

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. 1

ANTI DUMPING Appeal No. 50291 of 2018

(Arising out of Notification No. 52/2017-Customs dated 24.10.2017 passed by Designated Authority Directorate General of Anti-dumping and Allied Duties, New Delhi)

M/s. Jindal Stainless Limited

...Appellant

O.P. Jindal Marg,
Hisar – 125005
Haryana

Versus

**Designated Authority Directorate
General of Anti-dumping and Allied Duties**

....Respondent

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

with

ANTI DUMPING Appeal No. 50334 of 2018

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M/s. Jindal Stainless Hisar Limited

...Appellant

O.P. Jindal Marg,
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**Designated Authority Directorate
General of Anti-dumping and Allied Duties**

....Respondent

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

APPEARANCE:

Ms. Meenakshi Arora, Senior Advocate, Shri Jitendra Singh and Ms. Roshni Singh, Advocate for the Appellant

Mr. Ameet Singh, Mr. Rakesh Kumar, Mr. Naresh Thacker, Mr. Vivek Sharma, Mr. Abhishek, Mr. Akhil Sacher, Mr. Vineet Sinha, Advocates and Authorised Representative for the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing: **15.05.2019**
Date of Decision: **12.09.2019**

FINAL ORDER No. 51204-51205/2019**JUSTICE DILIP GUPTA**

Appellant No. 1 M/s. Jindal Stainless Limited and Appellant No. 2 M/s Jindal Stainless (Hisar) Ltd, which shall be referred to as the Domestic Industry, initiated anti-circumvention investigation of Cold-rolled Flat products of width not covered under customs notification dated 11 December 2015¹ originating in or exported from China PR, Japan, Korea, European Union, South Africa, Tiwan, Thailand and USA². The Designated Authority initiated anti-dumping investigation on imports of the PUI on 19 February, 2016 and issued the final findings on 18 August, 2017 recommending extension of existing anti-dumping duty imposed by customs notification dated 11 December 2015 also on the PUI from the date of notification to be issued by the Ministry of Finance. The Ministry of Finance issued the consequent notification dated 24 October 2017 and imposed anti-dumping duty on the PUI also from the date of publication of the notification. The Appellant is aggrieved by the final findings notified by the Designated Authority and the consequent notification no. 52/2017 issued by the Ministry of Finance to the extent anti-dumping duty has been imposed on the PUI from the date of publication of the notification on 24 October, 2017 and not retrospectively from the date of initiation of the anti-circumvention proceedings on 19 February, 2016.

2. The Domestic Industry had earlier filed an application under Rule 5 of the Customs Tariff (Identification, Assessment and

1. PUI

2. The Subject Countries

Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995³ for initiation of anti-dumping investigation into imports of Cold-rolled Flat products of stainless steel with width above 600 mm and thickness upto 4 mm⁴ from the subject countries. A provisional duty was imposed by the Central Government by a notification dated 22 April 2009. The final findings were issued by the Designated Authority by notification dated 24 November 2009 and on the basis of the recommendation made by the Designated Authority in the final findings, definitive anti-dumping duty was imposed by the Central Government by a notification dated 20 February 2010 which was made effective from the date of imposition of the provisional anti-dumping duty on 22 April 2009.

3. The Domestic Industry, before the expiry of the period of five years for which period the anti-dumping duty was levied, filed an application for a sunset review of the anti-dumping duty and based on the substantiated application filed by the Domestic Industry, a sunset review of the anti-dumping investigation was initiated by notification dated 17 April 2014. The Designated Authority gave its final findings on 12 October 2015 recommending the extension of anti-dumping duty for another five years. This was accepted by the Central Government by notification dated 11 December 2015.

4. The Domestic Industry, thereafter filed an application under Rule 26 of 1995 Rules for initiation of anti-circumvention investigations for the PUI and the Designated Authority initiated anti-dumping investigation into imports of the PUI from the Subject

3. the 1995 Rules

4. PUC

Countries by notification dated 19 February 2016. The product alleged to have been circumventing anti-dumping duty was Cold-rolled Flat stainless steel of the same description as the product under the notification dated 11 December 2015 but having width more than the width of the product described and covered under the said notification. According to the Domestic Industry, the PUI, which was the subject matter of the alleged circumvention, had all the essential and basic characteristics of the product earlier subjected to anti-dumping duty with the only difference being in terms of its width.

