in the absence of any statutory limitation, the appellants were put to any disadvantage due to such delay. It is necessary to note that immediately on the application filed by the applicant and initiation of NSR by the DA, order of provisional assessment has been issued by the competent authority so that the interest of the appellant shall be safeguarded. In case finally the authorities hold that the appellants are eligible for individual rate of AD duty or no AD duty, then all the benefits so available cannot be denied to the appellants. Keeping these facts in mind, we hold that delay in issuing the final findings cannot be the sole reason to set aside such final finding. This is more so in the absence of any statutory time limit under Rule 22 of the AD Rules.

14. We have also considered the case laws relied upon by the appellant. The Hon'ble Supreme Court in case of **Pune Municipal Corporation Vs. State of Maharashtra – 2007 (2) TMI 637** and in **State of Gujarat Vs. Patel Raghav Natha & Ors. 1969 (4) TMI 90 Supreme Court** was discussing the applicability of the concept of the reasonable time under **Urban Land (Ceiling and Regulation) Act, 1976** and the provisions of Bombay Land Revenue Code 1879. The Hon'ble Apex Court held that in the absence of limitation prescribed in the statute, reasonable time must be

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determined by the facts of the case and the nature of the order, which is being tested. We note that in the facts and circumstances of the present case and the fact that the provisional assessment has been ordered, which will safeguard the interest of the appellants, we hold that the final finding can not be struck down only on the ground of delay.

15. It is contended by the appellants that in second sunset review, the exports from China,PR have been found to involve no dumping during 2012-13 and accordingly, the request for sunset review was rejected. In view of the above fact, there is no dumping or injury and accordingly, it was pleaded that the NSR should have given a finding to that effect. We note that the AD duty imposed on the subject goods originating in or exported from China PR expired w.e.f. 26.6.2013. The second sunset review was to continue the AD duty, further, which was rejected by the DA. We note we are dealing with NSR, which is for the period of investigation from 1.5.2012 to 31.10.2012. During the said period, the AD duty was validly levied on the imports of the subject goods and the NSR sought was to have a separate finding for the appellants dealing with subject goods exported to India. We note that the reference of the appellant regarding termination of AD duty is not relevant to the issue at hand. The finding on NSR was based on the analysis and facts as recorded by the DA and the termination of the AD duty in 2013 has no implication for the period when the said duty was validly levied.

16. Coming to the merits of the issue, we note that the appellants contended that they were correctly eligible for NSR and the findings recorded by the DA is based on the incorrect facts. We note that the DA

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rejected the claim of the appellant for NSR on the ground that they do not fall within the scope of “New Shipper”. They had in fact exported the subject goods earlier and will be correctly covered by the general AD duty imposed on the subject goods originating in or exported from China PR.

17. We have considered the submissions of the appellant closely, in this regard. The DA gave his finding regarding non-fulfilment of preliminary condition under Rule 22 of AD Rules. We note that the DA was faced with non-availability of material data to support the claims of the appellant regarding their status as New Shippers. In terms of AD Rules and the provisions of WTO Agreement, the DA is required to review, for the purpose of determining individual dumping margin for any exporter or producer in the exporting country, which has not exported the subject goods to India during the period of investigation of the earlier AD proceedings with reference to subject goods from subject country. It is also to be examined whether the applicant is related to any of the exporter or producers in the subject country being notified for AD duty. Here, we note that China PR is a non-market economy. The data regarding the operation of various new entities and their inter-connected linkage in business as well as management controls can be examined only when true and transparent disclosures are made by the interested parties located in the subject country. In the present case, the DA, after following the procedures laid down in the AD Rules, proceeded to analysis the available record, before concluding the NSR. The crucial point is whether or not the appellants were involved in export of subject goods from the subject country during the earlier period. The DA also conducted though, belatedly, on the spot verification after the

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consent was given by the appellants. It is relevant to note the findings recorded by the DA on this crucial aspect:-

