**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 : 06/11/2017.**
**DATE OF DECISION : 20/12/2017.**

**Anti Dumping Appeals No. 51515, 51592-51593, 51630-51631 of 2017 with COD Applications No. 50833-50834 of 2017**

[Arising out of the Notification No. 28/2017-Customs (ADD) dated 14/06/2017 based on Final Findings of the Designated Authority, No. 14/3/2015-DGAD dated 11/04/2017.]

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| M/s Solvay Peroxythai Limited ]<br>M/s Samuda Chemical Complex Limited ]<br>M/s ASM Chemical Industries Limited ]<br>M/s National Peroxide Limited ]<br>M/s Hindustan Organic Chemicals Limited] | Appellants |

Versus

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| Union of India/DA | Respondent |

**Appearance**

S/Shri Sanjeev Sachdeva, Ashish Chandra, Ms. Tanvi Praveen, Advocates (for appellant No. 1), S/Shri Jitender Singh and Sharad Bhansali (For appellant No. 2,3), Ms. Reena Khair, Advocate (for appellant No. 4,5) – for the appellants.

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

Ms. Reena Khair, Advocate for Domestic Industry,
S/Shri Jitender Singh and Sharad Bhansali, Advocate (For respondent Sl. No. 4-5).

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. 58470-58474/2017 Dated : 20/12/2017

**Per. B. Ravichandran :-**

These are five appeals against final findings dated 11/04/2017 of the Designated Authority (DA), Directorate General of Anti Dumping and Allied Duties, Department of Commerce, Ministry of Commerce and Industry, New Delhi and Customs Notification No. 28/2017 – CUS (ADD) dated 14/06/2017 issued by the Ministry of Finance, Department of Revenue, Government of India, New Delhi imposing Anti Dumping duty on Hydrogen Peroxide (subject goods) originating in, or exported from Bangladesh, Taiwan, Korea RP, Indonesia, Pakistan and Thailand (subject countries) and imported into India.

2. The DA initiated Anti Dumping investigation based on an application filed jointly by M/s National Peroxide Limited (NPL) and M/s Hindustan Organic Chemicals Ltd. (HOCL), hereinafter referred to as Domestic Industry (DI), that there is dumping of subject goods from subject countries in India. After conducting the detailed investigation as mandated by Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles for Determination of Injury) Rules, 1995, the DA came to the conclusion that the subject goods have been exported to India from subject countries (other than Indonesia) below its normal value; the Domestic Industry has suffered material injury; and the injury has been caused by the dumped imports from subject countries. He accordingly recommended

various rates of AD duty to be imposed on such imports. Accepting the recommendation the Customs Notification dated 14/06/2017 was issued.

3. Two appeals (AD/51592-51593/2017) have been filed by the exporters from Bangladesh, one appeal (AD/51515/2017) was filed by the exporter from Thailand and two more appeals (AD/50833/2017 and AD/50834/2017) were filed by the Domestic Industry. While the appellant/exporter sought reduction or setting aside the imposition of Anti Dumping Duty, the DI sought enhancement of the said duty.

4. The learned Counsel Shri Sanjeev Sachdeva appearing for exporter from Thailand (M/s Solvay Peroxythai Limited) submitted that the appellant could not participate in the investigations as they were having financial interest in NPL, during the period of investigation. However, later they sold their stake to promoters of NPL on 31/03/2017. The learned Counsel submitted that the methodology adopted for determination of dumping and injury margin is not in conformity on the Article 6.8 of the Anti Dumping Agreement as well as Rule 6 (8) of the AD Rules. The margin arrived at in "others" category were much higher than those fixed for cooperating exporters from Thailand. He specifically contested Sl. No. 13 of the table annexed in the Customs notification. AD duty (U.S. $) 63.32 per M.T. was

incorrectly fixed affecting the appellant. He submitted that the landed value of subject goods has not been disclosed.

5. Contesting the submissions in the above appeal, Ms. Reena Khair, learned Counsel for DI submitted that the appellant/ exporter from Thailand has not participated in the investigation. As such, they have no locus to contest the landed value. She drew our attention to the findings of the DA that the transactionwise DGCIS data have been placed in public filed. The appellant having not participated before the DA, are precluded from contesting the findings made by the DA. Rule 6 (8) permits the DA to make determination based on facts available. She further relied on the decision of Hon'ble Supreme Court in **Designated Authority vs. Haldor Topsoe – 2000 (120) E.L.T. 11 (S.C.)**. It is reiterated that the DA correctly determined dumping and injury margin separately for cooperating and non-cooperating exporters as per consistent past practice as well as statutory provisions of Rule 6 (8) of AD Rules.

