*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.07.2014
Pronounced on : 11.07.2014

\+ **W.P.(C) 1851/2014, C.M. NO. 3866/2014 & 3867/2014**

M/S. KUMHO PETROCHEMICALS CO. LTD. …..Petitioner

Through: Sh. V. Lakshmikumaran, Sh. S. Seetharaman, Sh. Atul Gupta, Sh. Lakshmi. N. and Sh. Aditya Bhattacharya, Advocates.

Versus

UNION OF INDIA AND ORS. ……..Respondents

Through: Sh. Himanshu Bajaj, Central Govt. Standing Counsel and Sh. M.P. Singh, Advocate with Sh. J. Gupta, Director.

Ms. Shakshi Aggarwal, Advocate, for Resp. Nos. 1 and 2.

Sh. Sandeep Sethi, Sr. Advocate with Sh. Rajesh Sharma, Advocate, for Resp. No.3.

\+ **W.P.(C) 1866/2014, C.M. NO. 3886/2014 & 3887/2014**

FAIRDEAL POLYCHEM LLP …..Petitioner

Through: Sh. V. Lakshmikumaran, Sh. S. Seetharaman, Sh. Atul Gupta, Sh. Lakshmi. N. and Sh. Aditya Bhattacharya, Advocates.

Versus

UNION OF INDIA AND ORS. ……..Respondents

Through: Sh. Himanshu Bajaj, Central Govt. Standing Counsel and Sh. M.P. Singh, Advocate with Sh. J. Gupta, Director.

Ms. Shakshi Aggarwal, Advocate, for Resp. Nos. 1 and 2.

Sh. Rajiv Bansal with Sh. Rajesh Sharma, Advocates, for Resp. No.3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT
%
C.M. NO. 3867/2014 (for exemption) IN W.P.(C) 1851/2014
C.M. NO. 3887/2014 (for exemption) IN W.P.(C) 1866/2014

Allowed, subject to all just exceptions.

W.P.(C) 1851/2014, C.M. NO. 3866/2014
W.P.(C) 1866/2014, C.M. NO. 3886/2014

1. This judgment is in respect of writ petitions W.P.(C) 1851/14 and 1866/14. The petitioners calls into question the legality of the Central Government's decision initiating anti-dumping duty extension proceedings under Section 9A of the Customs Tariff Act, 1975 ("CTA") as well as the validity of notification No. 06/2014-Customs (ADD) by which anti-dumping duty was levied on Acrylonitrile Butadiene Rubber ("the product"), originating in, or exported from Korea RP. The said notification sought to amend a previous one, dated 2nd January 2009 (hereafter "the original notification") by which such anti-dumping duty was levied for five years.

2. The brief facts are that the Central Government, in terms of provisions of the CTA, held inquiry in accordance with Rules framed under that enactment; pursuant to the report furnished by the Designated Authority, the Central Government imposed anti-dumping duty on the product, by notification issued by the Ministry of Finance (Department of Revenue), No. 01/2009-Customs, dated 02-01-2009 (and published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), by G.S.R. 5(E), dated the 2nd January, 2009). The

notification in express terms was to be in force for five years, i.e. till 01-01-2014.

3. The petitioner in W.P.(C) 1851/2014 is a producer and exporter of the product from Korea RP and the petitioner in W.P. (C) 1866/2014 is an importer of the product from Korea RP. Both petitioners are aggrieved by the notifications dated 31-12-2013 and 23-1-2014 by Respondent 1. The Respondent No. 1 is the Ministry of Finance, Union of India. Respondent No. 2 is the Directorate of Anti-dumping and Allied Duties appointed under Section 9A of the CTA read with Rule 3 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury), 1995 (hereinafter referred to as "the Rules"). The Respondent No. 3 is the applicant domestic industry which filed a request to initiate a sunset review to extend the anti-dumping duty on import of the product originating in, or exported from, Korea RP.