5. On the basis of the submissions made by the producers / exporter / importers and the submissions made by the Domestic Industry, the Designated Authority found that the PUI had all the essential basic characteristics of the product earlier subjected to anti-dumping duty except for the width. The findings of the Designated Authority on this issue are reproduced below:

"The Product under Investigation alleged to be circumventing the anti-dumping duties is Cold-rolled Flat products of stainless steel of the same description as the Product under Consideration defined above but having widths above those described and covered under the scope of the Product under Consideration. These products i.e. product under investigation are also classifiable under Chapter 72 of the Customs Tariff Act, 1975 under the same sub-heading 7219.31, 7219.32, 7219.33, 7219.34, 7219.35 and 7219.90 even though the Customs classification is indicative only and not binding on the scope of the investigation. The Authority notes that the product under investigation which is the subject matter of the alleged circumvention has all the essential and basic characteristics of the product subject to anti-dumping duties. The only difference is in terms of its width."

6. The Designated Authority, then determined the circumvention. After examination of the submissions made by the producers / exporters / importers and the Domestic Industry, the Designated Authority found that the concerns of importers that higher widths are not slitted and are for genuine use was not substantiated. The Designated Authority also noted that the slitting

activity was covered under the 1995 Rules. The Designated Authority also examined the change in trade pattern to evaluate the circumvention of the existing anti-dumping duty from February 2010 till the period of investigation and observed that the volume of imports of the product covered by the notification from Subject Countries declined post imposition of the anti-dumping duties, but the volume of the imports of the PUI from Subject Countries increased significantly. It also noted that the volume of imports of the product covered by the notification dated 11 December 2015 from non Subject Countries remained more or less the same during the period of investigation.

7. Thereafter, in terms of the provisions of the Rule 16 of the 1995 Rules, the Designated Authority informed all interested parties of the essential facts under consideration which formed the basis for its decision.

8. The Domestic Industry filed post disclosure comments. It was emphasised that anti-dumping circumvention duty should be imposed from the date of initiation of the investigation on 19 February, 2016 in terms of Rule 27 of the 1995 Rules, otherwise the motive of the importers to delay the imposition of duty would be achieved. The relevant portion of the post disclosure comments on this aspect are as follows:

i. **"Domestic Industry requests the Authority to recommend the anti-circumvention duties from the date of initiation of the investigation in terms of the Rule 27.** The Authority would like to appreciate that good 18 months have lapsed since the initiation of the investigation while the Domestic Industry continued to suffer because of the established malpractice of circumvention of the anti-dumping duties carried out by the exporting producers / exporters.

ii. **Domestic Industry submits that if the Authority recommends only prospective anti-circumvention duties, the motive of importers / exporters to delay the extension of duties by blocking the investigation will be achieved.** It is submitted that in such a situation the decision of the Authority will only be partially effective and in fact, would amount to an undue favour to the interested parties who have been found to be circumventing the anti-dumping duties. In any case, the

Authority needs to appreciate that extension of anti-dumping duties would not have any impact of genuine users in view of the specific exemption proposed by the Authority. Only those traders / users / importers who are involved in the act of circumvention shall be prevented from "gaining" from their malpractices. It is humbly submitted that such unscrupulous parties cannot be given any concession of any sort by the DGAD.

- iii. **Attention is also invited to Rule 27 wherein it may be seen that while the law uses the term "may" for the date of levy, the apparent discretion is no longer available as soon as the condition precedent i.e., the existence of circumvention, is proved.** The discretion, if any, also cannot be used arbitrarily. In any case, there is no reason whatsoever not to impose the duties from the date of initiation of the investigation in the facts and circumstances of this case."

(emphasis supplied)

9. The other interested parties also submitted their post disclosure comments.

10. The Designated Authority examined and analysed the submissions made by the parties and the relevant portions are as follows.

"The Authority notes the submissions regarding broadening the scope of original investigation, back door entry by Domestic Industry to reopen the already settled issues, and holds that PUI imported for use as PUI only without any alteration / slitting is not being considered for continuation of existing anti-dumping duty on PUC but only to situation where PUI imported from subject countries is not used as PUI but altered for use as PUC or non PUC.

The authority notes that it has been submitted that there is no evidence of undermining of remedial effects of anti-dumping duty on PUC and also that DG safeguards had held that losses to Domestic Industry were due to internal reasons of Domestic Industry. The Authority holds that undermining of anti-dumping duty on PUC by circumvention due to imports of PUI not intended to be used as PUI is in fact undermining the remedy provided by the Authority to provide a level playing field to PUC. The issue of Dumping, Injury and Casual Link on PUC has already been settled in the original investigation and thereafter in Sunset Review investigations."

