PETITIONER:
MINISTRY OF COMMERCE

Vs.

RESPONDENT:
M/S HALDOR TOPSOE

DATE OF JUDGMENT: 20/07/2000

BENCH:
N.S.Hegde, B.N.Kirpal

JUDGMENT:

SANTOSH HEGDE, J.

Leave granted in SLP Â© No.5361/2000. The appellant in Civil Appeal No._____ of 2000 (arising out of S.L.P. Â© No.5361/2000) had filed a petition before the Designated Authority (Anti-Dumping) Ministry of Commerce (for short the Authority) alleging that M/s Haldor Topsoe A/S (to be referred to as the respondent) was indulging in dumping in India of six types of catalysts, particulars of which were enumerated in the said petition. Based on this petition, the Authority had initiated proceedings against the respondent under Section 9A of the Customs Tariff (Amendment) Act, 1995 (for short the Tariff Act). The Authority, on 6th of September, 1996, issued a public notice of the anti dumping investigation to be conducted against the respondent for the export to India of the above-referred six catalysts from Denmark. The Authority also heard the parties concerned including the respondent and on 7.5.1997 published a preliminary finding holding that the export of the said catalysts amounted to dumping and proposed provisional imposition of anti- dumping duties against the respondent. The said determination of the Authority was accepted by the Government of India vide its Notification No.56/97, and a provisional anti-dumping duty valid up to 19th of December, 1997 was levied. Respondent challenged the said provisional determination, consequently the Authority proceeded to make the final determination of the normal value of the subject catalyst and final dumping duty leviable. For this purpose, the Authority initiated a public hearing on 8th of July, 1997. However, this hearing could not be completed because of a change in the person holding the office of the Authority, hence, a fresh public hearing had to be resorted from 5th of January, 1998. On the conclusion of the public hearing, the Authority by its final order confirmed its preliminary findings on the question of dumping as well as anti-dumping duty payable. This finding of the Authority was also accepted by the Central Government vide its Notification No.ADD/IW/39/95-96 dated 5.1.1998, and accordingly, anti-dumping duties were imposed on the respondents. During the course of the inquiry, the Authority inter alia held that inspite of the demand made by it, the respondent had failed to furnish the necessary information in regard to its export price of the said catalysts to other third countries which failure, according to the Authority, significantly impeded the

investigation. Consequently, the Authority determined the normal value of the concerned catalysts on the basis of best judgment assessment. Being aggrieved by the said decision as well as the Notification issued by the Government of India, the respondent preferred a statutory appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (for short the Tribunal) under Section 9C of the Tariff Act urging the following contentions :- (i) The investigation by the Authority was barred by time; (ii) The Authority erred in fixing the normal value of the catalysts by adopting a methodology contrary to the provisions of the Statute; (iii) The Authority did not properly find out the injury margin nor did the Authority take into consideration the fair selling price of the catalysts manufactured by the domestic industries while fixing the dumping duty; (iv) The Authority erred in fixing two dumping margins in regard to the same catalysts depending on the end-use to which the imported articles have been put to.

The Tribunal rejected the first contention regarding the limitation holding that the Central Government on a request made by the Authority had extended the time to complete the inquiry which extension cannot be questioned before the Appellate Tribunal because the Tribunal being a Tribunal of limited jurisdiction, it had no authority in law to sit in judgment over the extension of time granted by the Central Government. It also held that the respondent having participated in the proceedings during the extended period without objecting to the extension, it cannot be permitted to challenge the extension after the decision had gone against it.

However, in regard to the next ground based on Section 9A of the Act as to the determination of the normal value, the Tribunal came to the conclusion that the anti-dumping duty was exporter and exporting country specific. On this foundation, the Tribunal held that under clause Â© of Section 9A(1), there were following three options before the Designated Authority : (i) finding out the comparable price for the like article in the ordinary course of trade when meant for consumption in the exporting country or territory of the same exporter; (ii) if the exporter is not having a domestic market in the exporting country then his price of the article to an appropriate third country; (iii) in the absence of such an export price of a specific exporter to an appropriate third country to find out the cost of production of the said article in the country of origin incurred by the said exporter and add to it administrative, selling and general costs and the profits. The Tribunal also held that since the anti-dumping duty is exporter specific or manufacturer specific, the price of similar article manufactured by some other exporter/manufacturer cannot be the basis for finding out the normal value. Applying the above options, the Tribunal came to the conclusion that since the respondent did not have any domestic market for the subject catalysts in Denmark, and there being no material to establish respondents export price of these articles to appropriate third countries, the only basis to determine the dumping duty, if any, would be the manufacturers cost of production in its country of origin. The Tribunal also found fault with the Authority for having relied on the list price of another manufacturer, namely, M/s. Sud Chernie of Germany to find out the normal value of the respondents article which, according to the Tribunal,