4. India is a signatory to the Marrakesh Agreement establishing the World Trade Organization in 1994. Pursuant to this, she has implemented the Agreement on Implementation of Article VI of the GATT 1994 referred to as the Anti-dumping Agreement (hereafter referred to as "ADA"), which is one of the Agreements that forms part of the WTO treaty. In terms of Article 18.4 of the ADA, each Member country is required to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the ADA. As a consequence, Sections 9A, Section 9AA, Section 9B and Section 9C

of the CTA were enacted. The Rules were framed in terms of the powers conferred by Section 9A (6) of the CTA. Section 9A(1) empowers the Central Government, by notification in the official gazette, to impose an anti-dumping duty not exceeding the margin of dumping i.e. i.e. the difference between the normal value and the export price, in relation to any article which is exported to India at less than its normal value. Under Rule 3, the Central Government has constituted the second respondent to investigate the existence, degree and effect of any alleged dumping and to submit its final findings in this regard and also to recommend the amount of anti-dumping duty which, if levied, would be sufficient to remove injury.

5. In terms of Section 9A(5) of the Act and Rule 23(lB) of the Rules, such duties are effective only for a period not exceeding five years from the date of its imposition. The duty automatically expires five years from the date of imposition unless the second respondent, in a review initiated before the end of the five year period, concludes that that the expiry of the said anti-dumping duty is likely to lead to continuation or recurrence of dumping and injury to the domestic industry. Such reviews are commonly referred to as "sunset reviews".

6. The petitioner in W.P.(C) 1851/2014 was subjected to the anti-dumping duty levy in terms of the original notification, urges that the Central Government could not levy and collect any anti-dumping duty after 01-01-2014. It urges that if the Central Government were of the opinion that such course of action was warranted, by virtue of continuing injury to domestic manufacturers or domestic market on

account of practices of such exporters, it ought to have issued a notification in the Gazette in terms of first proviso Section 9A (5) which enables the extension of such anti-dumping duty levy beyond five years. Counsel urges that by virtue of operation of Rules 6, 19, 20 and 23, such extension ought to have been notified in the official Gazette and published *before* the expiry of the five year period from the date of the original notification, i.e. 02-01-2009. The petitioner buttresses this proposition by placing reliance on the second proviso to Section 9A (5), which states that in the event the Central Government wishes to continue the levy during the pendency of review/extension enquiry, which, though initiated before the expiry of the five year period could not be completed before its expiry, then that too should be manifested in an express notification, issued before the expiry of the first notification. If there is such a valid notification, the levy is valid for a period of one year.

7. The petitioners complain that in the present case, the notice proposing the review was published on 06-01-2014, after the expiration of the original notification. Thus, neither the review for continuing the duty, nor the levy during the pendency of inquiry was valid. The petitioners also urge that the notification of 23-01-2014, amending the 2-1-2009 notification so as to make it remain in force till 1-1-2015, was issued without any legal authority. Counsel argued that once the original notification lapsed on 01-01-2014, there could have been no question of resorting to the subterfuge of amending such expired notification. Here it was argued that there is no substantive

power to amend the terms of the original notification which could have not been in force for more than one year. Had the Central Government desired that such tax had to be levied during the interregnum (when review for continuing the levy was pending) a specific order should have been made concurrently with the publication of the extension. Counsel for the petitioners argued here that mere amendment of the terms of the original notification cannot legitimately amount to a valid levy. So long as the substantive provisions of Section 9A (5), particularly its second proviso are not complied with, the levy, even for an interregnum period would not be legal.

8. It is argued on behalf of the petitioners that the materials on record, in the form of RTI query replies, establish beyond doubt that the initiation of the sunset review in the present case took place on 31-12-2013, upon an application filed in that regard by the domestic industry on 11-11-2013. The irrefutable evidence was that though the initiation was published on 31-12-2013, the Gazette copy was sent for distribution to Kitab Mahal, a book store, only on 06-01-2014. This was the earliest point in time for the publication of the sunset review initiation. That being the case, argued counsel, both the initiation, and the subsequent notification of 23-01-2014 amending a notification which ceased to exist, is invalid and the attempt to enforce it as without authority of law. It was also contended during the hearing that such amendment was impermissible and could not even be sustained by recourse to any provision of the General Clauses Act, 1897,

because the original notification - as it had finite life was temporary legislation and, therefore, beyond the purview of that Act. In support of the submission, the counsel relied on the ruling of the Supreme Court in *State of Punjab v Mohar Singh* AIR 1955 SC 84 where, commenting on the applicability of Section 6 of the General Clauses Act, it was held that:

> *"the consequences laid down in section 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed. It has no application when a statute, which is of a temporary nature, automatically expires by efflux of time."*

Reliance is also placed on the judgment reported as Jindal Oil Mill & Ors vs Godhra Electricity Co. Ltd AIR 1969 SC 1225.