“25. The verification of the information and records of the NSR parties revealed that the M/s. Foshan Sanshui Romantic Ceramics Co Limited, China PR (Producer-1) and Heyuan Romantic Ceramics Company Limited, China PR (Producer-2), the related producers were not new players in the business, but were actually old players with different names. The on the spot verification revealed that Heyuan Romantic Ceramics Company Limited, China PR (Producer-2) was earlier known as Fanrong Ceramics Co Ltd, set up in the year 2000. The verification also revealed that the brand name used by Heyuan Romantic Ceramics Company Limited was registered way back in the year 2001. Although Heyuan Romantic Ceramics Company Limited claimed to have been set up in 2009, it was actually set up much before in its earlier incarnation as Fanrong Ceramics Co Ltd. None of these things were declared by the Company in its earlier submissions. Although the Company, in its comments on the verification report, tried to explain the position, but the fact remains that they failed to bring these facts before the Authority.

26. While Heyuan Romantic Ceramics Company Limited had declared as having only one production centre for the subject goods, the web based information followed by verification revealed that the Company had actually two production centres for the subject goods and not one as declared by them. Although Heyuan Romantic Ceramics Company Limited, China PR (Producer-2) claimed to have only one production facility for vitrified/porcelain tiles at Huangtuling Village, Denta Town, Dongyuan County, Guangdong Province, China PR, but, as per the website information, they have another production base at Zhangjiang in Guangdong province, which was not declared in their application/responses. Consequently, the Authority was not

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in a position to verify the production, sales and other details of the said non-declared plant. Without verifying their records, it cannot be ruled out that the said 2nd plant of Heyuan Romantic Ceramics Company Limited did actually not exist during the earlier investigations and not involved in the production and export of subject goods, either directly or indirectly, in some other form or nomenclature, as it is often observed in Chinese business.

27. The verification also revealed that both the related NSR producers had a much wider relationship network than what they had actually declared. There were many related companies involved in the production/sale of the subject goods, which were acknowledged to have either been existing prior to the POI or are closed and out of business now. But, the fact remains that these relationships and their activities were not declared up front by the NSR parties. Therefore, without being declared and subjected to verification, it cannot be ruled out that these related companies were not actually involved in the production and export of the subject goods to India, either directly or indirectly, during the earlier investigations.

28. In terms of the Anti-dumping Rules and provisions in the WTO Agreement concerning NSR, the Designated Authority is required to review, for the purpose of determining individual margin of dumping for any exporter or producer in the exporting country in question, who has not exported the subject goods to India during the period of investigation of the earlier anti-dumping investigations concerning imports of the subject goods from the subject country and that the applicant is/are not related to any of the exporters and producers in the exporting country who are subjected to the anti-dumping duty. Considering the facts and circumstances of the present case, wherein concerned parties have not come clean to declare the details of their production centres and related parties involved in the production and sales of the subject goods and a sales arrangement which smacks of a

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deliberate arrangement for the sole purpose of taking advantage of antidumping duty through the NSR route, the Authority is not in a position to draw such conclusions.

29. The verification by the Authority also revealed that Foshan Beyond Import and Export Company Limited, China PR, which is claimed to be a shipper, is actually the exporter of the subject goods and realised the export proceeds directly from the 15 Indian buyers. Foshan Beyond Import and Export Company Limited could not demonstrate with documentary evidence any commercial invoicing between themselves and Thai Impex Malaysia SDN BHD, Malaysia, which is declared to be the exporter.