6. Shri Jitender Singh appearing for exporters of subject goods from Bangladesh submitted mainly on two grounds :-

(i) with reference to error in export price arrived at by the DA ;

(ii) with reference to abnormal profit on export price as determined by the DA.

7. The learned Counsel also submitted that the scope of DI in terms of Rule 2 (b) has not been properly applied by the DA. The DI is suffering losses due to its own inefficiency and mis-management and not due to any dumping. The DA selected 15 months as POI without recording any proper reason. The DA has no discretion to take any unit as DI when they have imported the subject goods.

8. Contesting the finding of the DA, the learned Counsel further elaborated that calculation of dumping margin is not correct. There is a road transport as well as sea freight, the freight element has been double accounted resulting in error in factual appreciation of relevant date.

9. Countering the submissions of the exporter/appellant of subject goods from Bangladesh, the learned Counsel for DI submitted that the DI were not related to any exporter or importer in terms of explanation (ii) of Rule 2 (b) of the AD Rules. The foreign partner did not have a controlling interest in NPL. There was no Directors in the Board of NPL since 2006. Relying on various decisions of the Tribunal [final order No. 57057-57063/2017 dated 09/10/2017 in **Reliance** case, **M/s Huawei Technologies vs. DA – 2016 (334) E.L.T. 339 (T)** and **M/s Merino Panel Products vs. DA – 2016 (334) E.L.T. 552 (T)**] it was submitted that the DA is correct in appreciating the scope of DI.

10. Ms. Reena Khair, learned Counsel appearing for the Domestic Industry submitted that they have filed two appeals contesting the quantum of AD duty recommended/imposed on the subject goods. Before proceeding with the appeal, she pleaded that there is a delay of 28 days in filing the appeals and prayed for condonation of the said delay.

11. Noting the contents of the miscellaneous petition for condonation of delay, we are inclined to admit the appeals by condoning the delay.

12. The learned Counsel for the DI submitted on the following lines on the appeals by the DI.

> (a) though three issues were contested in the appeals, the points relating to depreciation and cost of utilities with reference to HOCL is not being pressed ;
>
> (b) the only point now pressed is the error in calculating the return on investment in respect of NPL. The method is not in conformity with Annexure III to the AD Rules as well as consistent practice of the DA ;
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> (c) considering the closure of unit of NPL for part of the period, the DA arrived at the calculation of optimum production of 15 months. The said production is arrived at 1,16,325 M.T. as against the actual production of 94,639 M.T. It is to be noted that due regard has been given for closure of the unit by arriving on such optimum production. The DA erred by again adjusting the return on capital which

is not legally sustainable. The net return which should have been arrived at on such calculation was actually fixed at lower amount on second adjustment which affected the final recommendation for AD duty.

13. Reliance was placed on decided cases in similar facts to substantiate the point raised above.

14. The learned Counsel for the DA supported the findings on imposition of AD duty. The POI taken for 15 months is as per the due consideration of relevant data and there is no provision to record reason for arriving at POI. The Parliamentary report on the performance of HOCL brings out the injury suffered by the unit. There is no mis-management of NPL during the material period. The injury is mainly attributable to the declining import price. The learned Counsel also mentioned that Pakistan also imposed AD duty for export from Bangladesh. Regarding computation of return on capital for NPL, he submitted that optimum production has been arrived at based on average. When pointedly asked regarding adjusted return again on such optimum production he submitted that this is the first time such second adjustment has been made while calculating the return.

15. The learned AR appearing for Revenue supported the findings as well as customs notification imposing AD duty. He drew our attention to specific findings on the points raised by various appellants.