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"The Authority therefore holds that genuine use of PUI imports as PUI only without slitting needs to be exempted from AD Duties. Many interested parties have also argued that PUC and PUI are not like article and that is why PUI remained excluded in original investigation. The Authority therefore reiterates that by allowing PUI for use as PUI only such issues are also addressed as any use of imported PUI for PUC or Non PUC / PUI purpose by the importers / users only needs to be saddled with extension of existing AD Duties on PUC to PUI.

Therefore, the primary objective of this investigation is to ensure that the interested parties are not negating or diluting the effect of the anti-dumping duties imposed by the Central Government by indulging in any kind of circumvention of duties. Further the Rules relating to circumvention do not have explicit provisions of either Rule 11 or

Annexure II for anti-circumvention investigation. Keeping this in view, the Authority is of the view that the large scale shift of volumes to PUI at prices much lower than the effective prices of PUC has rendered the existing Anti-Dumping Duties on PUC largely ineffective.”

11. On the basis of the contentions of the Domestic Industry and the interested parties, the Designated Authority concluded as follows:

“Having examined the contentions of the Domestic Industry and various interested parties and on the basis of the analysis as above, the Authority concludes that:

i. The Authority notes that imports of PUI i.e. “Cold-rolled Flat products of stainless steel of width greater than 1250 mm of all series not further worked than Cold rolled (cold reduced) with a thickness of up to 4 mm (width tolerance of +30 mm for Mill Edged and +4 mm for Trimmed Edged)”, excluding:

- Grades AISI 420 high carbon, 443, 441, EN 1.4835, 1.4547, 1.4539, 1.4438, 1.4318, 1.4833 and EN 1.4509.
- Product supplied under India Patent No. 223848 in respect of goods comprising Low Nickel containing Chromium – Nickel Manganese-Copper Austenitic Stainless Steel and representing Grades YU 1 and YU 4, produced and supplied by M/s. Yieh United Steel Corp (Yusco) of Chinese Taipei (Taiwan)”

have increased post levy of anti-dumping duty.

ii. The value addition in converting PUI to PUC is less than the prescribed threshold in the Rule.

iii. The PUI has been exported at dumped prices during the POI.

iv. The PUI has undermined the existing AD measure on PUC imposed vide Custom Notification No. 14/2010-Customs (ADD) dated 20 February 2010.”

12. The Designated Authority, accordingly, made the following recommendations on 18 August, 2017.

“The Authority keeping in view the aforesaid, recommends extension of the existing anti-dumping duty on PUC imposed vide Customs Notification No. 61/2015-Customs (ADD) dated 11 December 2015 on PUI as tabulated in the duty table in the Custom Notification No. 61/2015-Customs (ADD) dated 11 December 2015, as enclosed at Annexure 1, subject to following:

- i. The anti-dumping duty on PUI will be applicable from the date of its notification by the Ministry of Finance i.e. Central Government.
- ii. The validity of the anti-dumping duty on PUI would be co-terminus with the duty on PUC levied through Customs Notification No. 61/2015-Customs (ADD) dated 11 December 2015.
- iii. a) The PUI which is imported by an importer for end use in the same form without slitting (except to the extent of tolerances as mentioned in the Custom Notification No. 61/2015-Customs (ADD) dated 11 December 2015) will not be liable for payment of the

applicable AD Duty as per Custom Notification No. 61/2015-Customs (ADD) dated 11 December 2015.

b) Further in case a PUI is slitted into 2 or more PUI only i.e. sizes above 1250 mm (with permissible tolerances), it will not be subjected to any anti-dumping duty (for example a 2600 mm piece slit into two 1300 mm size pieces).

c) However if PUI is slit for a combination of PUI and below PUI size or below PUI sizes, it will be liable for applicable AD Duty. (For example a 1800 mm piece being slit into a 1400 mm and a 400 mm piece or a 2200 mm piece is slit into 1400 mm and 800 mm or a 1400 mm piece being slit into 600, 500 and 300 mm sizes).

vi. For the cases falling under (iii) (a) and / or (iii) (b) above, the importer will give a legally enforceable undertaking to the concerned Custom Authorities.

v. The Ministry of Finance may put in place an appropriate monitoring mechanism to monitor the genuineness of the usage of the PUI so imported for categories falling under (iii) (a) and / or (iii) (b) above without payment of AD Duty on the basis of aforesaid undertaking by its appropriate agencies."

13. The Central Government, thereafter, issued the notification dated 24 October, 2017 that was published in the Gazette of India Extraordinary on 11 December 2015. The Central Government imposed anti-dumping duty as specified in the Table on the import of subject goods from the date of publication in the Official Gazette upto 10 December, 2020.