9. It was contended on behalf of the Union of India, the Designated Authority as well as the domestic industry applicants, that the first proviso to Section 9A (5) of the CTA as well as a fair reading of Rule 6 do not lead to the conclusion that the intention to review and extend the anti-dumping duty, in the facts of a given case, have to be necessarily published and made available to all, before the expiry of the original notification. It was pointed out that in this case, the extension notification was in fact printed on 31-12-2013 in the Official Gazette. The compelling inference which the Court should draw, therefore, is that the requirement of Section 9-A (5) in that regard had been fulfilled. It was argued that the sunset review proposed by the impugned notification of 31-12-2013 is mandatory in terms of the

judgment of this Court, in *Indian Metal and Ferro Alloys v. Designated Authority*, 2008 (224) ELT 375 Del.

10. Learned counsel argued that whenever sunset review is initiated, apart from the requirement of commencing it before the expiration of the original period, there is also an element of invariability in the imposition of the duty, which would be concededly valid for one year, pending such sunset review, under second proviso to Section 9A (5). It was argued that this is to be inferred from the fact that the initiation itself is a ground for extending the duty for such period, since the degree of injury prevailing is presumed to exist. This is because there is no requirement of any form of inquiry into the injury; the inquiry which is undertaken prior to the imposition of the duty through the first notification is deemed sufficient and the injury deemed to continue. However, if the sunset review inquiry is not closed by one year, the duty would lapse. As a result, argue counsel for the respondents, the notification of 23-01-2014 - which sought to amend the original notification- is valid, and cannot be set aside.

Relevant provisions

11. It is necessary to, at this stage, set out the relevant statutory provisions under which the anti-dumping duty, which is the subject matter of these proceedings, was imposed. Section 9A of the CTA contemplates levy of anti-dumping duty on dumped articles. It reads as follows:

"(1) Where 7[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.

Explanation. - For the purposes of this section, -

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means -

(i) the comparable price, in the ordinary course of trade, for the like article when5[destined for consumption] in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either -

(a) comparable representative price of the like article when exported from the exporting country or1[territory to] an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transshipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(1A) xxx

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined: -

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) xxx

(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 under-mine 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 that 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.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in force.

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(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 for 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.

(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.]

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

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

12. Section 9C of the CTA provides for an appeal against the order passed under Section 9A to the Customs, Excise and Service Tax

Appellate Tribunal constituted under Section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal). The Rules (of 1995) prescribe an elaborate procedure for identification, assessment and collection of anti-dumping duty on dumped articles. The Rules, relevant for the present petition, reads as under:

> *"6. Principles governing investigations. –*
>
> *(1) The designated authority shall, after it has decided to initiate investigation to determine the existence, de-gree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate informa-tion on the following :-*
>
> *(i) the name of the exporting country or countries and the article involved;*
>
> *(ii) the date of initiation of the investigation;*
>
> *(iii) the basis on which dumping is alleged in the application;*
>
> *(iv) a summary of the factors on which the allegation of injury is based;*
>
> *(v) the address to which representations by interested parties should be directed; and*
>
> *(vi) the time-limits allowed to interested parties for making their views known, .*
>
> *(2) A copy of the public notice shall be forwarded by the designated au-thority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties.*
>
> *(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to -*

(i) the known exporters or to the concerned trade association where the number of exporters is large, and

(ii) the governments of the exporting countries:

Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefor in writing.

(4) The designated authority may issue a notice calling for any informa-tion, in such form as may be specified by it, from the exporters, foreign produc-ers and other interested parties and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

Explanation: For the purpose of this sub-rule, the notice calling for infor-mation and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the indus-trial users of the article under investigation, and to representative consumer organisations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, in-jury where applicable, and causality.

(6) xxx

(7) xxx

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its find-ings on the basis of the facts available to it and make

such recommendations to the Central Government as it deems fit under such circumstances.

23. Review.--

(1) Any anti-dumping duty imposed under the provision of section 9A of the Act, shall remain in force, so long as and to the extent necessary, to counteract dumping, which is causing injury.