16. We have heard all the sides and perused the appeal records. We take up the appeal filed by the exporter from Thailand first. M/s Solvay were provided adequate opportunities to participate in the investigations even during the initiation stage itself. The appellant had chosen not to cooperate in the proceeding before the DA. Now in the present appeal for the first time the appellant is raising question regarding methodology adopted for determining the injury and dumping margin. We note that the appellant is a non-cooperative exporter. Rule 6 (8) of the AD Rules provides for the Designated Authority to record its finding on the basis of facts available to it and make such recommendations to the Central Government as it deemed fit under such circumstances. In this connection, we refer to the decision of Hon'ble Supreme Court in **Haldor Topsoe** (supra), the Hon'ble Supreme Court observed as below :-

> "We also think that the respondent is not entitled to raise these objections about the comparable price of M/s Sud Chemie before us for the following further reasons. In the instant case, the entire exercise before the Authority would have been simplified if only the respondent had produced its export price of its catalyst to an appropriate third country which information was available with it, which, if furnished could have established the actual normal value of their catalysts. When it failed to do so for no valid reason, the Authority was compelled to rely on other material available to it and resort to the best judgment valuation. In such a situation we are of the opinion that the complaint of the respondent against the material relied

upon by the Authority cannot be countenanced. In this context we place reliance on a judgment of this Court in **Gopal Krishnaji Ketkar vs. Mahomed Haji Latif & Ors. (1968 3 SCR 862)** wherein this Court held as under :

"Even if the burden of proof does not lie on a party the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts in issue. It is not a sound practice for those desiring to rely upon a certain state of affairs to withhold from the ocurt the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof".

Though the above observation of this Court was with reference to a proceeding in a court of law, we find that the same is equally applicable to the investigation conducted by the Authority herein which has the duty of appreciating the evidence placed before it and also has the statutory authority of drawing adverse inference in the circumstances enumerated in Rule 6 (8) of the Rules".

17. As the present appellant is nowhere in the picture during the investigation by the DA, as per the consistent practice the export by the appellant were put under residual category for determining the quantum of AD duty. We find no infirmity in such action.

18. Regarding the appeals by the exporters from Bangladesh, we note that the appellants contested status of DI on various

grounds. The Domestic Industry is defined under Rule 2 (b) of AD Rules as under :-

> "(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in such case the term "domestic industry" may be construed as referring the rest of the producers.
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> Provided that in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if -
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> (i) the producers within such a market sell all or almost all of their production of the article in question in that market; and
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> (ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory;
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> Explanation. - For the purposes of this clause,-
>
> (i) producers shall be deemed to be related to exporters or importers only if,-
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> a) one of them directly or indirectly controls the other; or

b) both of them are directly or indirectly controlled by a third person; or

c) together they directly or indirectly control a third person subject to the condition that are grounds for believing or suspecting that the effect of the relationship is such as to cause the producers to behave differently from non-related producers.

(ii) a producer shall be deemed to control another producer when the former is legally or operationally in a position to exercise restraint or direction over the latter".

19. Article 4 of WTO agreement gives the scope of Domestic Industry as below :-

**"Article 4 of WTO agreement on anti-dumping duty**

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related[(11)] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter".

20. The relationship of NPL with exporter from Thailand is subject matter of dispute. NPL is a joint venture of M/s Bombay Dyeing and Manufacturing Company Limited and M/s Solvay SA which holds about 25.10% shares in NPL. The claim of the appellant is that Solvay SA is related to the DI in terms of explanation (ii) of Rule 2 (b) of AD Rules. We note that in spite of having share holding, M/s Solvay SA had no person in Board of

Directors of NPL. During the relevant period M/s Solvay had not attended any of the meetings of Board of Directors or share holders. In May 2006 M/s Solvay SA intimated the termination of their relationship for contribution and only share holding continued. It is noted that no EGM has taken place in NPL and M/s Solvay SA has not participated in any of the AGM since 2013.

21. We have specifically referred to the findings recorded by the DA at para 14, 15 and 16 of final finding dated 11/04/2017. It is clear that the DA on careful consideration arrived at the conclusion that NPL was not to be considered as a related company of Solvay. It was further recorded that the provision of Companies Act or provision relating to special resolutions are not relevant for the present investigation. We are in agreement with the findings recorded by the DA.

22. Regarding the discretion that can be exercised by the DA, we note that the Tribunal in final order No. 57057-57063/2017 dated 09/10/2017 held that the DA is well within his powers to consider the scope of DI who were importing or related to the exporters of subject goods. There is no legal sanction against considering such DI in the investigation.