14. Ms Meenakshi Arora, learned Counsel for the Domestic Industry submitted:-

(i) In the context of retrospective levy, the Domestic Industry in the comments dated 16 August, 2017 to the disclosure statement had expressly pleaded for imposition of retrospective levy of anti-circumvention duties on following grounds:

a. The Domestic Industry continued to suffer for 18 months since initiation of investigation because of established malpractice of circumvention of anti-dumping duties by exporters/importers etc.

- b. Imposition of prospective anti-dumping duty will only result in promoting the ulterior motive of imports/exporters to delay the extension of duties to PUI by delaying the investigation. The unscrupulous exporters/importers responsible for malpractice for circumvention will stand to further gain from their own wrongful acts that would result in undermining and rendering the anti-dumping duties ineffective for the domestic industry.
- c. Once the existence of circumvention is established, the Designated Authority is obliged to impose circumvention duty retrospectively from the date of initiation.;
- (ii)** The Designated Authority in the final findings dated 18 August, 2017 concluded that there was circumvention of anti-dumping duty by interested parties and, therefore, imposition of anti-dumping duty for imports of articles found to be circumventing the existing anti-dumping duty was necessary. However, the Designated Authority recommended imposing prospective duties on PUI. The final findings are completely silent and bereft of any reasoning as to why the same has not been imposed from the date of initiation of anti-circumvention proceeding. The findings are, therefore, arbitrary, whimsical and contrary to the principles of equality and natural justice.
- (iii)** The Designated Authority has a power under Rule 27 of the 1995 Rules to recommend anti-dumping duty on imports of articles found to be circumventing and existing

anti-dumping duty retrospectively from the date of initiation of investigation and so the Designated Authority erred in not recommending anti-dumping duty from the date of initiation of the anti-circumvention proceedings.;

- (iv) The exporters/importers had devised a novel method to overcome and overreach the anti-dumping duties on the PUC by importing PUI and by slitting. Thus, the product was rendered as PUC and thereby over reached the imposition of anti-dumping duty and frustrating the object and purpose of levy of anti-dumping duty on PUC. ;
- (v) While reading Rule 27 (1), of the 1995 Rules, the word "may" used therein with reference to retrospectively has to be constructed as "shall". In support of this contention reliance has been placed on the following decisions:
 - a. **State of Uttar Pradesh Vs. Jogendra Singh**⁵
 - b. Official Liquidator Vs. Dharti Dhan (P) Ltd.⁶
 - c. **Shri Rangaswami, Textile Commissioner and others. Vs. Sagar Textile Mills (P) Ltd and another**⁷;
- (vi) The object and purpose of the anti-dumping law and imposition of duty is to protect Domestic Industry from unfair trade by unscrupulous importers and exporters who, because of their pricing behaviour, cause injury to the Domestic Industry. To ensure that the object and purpose of levy is not frustrated through such circumventing methodologies, the legislature like other

5. (1964) 2 SCR 197 : AIR 1963SC1618

6. (1977) 2 SCC 166.

7. (1977) 2 SCC 578

members of WTO introduced section 9A(1A) and Rules 25 to 28 in the 1995 Rules to prevent and control such circumvention. Once the circumvention has been established, and the Designated Authority recommends imposition of anti-dumping duty on PUI, it is obliged to exercise the powers and recommend retrospective levy of the same.; and

- (vii)** Where a power is conferred to prevent circumvention and illegal overreach of anti-dumping duties, the duty to exercise such power for larger public purpose and benefit cannot be avoided.

15. Shri Naresh Thakkar, learned counsel for the Importer Outu Kumpu Oyi, however, submitted:-

- (i)** It is the prerogative of the Central Government under section 9A (1A) of the Tariff Act to extend or not to extend the anti-dumping duty in cases of circumvention where the anti-dumping duty is being rendered ineffective. If the intention of the law was that in all cases of circumvention, anti-dumping duty was required to be imposed retrospectively, then section 9A (1A) of the Tariff Act would have expressly provided for the same.;
- (ii)** Rule 27 of the 1995 Rules cannot be read de-hors section 9A (1A) of the Tariff Act. In fact, it emanates from a reading of section 9A(3) of the Act that an express provision stands enacted where the legislature seeks to impose anti-dumping duty retrospectively. Sub-Rule (1) of Rule 27 of the 1995 Rules intentionally uses the word 'may'. Sub-rule (2) of Rule 27 of the 1995 Rules uses the

term 'shall'. Thus, the two words have been intentionally used in the Rule. Rule 27(1) covers a situation where the Designated Authority has to give its recommendation and, therefore, the word 'may' has been used. The Designated Authority is bound to issue a public notice and record its finding and, therefore, the word 'shall' has been used in Rule 27(2) of the 1995 Rules;