30. Although the entire exports were made to its related Indian importers, Thai Impex Malaysia could not demonstrate with documentary evidence realisation of export proceeds. Only a part payment was received from the Indian buyers, but the Company could not justify with documentary proof the reasons for such payments received from the Indian buyers when the Indian buyers have already made the full payment to Foshan Beyond, China directly. During the verification, the Thai Company was found to be a name sake company without any major infrastructure or activities. During the verification, Thai Impex Malaysia could not demonstrate with documentary evidence its role as an exporter in the present transactions and realisation of the complete export proceeds in its name. Even the Company could not demonstrate its audit reports and audited annual accounts and could not reconcile the details claimed in Annexure 2A of the response with its books of accounts. During the verification, it could be made out that the sole motive of forming Thai Impex Malaysia was to facilitate the NSR transactions with the Indian buyers and to ensure that the Chinese NSR parties do not make any sales to any other Indian buyers, other than the related Indian buyers of Thai Impex Malaysia.

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31. Under the above stated circumstances, the Authority holds that it may not be appropriate to clear the exports of the subject goods made by M/s. Foshan Sanshui Romantic Ceramics Co Limited, China PR (Producer-1), Heyuan Romantic Ceramics Company Limited, China PR (Producer-2), Foshan Beyond Import and Export Company Limited, China PR (Shipper) and Thai Impex Malaysia SDN BHD, Malaysia (Exporter), without payment of Anti-Dumping duty.”

18. In the face of the above factual recordings and conclusion by the DA, the appellants claimed that there is no details as to which company was related to the NSR authorities, what was their nature of network and relationship and what and which goods were produced by the related parties. As we have already noted that the DA has to get true and full transparent information from the subject country regarding commercial and business interconnectivities among the various stake holders. Different countries have different legal parameters. Not all details will be manifestly known to outside persons and especially to the Government Agency like DA operating in India. In other words, the DA is, no doubt, will be constrained by the selective availability of certain facts and the gap being filled by the claims made by the interested parties. In such situation, the DA can only conduct a reasonable enquiry to collect and collate all the available data to form a reasonable conclusion. Having examined closely the arguments and facts of the case, as recorded above, we find that the DA did examine the data available to him and arrived at a sustainable and reasonable conclusion on NSR. The appellants are trying to take advantage of non-availability of certain specific data or non-disclosure of certain data to DA, to support their case that the DA cannot make a recommendation unless

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complete and thorough verification of all the facts are made and supported by the documentary evidences. We find such proposition is not tenable keeping in mind the constraints already noted and also the overall scope of the NSR investigation undertaken by the DA.

19. The change of name of some of the appellants and their interconnectivity in business, as explained by the DA, has formed the foundation for further analysis by the DA in NSR. It is necessary to note here that the appellants did not make full and complete disclosures regarding their period of existence and relationship among themselves. In the absence of full and complete disclosure in a true and transparent manner, it is not open to the appellant to contest the final findings against individual dumping margin. For instance, M/s. Heyuan Romantic Ceramics Co. Ltd. used brand name registered in 2001. Though claimed to have been set up in 2009, it had its existence as Fanrong Ceramics Co. Ltd. much before. There was no disclosure of some vital facts. Similarly the number of production units in China were not correctly disclosed. M/s. Foshan Beyond Import & External Company, China PR claimed to be shipper. However, they realized export proceeds directly from the Indian buyers as exporter. The documentary evidence to support transaction between M/s. Foshan and M/s. Thai Impex has not been submitted. These points, illustratively, show that the appellants failed to make all supporting disclosures and the DA correctly relied on available evidence with him to reject the claim for NSR. It is to be noted here that the NSR was initiated as per request of the applicants claiming individual dumping margin. It is apparent that the applicants have to establish their status as new shippers. It would appear that, in the present

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case, the applicants are substantially shifting the burden on the DA to adduce evidence that they are not new shippers. This is not a tenable proposition.

20. On careful consideration of all the points raised by the appellants, we find no merit in the present appeals and accordingly, dismiss the same.

[Order pronounced on 18.08.2017.]

[Justice Dr. Satish Chandra]
President

[S.K. Mohanty]
Member (Judicial)

[B. Ravichandran]
Member (Technical)

Ckp.