23. Regarding sickness and mis-management of DI attributable to other reasons, we note that there is no bar in consideration of a sick unit as a DI. There is no evidence to support the

contention of the appellants that the sickness or the deterioration of DI is caused by factors other than import of subject goods. The impact of import on the DI has been elaborately discussed by the DA on all aspects and we are not inclined to interfere with such findings in the absence of any specific contra evidence.

24. The appellants also contested the selection of 15 months as a POI. We note that there is no statutory provision fixing or prohibiting any POI. In this connection we refer to the decision of the Tribunal in **Simalin Chemical Industries vs. DA – 2003 (155) E.L.T. 51 (T.)**.

25. We have also considered certain miscellaneous objections like improper claim of confidentiality and error in calculation of freight of cooperating exporters. We note that there is no specific instance brought to our notice of violation of Rule 7 of Anti Dumping Rules. With reference to calculation of freight, we note that the freight details were given by the exporters only. There is no ground to question the finding just based on the submissions made by the appellants. The data which was relied upon by the DA has not been contested even during the spot verification carried out by the officers of DA. Any contest after the full disclosure is not tenable. In such circumstances, there can be no revision of data, post-disclosure. In this connection, we refer to para 33 of the final finding. The DA correctly recorded that he is unable to take into consideration fresh set of data made available

to the appellant very belatedly, post-disclosure statement. He also recorded that the profit margin has been re-determined considering the claim made by the exporter and the dumping margin is arrived at on such re-determination only. We find no infirmity in such determination.

26. We take up the appeals by the DI with reference to quantification of AD duty. The appellants are not pressing the points as originally raised in the appeal by HOCL. However, they pleaded that with reference to appeal by NPL, inadequate and incorrect return on capital employed has resulted in incorrect fixation of Anti Dumping duty. We have carefully considered the submissions of the appellant in this regard. As already noted there was a period of shut down of NPL. The DA as per the normal practice arrived at the optimum production which will address the issue of closure for part period, for computation of NIP. Apparently, the actual production is not taken into consideration. The optimum production is arrived at based on a notional or higher level of production during the last 4 years. Hence, the factor of shut down of NPL for a period loses its significance. We are also informed that the consistent practice is that once the notional /optimum production level is arrived at, the net return on capital employed is arrived at thereafter. We note that there is no mandate in the AD Rules to further adjust the notional return which was arrived at based on optimum utilization of capacities in the last 4 years. A further reduction in

such notional return apparently affected the final finding on quantification of AD duty. In this connection, we also refer to the decision of the Tribunal in **BASF Petronas Chemicals vs. Union of India – 2017 (347) E.L.T. 354 (T), Deepak Nitrite vs. DA – 2017 (347) E.L.T. 347 (Tri. – Del.)** and **Dyestuff Manufacturers Association vs. DA – 2016 (341) E.L.T. 406 (Tri. – Del.)**.

27. While we are upholding the imposition of anti dumping duty on the subject goods it is apparent that the grievance of the appellant (NPL) as a DI on the calculation of net return/ adjusted return as made by the DA requires re-examination. The learned Counsel for the DA also admitted that there has been no past instance of such second adjustment while arriving at the return on capital employed. In these facts and circumstances of the case, we note that the matter has to go back to the DA for a limited purpose of verifying the correctness of the return on investment as arrived at by the DA based on optimum production of 15 months and again by adjustment in the net return. We direct the Designated Authority to re-examine this aspect and to give a finding regarding the correctness of the method followed by him while determining the return on investment in respect of NPL. To that extent, the quantification of Anti Dumping duty is set aside for a re-examination by the DA. However, during that period of such re-examination the present levy as recommended and notified shall continued to be charged. We advice the DA to

complete his re-examination as above within three months of receipt of this order. The appellants and interested parties shall be provided adequate opportunity in this regard to present their case.

28. In view of the above discussion and analysis, we hold that there is no merit in the appeals filed by the exporters against the levy of anti dumping duty on the subject goods and the appeal filed by HOCL against the final finding. Accordingly, these appeals are dismissed. Regarding appeal filed by NPL, the same is disposed of with the above remand direction to the DA.

(Order pronounced in the open court on 20/12/2017.)

**(Justice Dr. Satish Chandra)**
**President**

**(S.K. Mohanty)**
**Member (Judicial)**

**(B. Ravichandran)**
**Member (Technical)**

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