- (iii)** The Designated Authority merely recommends to the Central Government and it is the Central Government which decides whether or not to accept the recommendation and from which date to impose the anti-dumping duty by issuance of a Notification. In this context the word "may" used in Rule 27(1) of the 1995 is extremely critical. If the word "may" has to be read as "shall", then the Designated Authority would be seen to be giving a command to the Central Government. This would fall foul to the entire scheme and would no longer be in the realm of a recommendation.;
- (iv)** It is for the Central Government to decide whether the anti-dumping duty is to be extended from the date of initiation of the investigation under Rule 26 or such date as recommended by the Designated Authority. If these two dates were always to be same, there would be no requirement for the latter part of Rule 27(3) (i.e. or such date as may be recommended by the Designated Authority). This part of the provision is for a reason, as the Designated Authority may recommend anti-dumping duty either prospectively or retrospectively. Resultantly,

under Rule 27(3) it is for the Central Government to decide, after considering the recommendation, whether duty is to be imposed from the date of initiation of the investigation under Rule 26 or such date as may be recommended by the Designated Authority. If the argument of the Domestic Industry on Rule 27(1) of the 1995 Rules were to be accepted, then this would make part of Rule 27(3) otiose which cannot be permitted in law. Thus, Rule 27(1) of the 1995 Rules is required to be given a meaning in the context of its setting.;

- (v) The submission of the Domestic Industry that “may” is required to be read as “shall” in Rule 27(1) of the 1995 Rules and “Designated Authority is obliged to impose duty retrospectively” simply falls foul of the provision, as the Designated Authority does not have the power to levy duty at all, let alone levy it retrospectively. If this were to be accepted, then the entire Rule 27(3) of the 1995 Rules would become redundant.;
- (vi) It is settled law that the word ‘may’ clearly indicates vesting of discretion. For this proposition reliance can be placed on the decision of the Madras High Court in **ALM Enterprises vs Commissioner of Customs (Imports), Chennai⁸**. It is also settled law that circumvention and evasion cannot be equated and for this proposition reliance can be placed on the decision of the Tribunal in **Samay Electronics (P) Ltd. vs CC (Import) (General)**

8. 2017 (353) ELT 289 (Mad)

Mumbai⁹. The Supreme Court in **Commissioner of Customs vs GM Exports and others¹⁰**; and

- (vii) The onus was on the Domestic Industry to lead necessary evidence before the Designated Authority, if it sought imposition of anti-dumping duty retrospectively.

16. In order to appreciate the contentions that have been advanced by learned counsel for the parties, it will be appropriate, at this stage, to refer to the relevant provisions.

17. Section **9A** of the Customs Tariff Act 1975¹¹ deals with anti-dumping duty on dumped articles and the relevant portion is reproduced below:

"9A (1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article."

18. Section **9A (1A)** of the Tariff Act that was inserted by Finance Act, 2011 with effect from 8 April, 2011 deals with circumvention of anti-dumping duty and is as follows:

"9A (1A) Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that circumvention of anti-dumping duty imposed under sub-section (1) has taken place, either by altering the description or name or composition of the articles subject to such anti-dumping duty or by import of such article in an unassembled or disassembled form or by changing the country of its origin or export or in any other manner, whereby the anti-dumping duty so imposed it rendered ineffective, it may extend the anti-dumping duty to such article or an article originating in or exported from such country, as the case may be."

19. Section **9A (3)** of the Tariff Act deals with retrospective levy of anti-dumping duty and is reproduced below:-

9. 2015 (328) ELT 238 (Tri-Mumbai)

10. (2016) 1 SCC 91

11. Tariff Act

"9A (3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that-

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and
- (ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under the sub-section, and notwithstanding anything contained in any law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification."

20. Section **9A (6)** of the Tariff Act deals with margin of dumping for which the Central Government make rules and is reproduced below:

"9A (6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide the manner in which articles liable for any anti-dumping duty under this section may be identified, and for the manner in which the export price and the normal value of, and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty. "

21. The Central Government has made Rules, namely the 1995 Rules. The rules relevant for the purpose of the Appeal are as follows:-

Rule 25. Circumvention of anti-dumping duty –

1. Where an article subject to anti-dumping duty is imported into India from any country including the country of origin or country of export notified for the purposes of levy of anti-dumping, in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India or in such country, such assembly, finishing or completion shall be considered to circumvent the anti-dumping duty in force if,-

- a) the operation started or increased after, or just prior to, the anti-dumping investigations and the parts and components are imported from the country of origin or country of export notified for purposes of levy of anti-dumping duty, and;
- b) the value consequent to assembly, finishing or completion operation is less than thirty-five percent of the cost of assembled, finished or complete article.