(1A) The designated authority shall review the need for the continued imposition of any anti-dumping duty, where warranted, on its own initiative or upon request by any interested party who submits positive information substantiating the need for such review, and a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty and upon such review, the designated authority shall recommend to the Central Government for its withdrawal, where it comes to a conclusion that the injury to the domestic industry is not likely to continue or recur, if the said anti-dumping duty is removed or varied and is therefore no longer warranted.

(1B) Notwithstanding anything contained in sub-rule (1) or (1A), any definitive anti-dumping duty levied under the Act, shall be effective for a period not exceeding five years from the date of its imposition, unless the designated authority comes to a conclusion, on a review initiated before that period on its own initiative or upon a duly substantiated request made by or on behalf of the domestic industry, within a reasonable period of time prior to the expiry of that period, that the expiry of the said anti-dumping dity is likely to lead to continuation or recurrence of dumping and injury to the domestic industry.

(2) Any review initiated under sub-rule (1) shall be concluded within a period not exceeding twelve months from the date of initiation of such review.

(3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review."

13. Section 9A was introduced pursuant to India's treaty obligations under the GATT. As is apparent from its provisions and those prescribed by the Rules, anti-dumping measures may be imposed if an investigation conducted in conformity with the procedural requirements, reveals (a) the existence of dumped imports; (b) that the dumped imports are resulting in material injury to a domestic industry; and (c) that there is a causal link between the dumped imports and the injury. (http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm). The determination of injury is dependent upon objective examination based on positive evidence of the extent of dumping (assessed through a loss of market share of the domestic industry in comparison to the dumped imports) and the effect on prices of the same good in the domestic market (assessed by whether there is a drop in prices or a preclusion of a price increase), and the consequent impact of such imports on the domestic industry like a decline in market shares, profits, etc. A finding in regard to the causal link between the dumping and injury to the domestic industry is the essential pre-requisite for imposing an anti-dumping duty.

14. The broad and comprehensive procedural requirements relating to investigations focus on the sufficiency of petitions to ensure that unmerited investigations are not initiated, time periods for the completion of investigation, and access to information to all interested parties, along with reasonable opportunities to present their views and

arguments. Other requirements concern the offering, acceptance, and administration of price undertakings by exporters in *lieu* of the imposition of anti-dumping measures. The Rules further provide for the timing of the imposition of anti-dumping duties, the duration of such duties, and require Designated Authorities to periodically review the continuing need for anti-dumping duties and price undertakings. Anti-dumping proceedings are initiated based on an application made by or on behalf of the concerned domestic industry to the Designated Authority in the Department of Commerce for an investigation into alleged dumping of a product into India. The interested parties to an anti-dumping investigation include the domestic industry on whose complaint the proceedings are initiated; the exporters or the foreign producers of the like articles subject to investigation; the importers of the same article allegedly dumped into India; the Government of the exporting country/countries and the trade or business associations of the domestic producers/importers/user industries of the dumped product.

15. The Designated Authority is expected generally to initiate proceedings for anti-dumping action on the basis of a petition received from the domestic industry alleging dumping of certain goods and the injury caused to it by such dumping. However, Rule 5(4) provides for *suo motu* initiation of anti-dumping proceedings by the Designated Authority on the basis of information received from the Collector of Customs appointed under the Customs Act, 1962 or from any other source. In such circumstances, the Authority initiates the anti-dumping

investigation on its own without any complaint/petition filed in this regard provided the Authority is satisfied that sufficient evidence exists as to the existence of dumping, injury and causal link between the dumped imports and the alleged injury. After initiation of the *suo motu* investigation, the same procedure, as the one based on a petition as mentioned in the Rules, is followed. The remedy against dumping is not always in the form of anti-dumping duty. The investigation may be terminated or suspended after the preliminary findings, if the exporter concerned furnishes an undertaking to revise his price to remove the dumping or the injurious effect of dumping as the case may be. No anti-dumping duty is recommended on such exporters from whom price undertaking has been accepted (Rule 15). An interim relief in the form of a provisional anti-dumping duty, pending the finalization of investigation proceedings, can also be provided to the affected domestic industry. Such provisional duty not exceeding the margin of dumping may be imposed by the Central Government on the basis of the preliminary finding recorded by the Designated Authority. The provisional duty can be imposed only after the expiry of 60 days from the date of initiation of investigation and will remain in force only for a period not exceeding 6 months, extendable to nine months under certain circumstances (Rule 13). Rule 21 provides that if the final duty levied is less than the provisional duty which has already been levied and collected, the differential amount already collected as provisional duty shall be refunded. If the final duty imposed is more than the provisional duty already imposed and collected, the difference shall not be collected. If the provisional duty is withdrawn, based on

the final findings of the Designated Authority, then the provisional duty already collected shall be refunded.