was in violation of the mandate of Section 9A(1)Â© of the Act. The Tribunal also doubted the correctness of the list price of M/s. Sud Chernie on the ground that this Company was closely connected with one of the appellants before us. It also did not accept the finding of the Authority regarding the normal selling price of the Indian manufacturers. The Tribunal further held that the two dumping duties fixed by the Authority based on the end-use of the catalyst were also not acceptable. The Tribunal further held that it had no jurisdiction to remand the matter to the Authority under Section 129-B of the Customs Act. Hence, it proceeded to determine the extent of dumping alleged against the respondent and so determined the anti-dumping duty on the basis of its own finding. It held that the normal value of the catalysts in question should have been based on the cost of production as claimed by the respondent and based on such particulars provided by the respondent, the Tribunal came to the conclusion that two out of the six catalysts viz., Zinc Oxide De Sulpherisation Catalyst (ZODS) and Low Temperature Shift Catalyst (LTS) had been exported below the normal value, and the other four catalysts had been exported above the normal value, hence it set aside the dumping duty imposed on the later four catalysts. Regarding the anti- dumping duty imposed on ZODS catalyst, it held that though the export of that catalyst was below the normal value, no injury was caused to the domestic market, hence no dumping duty was to be levied; while in regard to the LTS, it came to the conclusion that the injury was caused to the domestic market but reduced the dumping duty imposed by the Authority to Rs.22.82 per litre because, according to the Tribunal, that was the margin between the normal price and the export price. Against the said order of the Tribunal dated 13th of December, 1999, the Government of India through the Designated Authority has preferred C.A.No.487/2000 and the original petitioner before the said Authority, namely, United Catalysts India Ltd. has preferred C.A.No.___/2000 (@ SLP Â© No.5361/2000). We have heard Mr. Harish N. Salve, learned Solicitor General of India, Mr.Joseph Vellapalli, learned senior counsel for the appellants in the above appeals and Mr.V.Lakshmikumaran, learned counsel for the respondent in both the appeals. On behalf of the appellant, it is contended before us that the Authority was justified in relying on the comparable export price of another exporter in the background of the fact that the respondent was withholding the most relevant evidence and, in a way, compelling the Authority to proceed with the determination of the normal value based on the selective evidence produced by it. The respondent supported the order of the tribunal by contending that its cost of manufacture of the subject catalysts was sufficient material as contemplated by the statute itself, therefore, the Authority was not justified in placing reliance on the export price of the third parties while determining the normal value of the subject catalysts.

In the instant case, the Authority proceeded on the presumption that it had no obligation to accept per force the materials submitted by the respondent to establish the normal value of the article concerned; more so in the background of the fact that the respondent has not furnished the information pertaining to its export price of the said catalysts to an appropriate third country. In this background, it preferred to determine the normal value on the basis of what it held to be a comparable price of other exporters. It, in a way, drew adverse inference against the

respondent for not producing its export price of the subject catalysts. The Tribunal, on the contrary, came to the conclusion that since anti-dumping duty is exporter specific or manufacturer specific, the price of similar articles manufactured by other exporters/manufacturers cannot be the basis for finding out the normal value. For determining this question, we find it necessary to reproduce some of the relevant provisions of the Tariff Act and the Rules which are as follows : In Section 9A(1)Â© of the Tariff Act:- normal value, in relation to an article, means-

(i) the comparable price, in the ordinary course of trade, for the like article when meant 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 or territory or 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.

Rule 6(4) of the Rules reads:- Rule 6(4): The designated authority may issue a notice calling for any information, in such form as may be specified by it, from the exporters, foreign producers 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.

Rule 6(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 findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

Rule 8: Except in cases referred to in sub-rule (8) of rule 6, the designated authority shall during the course of investigation satisfy itself as to the accuracy of the information supplied by the interested parties upon which its findings are based.

From a perusal of the provisions reproduced hereinabove, it is clear that the statute itself has given sufficient guidelines to the Authority to be adopted in the process of determining the normal value. To some extent, these guidelines have been placed in a preferential sequence. For example, if acceptable material is available in regard to the comparable price in the ordinary course of trade in the exporting country or territory itself then the normal value will have to be determined on that basis, if such material in regard to comparable price is not available then the Authority has been given a choice under Section 9A(1)Â©(ii)(a) and (b). The said choice is between the comparable representative export price and cost of production in the country of origin of the goods. The question, therefore, for our consideration is whether an Investigating Authority has any discretion to reject the material produced by one of the party to the proceeding in regard to the alternatives enumerated in Section 9A(1)(c)(ii)(a) and (b) and prefer any other material to establish the normal value. As noticed above while the Authority proceeded on the basis that it had the discretion to reject the evidence produced by the respondent, the Tribunal held that the Authority had no such discretion in view of the fact anti-dumping duty is exporter specific. It would be appropriate at this stage to extract the actual wordings of the Tribunal in regard to this finding ; Since the anti-dumping duty is exporter specific or manufacture specific, price of similar article manufactured by other exporters/manufacturers cannot be the basis for finding out the normal value. (Para 12 of the Tribunals order)

With respect, we are unable to accept this finding of the Tribunal. From a careful reading of Section 9A of the Tariff Act and Rule 6 of the Rules, it is clear that the statute has nowhere put such a restriction on the Investigating Authority. On the contrary, a perusal of the said provisions clearly shows the normal value will have to be determined with reference to comparable price, the word comparable price in the context can only be with reference to the price of similar articles sold under similar circumstances irrespective of the manufacturer. By holding anti dumping duty to be exporter specific, the tribunal could not have restricted the scope of the investigation only to materials to be produced by a party against whom an investigation is being conducted. Such an interpretation of the statute is wholly contrary to the very scheme of the statute. It is to be noticed that the statute has given much wider power to the Investigating Authority than what is understood by the Tribunal which is evident from the language of Section 9A(1)Â©(i) of the Tariff Act and Rule 6(8) of the Rules. As noticed hereinabove, Rule 6(8) of the Rules specifically empowers the Authority to record its findings on the basis of the facts available to it in cases where an interested party refuses access to or otherwise does not provide the necessary information to it. That apart, the use of the words sale of like articles and comparable representative price of the like articles in Section 9(A)(1)(c) referred to hereinabove, also indicates that the statute intended that while determining the normal value, the Authority has the discretion to rely on such material as is available before it which reflects the comparable value of the articles concerned; meaning thereby that the Authority is not bound to look into the material which is produced by the interested party. Therefore, any argument which restricts the discretion of the Authority in

the area of appreciation of evidence on the ground that the anti-dumping duty is manufacturer specific, will have to be rejected.

In the instant case, the Authority has come to the specific conclusion that the respondent has preferred not to disclose the details of its export price of the concerned catalysts to an appropriate third country, even though the same was available with the respondent. It has also noted that the reasons advanced by the respondent for not furnishing the information are not worthy of acceptance. The Authority has further observed that by withholding the necessary information which the respondent was bound to have disclosed under the statute, the respondent has not cooperated with the investigation and has caused impediments in determination of the normal value. In these circumstances, we are of the opinion that the Authority was justified in proceeding to determine the normal value of the subject catalysts on the basis of best judgment assessment as contemplated under Rule 6(8) of the Rules. It is next contended before us that the material considered by the Authority for determining the normal value being material referable to an exporter from Germany, the same cannot be a comparable price for the purpose of determining the normal value of the respondents catalysts which is exported from Denmark. Similar argument addressed before the Authority was rejected holding that the members of the European Union which includes both Germany and Denmark, formed a single unified market without any customs barriers and the European Union forms a unit for the purpose of anti-dumping investigations, therefore, the export price of like catalysts from Germany will be a comparable price to determine the normal value of the respondents catalysts. The Tribunal, per contra, held that the Designated Authority could not have adopted the export price from Germany as a comparable price for the simple reason that the proceedings before the Authority were not in relation to the goods originating from Germany. The Tribunal further held that this is because of the fact that anti-dumping is country specific. It also held that the European Union cannot be a territory for the purpose of determining the normal value. We do not agree with this view of the Tribunal also. The use of the word territory in Section 9A(1)Â© indicates that the Statute empowered the Authority while determining the normal value to take into consideration the comparable price of the like article in the exporting country or territory. The placement of this word territory after the word country indicates that the Legislature intended to use the word territory with reference to a larger geographical area than the exporting country which geographical area or territory has some commercial similarity with the exporting country and the exporting country is a part of the said territory, though not in the political sense but in the economic sense of that word. It is a well-known fact that the European Union was formed with an object of creating a common market among its member States. The treaty forming the European Union commonly known as the Treaty of Rome provided for elimination of commercial/customs barriers to facilitate free movement of goods, workers, services and capital among the member-States and the establishment of a common tariff and commercial policy towards non-members. To achieve these objects, the said Treaty also provides for common policies in agriculture, competition and transportation. It also provides for the harmonisation of the member-State laws generally to the extent required for

the proper functioning of the common market. There are European Union legislations applicable in such fields as environment, worker and consumer protection, gender equality, corporate law and securities regulation, and taxation. (See Legal Problems of International Economic Relations, 3rd Edition, page 188). They also have a common anti-dumping law. In such circumstances, we hold that the European Union is a territory for the purpose of Section 9A of the Act and the export price of like catalysts from Germany which is also a part of that territory viz., European Union would be a comparable price for the purpose of determining the normal value of the respondents catalysts.

The respondent in this context has further argued that the list price does not always reflect the correct selling price and that M/s. Sud Chernie being an associate of one of the appellants before us, its export price ought not to have been relied upon by the Authority while determining the normal value of their catalyst. This basically is a question of fact and we find that the Authority has given cogent reasons for rejecting these contentions while the tribunal on a wrong application of law has reversed these findings. Once we come to the conclusion that the legal basis of the Tribunals order is erroneous then it is safer to rely on the finding of fact arrived by the Authority which is not shown to be either perverse or based on irrelevant material. We also think that the respondent is not entitled to raise these objections about the comparable price of M/s.Sud Chernie before us for the following further reasons. In the instant case, the entire exercise before the Authority would have been simplified if only the respondent had produced its export price of its catalyst to an appropriate third country which information was available with it, which, if furnished, could have established the actual normal value of their catalysts. When it failed to do so for no valid reason, the Authority was compelled to rely on other material available to it and resort to the best judgment valuation. In such a situation we are of the opinion that the complaint of the respondent against the material relied upon by the Authority cannot be countenanced. In this context we place reliance on a judgment of this Court in Gopal Krishnaji Ketkar v. Mahomed Haji Latif & Ors. (1968 3 SCR 862) wherein this Court held as under :

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

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

It was next contended by the respondent before us that

the Authority erred in fixing two different injury margins for the same catalyst based on different end-users of the said catalyst which, according to the respondent, is impermissible in law. This argument has also found favour with the tribunal. In this regard, we note that the Authority has come to the conclusion that the catalysts in question were imported to this country under two different tariff items based on its end-user for which the import was made. It is noticed that when the catalyst concerned was imported under a project import basis, the same was cleared under Chapter 98 of the Act at NIL rate of customs duty and if imported for any other purpose, the same was cleared under Chapter 38 at the prevailing duty. Thus there is a difference in import duty based on the user factor. In this background, the Authority came to the conclusion that the landed value of the subject catalyst will vary with the applicable customs duty and consequently there will be difference between the cost of import and the margins of dumping would also vary. The Tribunal did not give any specific reason why the two different margins cannot be made applicable based on different import duties applicable to the concerned catalysts. In this regard, it accepted the argument of the respondent in the following words :

Designated Authority has found two dumping duties on each of the catalysts depending on the use of which these are put to on import. This action of the Designated Authority has come under very serious attack by the appellant. Learned counsel representing UCIL did not try to support this action of the Designated Authority. The argument advanced by the Designated Authority was that depending on the end-use each catalyst was having two different export prices. Consequently, they warranted two anti-dumping duties. We are not able to uphold the action of the Designated Authority. During the relevant period duty rates varied depending upon whether the importer was a fertiliser unit of refiner, while for former enjoyed total exemption the latter was subjected to a lower rate of duty than the duty for imports under Chapter 38. Thus, there were three effective rates and not two taken into account by the Authority. The fair selling price and injury margins worked out were incorrect for this reason too.

It, however, did not give any finding why two dumping duties based on different injury margins cannot be levied under the Act. The margin of dumping is defined to mean the difference between its export price and its normal value. The Authority while determining the margin of dumping has come to a definite conclusion that the argument of the exporter that its export price has been more or less the same irrespective of tariff head under which the catalyst was imported, was incorrect and the Authority has further found different dumping margins based on clearances under the two different tariff heads. Section 9A(1) contemplates levy of an anti-dumping duty not exceeding the margin of dumping in relation to such article. If that be so then when the Authority on an investigation of facts comes to the conclusion that by virtue of two different customs duties there have been two different dumping margins in regard to the subject catalyst based on customs clearances, ipso facto, anti-dumping duty which is relatable cost of import also changes. Therefore, the contention of the respondent that there cannot be two anti dumping duties in regard to the same catalyst, cannot be countenanced.

It was next contended on behalf of the respondent that the Authority was statutorily bound to have completed its investigation within a period of one year from the date of initiation of such investigation. He contended that the investigation in question was initiated by the preliminary notification of 6th of September, 1996 and the same concluded only by a Notification of 5th January, 1998 and though there was an extension granted by the Government of India under proviso to Rule 17, the same having been granted without notice to the respondent, the extension is in violation of principles of natural justice and consequently the final determination made by the authority being beyond the period of one year specified by the Rules, the same is liable to be quashed on the ground of limitation. Under Rule 17 of the Rules, the Authority had to complete the investigation within a period of one year but this period is extendable by a further period of six months by the Central Government in circumstances of exceptional nature. The Tribunal on investigation of the concerned files produced by the Central Government came to the conclusion that on an application made by the Authority, the Central Government had extended the time within the limit prescribed under proviso to Rule 17 of the Rules and the final finding was submitted to the Central Government by the Authority within such extended period. However, as noticed above, the respondent contends that such extension of time is opposed to the principles of natural justice inasmuch as the respondent was not notified in regard to the request of the Authority for extension of time, nor was it heard before time was extended. In support of this contention, the respondent has relied on two judgments of this Court in I.J.Rao, Asstt. Collector of Customs vs. Bibhuti Bhushan Bagh (1989 42 ELT 338 SC) and The Assistant Collector of Customs & Superintendent, Preventive Service Customs, Calcutta and Ors. vs. Charan Das Malhotra (AIR 1972 SC 689). Per contra, on behalf of the appellants, it is argued that the extension of time contemplated under the proviso to Rule 17 is an administrative act based on exigencies of the case. A decision taken in regard to the extension of time to complete the investigation does not in any manner effect the right of the parties to the investigation. Therefore, the requirement of the respondent being hurt before granting any such extension, does not arise. We notice that under the provision empowering the extension of time by the Central Government (proviso to Rule 17), there is no requirement that the concerned parties to the investigation should be heard before extending the time. We agree with the appellant that this decision in question is an administrative decision based on exigencies of the case. The statute governing the investigation into dumping by an Authority has provided an elaborate procedure and wherever the concerned parties are entitled to notice, it has specifically provided for the same. In the absence of any such requirement to issue notice in proviso to Rule 17, we are of the opinion that the contention of the respondent that it is entitled to any notice prior to the exercise of the power under the proviso to Rule 17 by the Central Government, is devoid of any merit. In the instant case, the investigation was completed within the stipulated period after obtaining the necessary extension from the Central Government. The decisions relied upon by the respondent, in our opinion, have no bearing on the facts of this case since in those cases the proceedings were quasi-criminal in nature where application of principles of natural justice was

inherent, unlike the present case where the application of principles of natural justice is limited to the provisions already made in the statute. Further, apart from the fact the respondent is not entitled to any notice before extending the time for concluding the investigation under Rule 17, we also notice that the respondent has not established any prejudice suffered by it whatsoever. Here we notice with approval the observations of the Tribunal to the effect that the respondent, though, was aware of the extension granted to the Authority by the Central Government, did not object to the same when the proceedings before the Authority continued after the extension of time and having suffered an adverse order cannot be permitted to raise this question subsequently at an appellate stage. Accordingly, this objection of the respondent also fails and the same is rejected. For the reasons stated above, these appeals succeed and the orders of the Tribunal, impugned herein, are set aside. The appeals are allowed with costs.