Explanation I – “Value” means the cost of assembled, complete or finished article less value of imported parts or components.

Explanation II – For the purposes of calculating the ‘value’, expenses on account of payments relating to intellectual property rights, royalty, technical know-how fees and consultancy charges, shall not be taken into account.

2. Where an article subject to anti-dumping duty is imported into India from country of origin or country of export notified for the levy of anti-dumping duty after being subjected to any process involving alteration of the description, name or composition of an article, such alteration shall be considered to circumvent the anti-dumping duty in force if the alteration of the description or name or composition of the article subject to anti-dumping duty results in the article being altered in form or appearance even in minor forms regardless of the variation of tariff classification, if any.

3. Where an article subject to anti-dumping duty is imported into India through exporters or producers or country not subject to anti-dumping duty, such exports shall be considered to circumvent the anti-dumping duty in force if the exporters or producers notified for the levy of anti-dumping duty change their trade practice, pattern of trade or channels of sales of the article in order to have their products exported to India through exporters or producers or country not subject to anti-dumping duty.

Explanation- For the purposes of this sub-rule, it shall be established that there has been a change in trade practice, pattern of trade or channels of sales if the following conditions are satisfied, namely :-

- a) absence of a justification, economic or otherwise, other than imposition of anti-dumping duty;
- b) evidence that the remedial effects of the anti-dumping duties are undermined in terms of the price and or the quality of like products.

Rule 26. Initiation of investigation to determine circumvention –

1) Except as provided herein below, the designated authority may initiate an investigation to determine the existence and effect of any alleged circumvention of the anti-dumping duty levied under section 9A of the Act, upon receipt of a written application by or on behalf of the domestic industry.

2) The application shall, inter alia, contain sufficient evidence as regards the existence of the circumstances to justify initiation of anti-circumvention investigation.

3) Notwithstanding anything contained in sub-rule (1), the designated authority may initiate an investigation suo motu if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or any other source that sufficient evidence exists as to existence of the circumstances pointing to circumvention of anti-dumping duty in force.

4) The designated authority may initiate an investigation to determine the existence and effect of any alleged circumvention of the anti-dumping duty in force where it is satisfied that imports of the article circumventing an anti-dumping duty in force are found to be dumped:

Provided that, the designated authority shall notify the government of the exporting country before proceeding to initiate such an investigation.

5) The provisions regarding evidence and procedures under rule 6 shall apply mutatis mutandis to any investigation carried out under this rule.

6) Any such investigation shall be concluded within 12 months and in no case more than 18 months of the date of initiation of investigation for reasons to be recorded in writing by the designated authority.

Rule 27. Determination of circumvention-

1) The designated authority, upon determination that circumvention of anti-dumping duty exists, may recommend imposition of anti-dumping duty to imports of articles found to be circumventing an existing anti-dumping duty or to imports of article originating in or exported from countries other than those which are already notified for the purpose of levy of the anti-dumping duty and such levy may apply retrospectively from the date of initiation of the investigation under Rule 26.

2) The designated authority shall issue a public notice recording its findings.

3) The Central Government may, pursuant to the recommendations made by the designated authority, extend the anti-dumping duty to imports of article including imports of such article from the date of initiation of the investigation under rule 26 or such date as may be recommended by the designated authority. "

22. It would be seen that section 9A (1) of the Tariff Act empowers the Central Government to impose anti-dumping duty. Section 9A (1A) of the Tariff Act deals with circumvention of anti-dumping duty. It provides that if the Central Government is of the opinion that circumvention of anti-dumping duty has taken place whereby the anti-dumping duty imposed has been rendered ineffective by altering the description or the composition of the article, then it may extend the anti-dumping duty to such article. In exercise of the powers conferred under section 9A (6) of the Tariff Act, the Central Government framed Rules called the 1995 Rules. Rule 25 deals with circumvention of anti-dumping duty, while Rule 26 deals with initiation of investigation to determine circumvention. Rule 27 deals with determination of circumvention. It provides that Designated Authority, upon determination that circumvention of anti-dumping duty exists, may recommend imposition of anti-dumping duty to imports of articles found to be circumventing an existing anti-dumping duty and such levy may apply retrospectively from the date of initiation of the investigation under Rule 26. Sub-

Rule (3) of Rule 27 provides that the Central Government may, pursuant to the recommendations made by the designated authority, extend the anti-dumping duty to imports of article from the date of initiation of the investigation under Rule 26 or such date as may be recommended by the Designated Authority.