16. The scheme of Section 9A and the Rules does not permit levy of anti-dumping duty on retrospective basis. The only exception where anti-dumping duty can also be levied on a retrospective basis is in case 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 the injury 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. Even here, the anti-dumping duty cannot be levied retrospectively beyond 90 days from the date of issue of notification imposing duty (Section 9A (3)).

Analysis and findings

17. In the present case, the first- original notification of 02-01-2009- was preceded by an inquiry in terms of the Act and Rules. There is no controversy about its validity for the first period of five years. The petitioners' argument are two-fold, i.e. that a fair reading of Section 9A (5) second proviso with Rules mandate that a valid sunset review should be initiated and publicly made aware to the concerned parties, before the expiry of five years and secondly, that the extension of the anti-dumping duty for a further one year period, till 01-01-2015, through the notification of 23-01-2013, is without authority of law.

18. The decision in *Automotive Tyre Manufacturers v Designated Authority* (2011) 2 SCC 258, establishes that the functions of a designated authority, which determines the existence of dumping and extent of injury, are quasi-judicial. It therefore, has to conform to principles of natural justice:

> *" the elaborate procedure prescribed in Rule 6 of 1995 Rules, which the DA is obliged to adhere to while conducting investigations, we are convinced that duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules."*

19. In this case, the facts indicate that the initiation or commencement of the sunset review is under dispute. The petitioner argues that Rule 6 mandates the publication - which in effect means the making available of the notification to the concerned party- of the decision to initiate the sunset review, before the expiry of the original period. Rule 6 (1) inter alia, requires that "The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision…" Rule 6 (2) states that a copy of the public notice "shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped …" Although Rule 6 applies for investigations when anti-dumping investigations are undertaken in the first instance, sub-Rule (3) of Rule 23 which deals with the procedure for sunset review states that:

"(3) The provisions of rules 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, and 20 shall be mutatis mutandis applicable in the case of review."

20. Superficially the petitioners' argument, based on a joint reading of Rule 6 and 23 is attractive. However, it ignores that Section 9-A (5) and its proviso do not mandate a public notice or a Gazette notification as a precondition for the initiation of sunset inquiry. The reference to publication by an official Gazette is, significantly, in Section 9-A (1) which talks of imposition of anti-dumping duty. That levy can be imposed after the conclusion of inquiry under Section 9-A (6) of the Act. The only reference to initiation of sunset review before the expiry of the period mentioned in the original notification is in the second proviso to Section 9-A (5). The procedural steps outlined in the Rules, especially Rule 6(1) and 6 (2) are prerequisites for holding inquiry to determine the extent of injury in the first instance, i.e. while deciding whether to impose anti-dumping duty or not, in the first instance. Even this rule nowhere states that the notice or notification should be published in the official Gazette. The reason for this is not far to seek; at that stage the designated authority calls for all those interested to participate and give their views in a proceeding that is likely to culminate in an adverse report. It is only after the report is accepted and the Central Government decides to levy the duty that the requirement of publishing the notification levying the duty in the official Gazette, operates. The rationale for a public notice, followed by individual notices to foreign exporters and governments is the likelihood of their interests being affected by any investigation to

determine dumping effects on articles exported by them. Rule 23(3) states that provisions of Rule 6 would apply "mutatis mutandis". It does not in any manner make the publication of notice initiating the sunset review or making available of the public notice or individual notice, a precondition for initiation of the inquiry under first proviso to Section 9-A (5). As long as the initiation is shown to have been before the expiry, and public notice is made available within a proximate period from that date, the inquiry should be held valid. The consequence of holding that an initiation would not be valid unless notice in that regard is made available individually, or to the public, before expiration of the period of the original notification would be that even without a mandatory requirement in the enactment or the rules, a consequence not envisioned in the statute would be deemed. The only consequence provided in the statute is that contemplated by second proviso to Section 9-A (5) i.e. invalidity of a levy during pendency of the sunset review, unless it is imposed before the expiry of the original levy. Courts cannot stretch the operation or effect of a restricted consequence in the manner sought to be urged. This court is supported in this view by the settled proposition that the effect of a proviso should be confined to what it expressly provides (Ram Narain *Sons P. Ltd v Asst Commissioner of Sales Tax* 1955 (6) STC 627 (SC). In *Binani Industries v Commissioner of Commercial Taxes* (2007) 6 VST 783 it was held that:

> *"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the*

enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406),Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672)."

21. If the court were to accept the petitioners' argument about the compelling nature of the requirement that for a sunset review to be valid, not only should it be shown to be initiated before the expiration of the period of the original notification, but also that the public notice in that regard should be shown to be issued and made available before the period, it would be doing violence to the statute. Apart from the

consequence spelt out in second proviso to Section 9A (5), there is none other. The reference to Rule 6, mutatis mutandis in Rule 23 merely alerts the reviewing authority that it has to follow the procedure, and comply with natural justice. As long as it is shown that the initiation is done within the time, and public notice issued within proximate time, the sunset review is valid. There could be cases, where the initiation might be within time, but public notice is unreasonably delayed; in such instances, it could be argued that the inquiry is vitiated. In the present case, there is no dispute that the initiation took place on 22-12-2013; the notice was published in the Official Gazette on 31-12-2013 though it could be made available on 06-01-2014. Consequently the initiation of the sunset review was valid and proper. The petitioners' first challenge to the legality of the initiation therefore, fails.

22. The next issue is the legality of the levy pending sunset review. The second proviso to Section 9A (5) is conclusive on this aspect. Whilst the need for a sunset review has been described as compelling and mandatory in a decision of this Court (Indian Metals & Ferro Alloys Ltd v Designated Authority 2008 (224) ELT 375 Del, based on the Supreme Court ruling in Reliance Industries v Designated Authority 2006 (10) SCC 368), the court had this to say:

> *"…the first proviso to Section 9A(5) of the Act casts an obligation on the Central Government to ensure that for the protection of the domestic industry (for the reasons given by the Supreme Court) withdrawal of anti-dumping duty should not lead to continuation or recurrence of dumping as well injury to the domestic industry. In other words, the Central Government has to ensure that the status quo ante is not restored, for that would then mean that the Designated*

Authority would have to conduct, all over again, a fresh investigation under Rule 5 of the Rules and the subsequent statutory procedures would also have to be repeated. It is, therefore, not only to protect the domestic industry but to avoid repetitive exercises that a review is mandated by the Act and the Rules.

28. The key words in Section 9A(5) of the Act are contained in the first proviso thereto, namely, 'the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury'. It is possible that imposition of anti-dumping duty may control the problem, insofar as the domestic industry is concerned, during the five-year period when the anti-dumping duty is exigible, but the problem may recur after the anti-dumping duty is withdrawn. If this is coupled with injury to the domestic industry, then the anti-dumping duty should continue. It is for this reason that a proper assessment, through a review, is necessary to determine whether anti-dumping duty should continue or not."

It could have been argued that Section 9A and the notification published is a one-time measure; however, the need for review was contemplated in Article 11.1, 11.2 and 11.3 of the agreement for implementation of Article VI of GATT ("Implementation Agreement"). The said provisions read as follows:

"11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.

Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

It is clear that Section 9A (5) has echoed Articles 11.1, 11.2 and 11.3. In the context of the present discussion, it is pertinent that the Implementation Agreement makes the imposition of duty during pendency of sunset review discretionary ("The duty may remain in force pending the outcome of such a review."). Likewise, second proviso to Section 9A (5) states that *"where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year".*

23. The respondents' contention that continuing the anti-dumping duty during pendency of the sunset review is more or less automatic, is thus, belied by the terms of the Implementing Agreement, which was enacted in the second proviso. It consequently does not follow as a sequitur that whenever a sunset review is initiated under Section 9A (5), first proviso, the duty existing as on that date, would continue. This inference is obvious because, in the first instance, the original levy has a life of only five years. Thus, the legality of such levy is supported - by virtue of Section 9A (5) only for that duration. If the respondents wish to continue the levy for a period beyond that, during pendency of sunset review (which might not be concluded by the time the first period expires) they have to issue a notification, *before* the expiry of that period. It needs to be underlined here that but for the second proviso, there can be no legal extraction, during the sunset review, if the proceeding extends beyond the first five year period. In other words, the second proviso truly carves out an exception and makes the levy which otherwise would be invalid, on account of the operation of the main part, i.e. Section 9A (5), valid if its conditions are fulfilled.

24. This court holds that the petitioners' submission that a notification under Section 9A (1) issued after review is in the nature of temporary legislation, is merited. A statute is ordinarily perpetual, in the sense that no time is fixed for its duration. In that sense Section 9A is perpetual. However, that provision is merely enabling; it authorizes a levy of anti-dumping duty upon proof of injury, and upon fulfillment of other conditions. Once notified, the levy has effect - in terms of the notification and Section 9A (5) for five years. That levy is

consequently, temporary as the duration is finite. In these circumstances, Section 6 of the General Clauses Act, which provides that notifications, bye-laws etc. validly made under a repealed law can continue to be in force, would have no application. This position was clarified by the Supreme Court in *District Mining Officer and others v. Tata Iron and Steel Co. & Anr* AIR 2001 SC 3134, where the question as to what is a "temporary statute", was examined and it was observed that:

> *"19..... A Statute can be said to be either perpetual or temporary. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal which may be express or implied. But a Statute is temporary when its duration is only for a specified time and such a Statute expires on the expiry of the specified time, unless it is repealed earlier .....Admittedly, to a temporary Statute, the provisions of Section 6 of the General Clauses Act, 1897 will have no application .....A temporary Statute even in the absence of a saving provision like Section 6 of the General Clauses Act may not be construed dead for all purposes and the effect of expiry is essentially one of the construction of the Act....."*

25. In the light of the above position, this Court holds that what follows is that the levy of anti-dumping duty ended on 01-01-2014, with the lapse of the original notification. The second proviso to Section 9A (5) precluded the Central Government from continuing the levy *beyond* that period or date, except to the extent its conditions were fulfilled, i.e. if the levy of the duty were to have been notified before such date. In such cases, the power under the second proviso to

Section 9A(5), after expiry of the date of the original notification, is unavailable. The notification in the present case states that

> *"3. Notwithstanding anything contained in paragraph 2, this notification shall remain in force upto and inclusive of the 1st day of January, 2015, with respect to anti-dumping duty on Acrylonitrile Butadiene Rubber originating in, or exported from Korea RP, unless revoked earlier".*

Neither does Section 9A (1) nor Section 9A (5) permit the extension of anti-dumping duty once the main period of five years lapses, as held earlier. The Central Government is not arguing that it had the benefit of Section 21 of the General Clauses Act- for the simple reason that extension or amendment of an earlier notification can be only after following the procedure adopted while issuing the main notification. In the present case, the amendment is retrospective, as it were, and made effective from 2009. It was in fact made after the lapse of the first period.

26. Long ago, in *Nazir Ahmed v King Emperor*, AIR 1936 PC 253, the Privy Council declared that *"[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."* This salutary rule has been universally followed in numerous later judgments, including those of the Supreme Court (*Rao Shiv Bahadur Singh v. State of V.P.* AIR 1954 SC 322; *State of U.P. v. Singhara Singh* AIR 1964 SC 358; *Meera Sahni vs. Lieutenant Governor of Delhi & Ors.* 2008 (9) SCC 187 and *Shin-Etsu Chemical Co. Ltd. vs. Aksh Optifibre Ltd. & Anr.* reported in (2005) 7 SCC 234). The imperative nature of second proviso to Section 9A (5) leaves no room for doubt that in case the Central Government wishes to extend

the levy during the sunset review period, it has to comply with the terms of that provision and do so, before expiration of the original period - which in this case was 01-01-2014. Not having done so, its attempt to levy the duty through the later notification of 23-01-2014 is without authority of law; it is contrary to the terms of proviso to Section 9A (5).The attempt to recover any amounts as duty, therefore, violates Article 265 of the Constitution of India.

27. In view of the above findings, it is held that the initiation of sunset review is valid and legal; however the levy of anti-dumping duty through the impugned notification of 23-01-2014 is without authority of law. The said notification is declared illegal and hereby set aside. The petitioners are entitled to refund of the amounts paid till date. The writ petitions partly succeed and are allowed to the above extent; there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

JULY 11, 2014