23. In the instant case, after the Designated Authority informed all interested parties of the essential facts under consideration which formed the basis of its decision, the Domestic Industry filed post disclosure comments. It emphasised that the anti-dumping circumvention duty should be imposed from the date of initiation of the investigation on 19 February, 2016 in terms of Rule 27 of the 1995 Rules. The relevant portion of the post disclosure comments have been reproduced in paragraph 8 of this order. It was pointed out that the motive of the importers/ exporters would be achieved if the Designated Authority recommends prospective anti-circumvention duty. The Designated Authority examined and analysed the submissions made by the parties but what is noticed is that there is no discussion at all in final findings of the Designated Authority about this specific submission made by the Domestic Industry in the post disclosure comments that the Designated Authority should recommend anti-circumvention duty from the date of initiation of the investigation in terms of the provisions of Rule 27 of the 1995 Rules.

24. Though elaborate submissions were made by learned Counsel for the parties on this specific issue and these submissions have been noted, but it will not be appropriate for the Tribunal to

examine this issue in the first instance as it is the Designated Authority which has to first record a specific finding.

25. It is a settled law that the impugned order has to be judged on the basis of the reasons given in the order and the order cannot be supported by fresh reasons advanced during the course of hearing of the Appeal. In this connection reliance can be placed on the decision of the Supreme Court in **Mohinder Singh Gill and another Vs. Chief Election Commissioner, New Delhi**¹². The observations are:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (1) "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
Orders are not like old wine becoming better as they grow older."

26. It will, therefore, not be appropriate to examine the order on the basis of reasons not contained in the final findings recorded by Designated Authority. The reasons contained in the order can only be seen, but as noticed above, no reasons are contained in final findings as to why the anti-circumvention duty as pointed out by the Appellant was not levied retrospectively. There is no consideration of this aspect in the final findings even though it was specifically raised by the Appellant in the post disclosure comments.

12. (1978) 1 SCC 405

27. It has been emphasised by the Supreme Court time and again that the nature of proceedings before the Designated Authority are quasi judicial and reasons have to be stated by the authority for arriving at findings.

28. In this connection, it would be pertinent to refer to the decision of the Supreme Court in **Reliance Industries Ltd v/s Designated Authority and other**¹³. The Supreme Court observed that the nature of proceedings before the Designated Authority are quasi judicial and reasons have to be recorded by the designated in support of its findings. The observations are:

"38. We are of the opinion that the nature of the proceedings before the DA are quasi-judicial, and it is well-settled that a quasijudicial decision, or even an administrative decision which has civil consequences, must be in accordance with the principles of natural justice, and hence reasons have to be disclosed by the authority in that decision vide S.N. Mukherjee v. Union of India, [1990] 4 SCC 594.

39. We do not agree with the Tribunal that the notification of the Central Government under Section 9A is a legislative Act. In our opinion, it is clearly quasi-judicial. The proceedings before the DA is to determine the lis between the domestic industry on the one hand and the importer of foreign goods from the foreign supplier on the other. The determination of the recommendation of the DA and the Government notification on its basis is subject to an appeal before the CESTAT. This also makes it clear that the proceedings before the DA are quasi-judicial.

40. In the present case, the NIP computed by the DA was much lower than that computed by the Appellant, and the reasons for such variance and detailed calculations were not disclosed by the DA to the Appellant. No good reasons were given for reducing the cost price of electricity supplied by the Appellant produced in its captive power plant. This was clearly illegal.

... ..

45. In our opinion, excessive and unwarranted claim of confidentiality defeats the right to appeal. **In the absence of knowledge of the consequences, grounds, reasoning and methodology by which the DA has arrived at its decision and made its recommendation, the parties to the proceedings cannot effectively exercise their right to appeal either before the Tribunal or this Court.** This is contrary to the view taken by the Constitution Bench of this Court in S.N. Mukherjee's case."

(emphasis supplied)

13. (2006) 10 SCC 368

29. In **Asstt. Commr. Commercial Tax Department v/s. Shukla & Brothers¹⁴**, the Supreme Court, again observed that the proceedings before the Designated Authority are quasi judicial in nature and reasons have to be recorded by the Designated Authority. The Supreme Court noticed that NIP computed by the Designated Authority was much lower than that computed by the Appellant but reasons for such variance and detailed conclusion had not been disclosed by the Designated Authority to the Appellant. It is for this reason that the Supreme Court observed that in the absence of knowledge of the consequences, grounds, reasons and methodology by which the Designated Authority arrived at this decision, the party to the proceedings cannot exercise its right of appeal, either before the Tribunal or before the Supreme Court. The observations of the Supreme Court are as follows:

"13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders. In the case of Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India and Anr. [AIR 1976 SC 1785], the Supreme Court held as under :-

"6.....If courts of law are to be replaced by administrative authorities and tribunals, as indeed, in some kinds of cases, with the proliferation of Administrative Law, they may have to be so replaced, it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in

14. 2010 (254) ELT 6 (SC)

support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law. ...”

(emphasis supplied)

30. In **Kranti Associates Pvt. Ltd. Vs. Masood Ahmed Khan**¹⁵

reported in the Supreme Court after referring to the earlier decisions that hold that a quasi judicial authority must record reasons in support of its conclusion because reasons assure that the discretion has been exercised by the decision maker on relevant grounds and by disregarding irrelevant considerations, also observed that recording of reasons operates as a valid restraint on any possible arbitrary exercise of quasi judicial power. In paragraph 51 of the judgement, the Supreme Court summarised the position of law and the said paragraph is reproduced below:

“51. Summarizing the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the Life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants’ faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

15. 2011 (273) ELT 345 (SC),

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or „rubber-stamp reasons“ is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya v. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, “adequate and intelligent reasons must be given for judicial decisions”.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of “Due Process”.

31. Thus, it is clear from the aforesaid decisions of the Supreme Court that the principles of natural justice not only require the Designated Authority to grant an opportunity to the party to show cause but the order passed by the Designated Authority should also give reasons for arriving at conclusions and any violation of these two facets can vitiate the order. In the present case, the final findings do not give any reason.

32. It is seen that the Designated Authority, without examining whether the anti-dumping duty should be levied retrospectively from the date of initiation of the investigation, recommended that the anti-dumping duty will be applicable from the date of its notification by the Central Government. The Central Government issued the Notification No. 52/2017 that was published in the Gazette of India, Extraordinary on 24 October, 2017 imposing anti-dumping duty from the date of publication in the Gazette. The matter, therefore, needs to be remitted to the Designated Authority to record a specific finding as to whether the anti circumvention duty should be levied retrospectively from the date of initiation of the investigation.

33. Thus, without disturbing the imposition of levy of anti-dumping duty in the Notification published in the Gazette, it is considered necessary to remit the matter to the Designated Authority to record a finding whether the Central Government should levy anti-dumping duty from the date of initiation of anti-dumping or from the date of publication in the Gazette. The anti-circumvention proceedings were initiated on 19 February, 2016 and the Notification was issued by the Government on 24 October, 2017. It is, therefore, a fit case where a further direction needs to be issued to the Designated Authority to pass an appropriate order expeditiously and preferably within three months from the date a copy of this order is produced by any of the parties before the Designated Authority. The final finding and the notification shall abide the decision of the Designated Authority. The Appeal is allowed to the extent indicated above.

(Order pronounced in the open court on 12 September, 2019)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. 1

ANTI DUMPING Appeal No. 50291 of 2018

(Arising out of Notification No. 52/2017-Customs dated 24.10.2017 passed by Designated Authority Directorate General of Anti-dumping and Allied Duties, New Delhi)

M/s. Jindal Stainless Limited

...Appellant

O.P. Jindal Marg,
Hisar – 125005
Haryana

Versus

**Designated Authority Directorate
General of Anti-dumping and Allied Duties**

....Respondent

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

with

ANTI DUMPING Appeal No. 50334 of 2018

(Arising out of Notification No. 52/2017-Customs dated 24.10.2017 passed by Designated Authority Directorate General of Anti-dumping and Allied Duties, New Delhi)

M/s. Jindal Stainless Hisar Limited

...Appellant

O.P. Jindal Marg,
Hisar – 125005
Haryana

Versus

**Designated Authority Directorate
General of Anti-dumping and Allied Duties**

....Respondent

Department of Commerce & Industry,
Parliament Street,
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New Delhi-110001

APPEARANCE:

Ms. Meenakshi Arora, Senior Advocate, Shri Jitendra Singh and Ms. Roshni Singh, Advocate for the Appellant

Mr. Ameet Singh, Mr. Rakesh Kumar, Mr. Naresh Thacker, Mr. Vivek Sharma, Mr. Abhishek, Mr. Akhil Sacher, Mr. Vineet Sinha, Advocates and Authorised Representative for the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

Date of Hearing: **15.05.2019**

Date of Decision: **12.09.2019**

Pronounced on 12 September, 2019.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha