CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

ANTI DUMPING APPEAL NO. 51491 OF 2021

[Arising out of final findings No. 6/18/2020-DGTR dated 12.05.2021 of the Designated Authority, Directorate General of Trade Remedies and the Office Memorandum No. CBIC-190354/97/2021-TO(TRU-I)-CBEC dated 20.07.2021 issued by the Ministry of Finance.]

M/s Apcotex Industries Limited **.....Appellant**
Mahaveer Centre, 49-53, 3rd Floor,
Sector-17, Vashi, Navi Mumbai – 400703
Maharashtra, India

Versus

1. **Union of India**
   Through Secretary,
   Ministry of Finance,
   Department of Revenue,
   North Block, New Delhi 110001

2. **The Designated Authority**
   Directorate General of Trade Remedies
   Department of Commerce & Industry,
   Parliament Street, Jeevan Tara Building,
   4th Floor, New Delhi-110001

3. **Union of India (Wrongly Repeated)**

4. **The Designated Authority (Wrongly Repeated)**

5. **Arlanxeo Emulsion Rubber France S.A.S., France**
   2 Rue du Ried, 67610 La Wantzenau,
   France

6. **Goko Trading Co. Ltd., Japan**
   Centralshinosaka Building 4536
   Miyahara Yodogawaku
   Osakacity 5320003
   Japan

7. **JSC Krasnoyarsk Synthetic Rubber Plant, Russia**
   Per Kauchukoviy 6, Krasnoyarsk 660004,
   Russia

8. **JSR Corporation, Japan**
   100 Kawajiri – cho, Yokkaichi,
   mie 510-0871, Japan

9. **JSR Trading Co. Ltd., Japan**
   Shiodome Sumitomo Bldg., 22nd Floor
   1-9-2 Higashi Shimbashi, Minato-ku,
   Tokyo 105-0021, Japan

10. JTC Corporation, Japan
Nakanoshima Daibiru No. 805,
Nakanoshima 3-3-23,
Kita-Ku, Osaka, 530-6108,
Japan

11. Kato Sansho Co. Ltd., Japan
KATO IHI Building, Tokyo
21-7 Nihonbashi Kabutocho, Chuo-ku,
Tokyo, Japan 103-8228

12. PJSC Sibur Holding, Russia
Building 30, No. 6, Quarter 1, Vostochniy
Industrial District, Tobolsk,
Tyumen Region, 626150,
Russia

13. Sibur International GmbH, Austria
Prinz Eugen Str. 8-10, 1040 Vienna,
Austria

14. Tokyo Zairyo Co. Ltd., Japan
Shin Marunouchi Center Building, 1-6-2
Marunouchi, Chiyoda-ku,
Tokyo 100-005

15. Zeon Asia Pte. Ltd., Singapore
331 North Bridge Rd, #20-01/02
Odeon Towers, Singapore 188720

16. Zeon Corporation, Japan
Shin Marunouchi Center Building,
1-6-2 Maruouchi,
Chiyoda-ku, Tokyo 100-005, Japan

17. Imperial Waterproofing Industries Pvt. Ltd.
Block No. 23, New Sun Mill Compound,
Lower Parel (West),
Mumbai – 400 013, India

18. JMF Synthetics India Pvt. Ltd.
3”N, Rd Number 7, Punjabi Bagh East,
Punjabi Bagh, Rajiv Gandhi Colony,
New Industrial Town,
New Delhi, Haryana 121005

19. Olmec Inventures
81, Panorama, 203 Walkeshwer Road,
Malabar Hill
Mumbai, Maharashtra

20. Tokyo Zairyo (India) Pvt. Ltd.
53, Golf Course Rd, DLF Phase 5,
Sector 53, Gurugram, Haryana 122002

21. Vista Business Ventures LLP
81, 8th Floor, Plot No. 203, Panorama Building,
Walkeshwar Road, Teen Batti, Malabar Hill,
Mumbai City MH 400006

22. All India Rubber Industries Association
601, Pramukh Plaza “B” Wing, 485,

Cardinal Gracious Road,
Chakala, Andheri [E], Mumbai 400 099,
India

23. Aarchem Corporation
KNG Pudur Pirivu, Comibatore,
Tamil Nadu 641108

24. Avneesha Polymers LLP
3/6, Spurthi Society,
Mumbai-Pune Road,
Wakdewadi, Pune-411003

25. Devashish Polymers Pvt. Ltd
1st Floor, NTC House, NM Marg,
Ballard Estate, Mumbai,
Maharashtra 400038

26. Hi-Tech Arai Pvt. Ltd.
33, Sarojini St, Chokikulam,
Tamil Nadu 625002

27. J.K. Fenner (India) Limited
3, Madurai - Melakkal Road, Kochadai,
Madurai - 625 016, India

28. Jayashree Polymers Pvt. Ltd
163, Sector-3, Imt Manesar,
Gurugram, Haryana 122051

29. K.D. Sons
E-52, Hauz Khas Rd, Hauz Khas Market,
Block E, Hauz Khas, New Delhi,
Delhi 110016

30. Nishigandha Polymers Pvt. Ltd.
3rd Floor, Rustom Building, 29, Veer
Nariman Road,
Kala Ghoda, Fort, Mumbai,
Maharashtra 400023

31. Parkman Elastometers Pvt. Ltd.
303. Vireshwar Chambers, 3rd Floor,
M.G. Road, Vile Parle (East),
Mumbai 400057

32. Precision Rubber Industries Pvt. Ltd.
5Q89+VH9, 52 Hector, Devdham,
Umargam, Gujarat 396171

33. Rishiroop Ltd.
65, Atlanta
Nariman Point
Mumbai 400021
India

34. Roop Rubber Mills Private Limited
27, Idc, Mehrauli Road, Idc, Gurugram,
Haryana 122002

35. SRP Synthetic Rubber Products Pvt. Ltd.
C-81, 2nd Main Rd, Peenya 2nd Stage,

2nd Stage, Peenya Industrial Area Phase
IV, Peenya, Bangaluru, Karnataka 560058

36. Rubber Chemical Centre
9, Rama Road Industrial Area, Block B,
Najafgarh Road Industrial Area,
New Delhi, Delhi 110015

37. Technocraft Industries (India) Ltd.
2nd floor, opus centre, plot no. 47,
Opp. Hotel Tunga Paradise,
Andheri (East), Mumbai – 400093,
Maharashtra, India

38. Ministry of Economic Development and the Ministry of Industry and Trade of the Russia Federation
Shantipath, Chanakyapuri, New Delhi,
Delhi 110021

39. European Union **.....Respondents**
5, Rd Number 5, Market,
near Shanti Niketan, New Delhi,
Delhi 110021

WITH

ANTI DUMPING APPEAL NO. 52174 OF 2021

[Arising out of final findings Notification File No. 221 5/2019-DGTR dated 21.08.2020 and Office Memorandum dated 18.11.2020 issued by the Ministry of Finance.]

Sterlite Technologies Ltd. **.....Appellant**
Equinox Business Park, Ground Floor,
Tower-4, Unit-1, LBS Marg, Kurla (W),
Mumbai-400700

Versus

1. Union of India
Through Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi 110001

2. The Designated Authority Directorate General of Anti-Dumping & Allied Duties,
Ministry of Commerce & Industry,
Parliament Street, Jeevan Tara Building,
4th Floor, New Delhi-110001

3. Birla Furukawa Optics Pvt. Ltd.
Plot Nos. L-62,
Verna Industrial Estate,
Salcette, Verna, Goa 403722

4. Corning Technologies India Pvt. Ltd.
2nd Floor, Pioneer Square,
CRPF Rd, Sector 62,
Gurugram, Haryana 122102

5. Corning Finolex Optical Fibre Pvt. Ltd.
D-237, MIDC, Phase – II,
Chakan Industrial Area, Varale, Tal. Khed
Chakan, Pune, Maharashtra 410501

6. Finolex Cable LTd.
26-27, Mumbai-Pune Road,
Pimpri, Pune-411018

7. HFCL Ltd., India
8, Commerical Complex, Masjid Moth,
Greater Kailash II, New Delhi-110048

8. WestcoastOptilinks
Plot no. 386 & 387, Kiadb Electronic
City Hebbal Industrial Area, Mysore
Karnataka, India 570016

9. Fibrehome India Pvt. Ltd.
C-48, C Block, Sector 65, Noida,
Uttar Pardesh 201301

10. Sumitomo Electric Industries Ltd. ('SEI'), Japan
Akasaka Center Building, 1-3-13,
Motoakasaka, Minato-ku, Tokyo 107-8468

11. SWCC Showa Cable Systems Co. Ltd., Japan
Shiroyama Trust Tower 4-3-1
Toranomon Minato-ku Tokyo, 105-6012
Japan

12. Fujikura Ltd., Japan
1-5-1, Kiba, Koto-ku, Tokyo 135-8512,
Japan

13. Pt. ZTT Cable, Indonesia
Kawasan Industri Suryacipta VII, Kav
1-66G1&G2, Jl. Surya Madya,
Mulyasari, Kec. Ciampel, Kabupaten
Karawang, Jawa Barat 41363,
Indonesia

14. Pt. Supreme Cable Manufacturing and Commerce Tbk, Indonesia
Jl. Kebon Sirih No. 71, 10340-Indonesia

15. Pt. Voksel Electric Tbk., Indonesia
Menara Karya 3rd Floor, Suite D,Jl.
HR. Rasuna Said Block X-5,
Kav. 1-2, Jakarta 12950-Indonesia

16. Pt. Yangtze Optical Fibre, Indonesia
Jl.Surya Madya X Kav.1-65 E3,
Suryacipta City of Industry Ds,
Mulyasari, Kec. Ciampel, Kabupaten

Karawang, Jawa Barat 41361,
Indonesia

17. Pt. Communication Cable Systems, Indonesia
Grand Slipi Tower, Jl. Letjen S.
Parman No.Kav 22-24, RT.1/RW.4,
Palmerah, Kec. Palmerah, Kota
Jakarta Barat, Daerah Khusus Ibukota
Jakarta 11480, Indonesia

18. Embassy of Japan
Plot No. 4&5, Shantipath,
Chanakyapuri, New Delhi,
Delhi 110021

19. Embassy of Indonesia
No. 50-A, Kautilya Marg, Diplomatic Marg,
Chanakyapuri, New Delhi

20. Embassy of Russian Federation,
Shantipath, Chanakyapuri, New Delhi

21. Embassy of Brazil, **.....Respondents**
8, Dr. APJ Abdul Kalam Rd.,
Aurangzeb Road, New Delhi

AND

AD/51492/2021	**AD/51829/2021**	**AD/51830/2021**
AD/51836/2021	**AD/51877/2021**	**AD/51878/2021**
AD/51879/2021	**AD/51880/2021**	**AD/51922/2021**
AD/51923/2021	**AD/51924/2021**	**AD/51925/2021**
AD/51926/2021	**AD/52100/2021**	**AD/52101/2021**
AD/52102/2021	**AD/52172/2021**	**AD/52072/2021**
AD/50017/2022	**AD/50060/2022**	**AD/50134/2022**
AD/50271/2022	**and**	**AD/50272/2022**

APPEARANCES:

Advocates for the Appellants

Shri Vipin Jain, Shri Ashutosh Mishra, Ms. Tuhina.

Ms. Reena Khair, Shri Rajesh Sharma, Shri Katham Shukla and Shri Subham Jaiswal.

Advocates for the Respondents

Shri Rakesh Kumar, Authorized Representative for the Union of India.

Shri Ameet Singh, Shri Mohit Yadav and Harjodh Singh, Shri Pranav Narang, Shri Utkarsh Shrivastava and Ms Nidhi Rikhani, Advocates for Designated Authority.

Shri S. Seetharaman and Shri Darpan Bhuyan.

Shri B Lakshmi Narasimhan, Shri Devinder Bagia and Shri Neeraj Chabra.

Shri Parthasarthi Jha and Shri Naghm Ghei, Shri Parthasarthi Jha, Shri Naghm Ghei and Harika Bakuruju.

Shri Ratheesh M. and Shri M.S. Pothal, Chartered Accountant.

Shri Ashish Chandra, Shri Anupal Dasgupta and Surinkhla Gupta.

Shri Jatin Arora, Shri Aman Bansal.

Shri Anurag Ojha, Shri Karan Aggarwal, Ms Radhika Sharma, Ms. Suhani Chanchalani and Shri Amit Randev.

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHANA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: 13.05. 2022
DATE OF DECISION: 30.08. 2022

FINAL ORDER NO. 50756-50780/2022

JUSTICE DILIP GUPTA:

All these appeals have been filed by the domestic industry raising a concern that despite recommendations made by the designated authority in the final findings for imposition of anti-dumping duty under section 9A of the Customs Tariff Act 1975[1] on articles exported by the exporters or producers to India at less than its normal value, the Central Government did not issue the notification for imposition of anti-dumping duty. The relief, therefore, that has been claimed in most of the appeals is that the office memorandum issued by the Ministry of Finance, Department of Revenue, Tax Research Unit conveying the decision of the Central Government not to impose anti-dumping duty proposed in the final findings be set aside and a direction be issued to the Central Government to issue a notification for imposition of anti-dumping duty, based on the recommendation made by the designated authority. In few appeals, such an office

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1. the Tariff Act

memorandum has not been issued by the Central Government, though three months have expired from the date of publication of the final findings of the designated authority and these appeals are Anti-Dumping Appeal No's. 51836 of 2021, 51877 of 2021, 51922 of 2021, 51923 of 2021, 51924 of 2021, 51925 of 2021, 51926 of 2021, 52100 of 2021, 52101 of 2021, 50017 of 2022, 50060 of 2022 and 50271 of 2022.

2. It also needs to be noted that the Anti-Dumping Appeal filed by Sterlite Technologies Ltd. relates to imposition of safeguard duty under section 8B of the Tariff Act. The Director General (Safeguard) had issued a notification containing the final findings for imposition of safeguard duty, but the Department of Revenue, Tax Research Unit issued an office memorandum notifying that the Central Government, after examining the recommendation, decided not to impose safeguard duty.

3. To appreciate the issues raised in these appeals, it would be necessary to relate facts concerning of the two appeals filed by M/s. Apcotex Industries Limited and Sterlite Technologies Ltd.

Apcotex Industries Limited

4. Apcotex Industries had filed an application before the designated authority on 31.03.2020 for initiation of anti-dumping investigation under the provisions of the Tariff Act and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995[2] for imposition of anti-dumping duty on imports of the subject goods from

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2. the 1995 Anti-Dumping Rules

the subject countries, alleging dumping and consequent injury. The designated authority issued a public notice dated 26.05.2020 for initiation of anti-dumping investigation under rule 6(1) of the 1995 Anti-Dumping Rules to determine the existence, degree and effect of alleged dumping and to consider recommendation for imposition of anti-dumping duty, if any. The period of investigation for the purpose of anti-dumping duty was from 01.07.2019 to 31.03.2020 and the injury investigation period was from 01.04.2016 to 30.06.2019. Oral hearings were conducted and the parties that attended the oral hearings were advised to file written submissions on the views expressed orally, followed by rejoinders, if any. As contemplated under rule 16, the essential facts of the investigation were disclosed to the known interested parties by a disclosure statement dated 22.07.2021. The interested parties, including the appellant, filed comments to the disclosure statement. Thereafter, the designated authority notified the final findings on 12.05.2021. The relevant portions of the conclusion drawn by the designated authority in the final findings are as follows:

> "176. After examining various submissions of the interested parties with regard to product under consideration, confidentiality, adequacy and accuracy of the application, questionnaire responses, selection of period of investigation, dumping margin determination, injury to the domestic industry, other factors allegedly causing injury to the domestic industry, the Authority notes that it has appropriately dealt with the issues raised in relevant paragraphs of these findings. **After examining the submissions made by the interested parties and issues raised therein and considering the facts available on record, the Authority concludes that:**
>
> (a) The Applicant constitutes domestic industry under Rule 2(b) of the Rules and considers that

the application satisfied the criteria of standing in terms of Rule 5(3) of the Rules.

(b) xxxxxxxxxxx.

(c) xxxxxxxxxxx.

(d) The Authority has calculated dumping margin on weighted average basis for all the responding exporters.

(e) xxxxxxxxxxx.

(f) xxxxxxxxxxx.

(g) xxxxxxxxxxx.

(h) Considering the normal value and export price for subject goods, the dumping margins for the subject goods from subject countries have been determined, and the margins are significant.

(i) **The Domestic Industry has suffered material injury. The examination of the imports of the subject product and the performance of the domestic industry clearly shows that the volume of dumped imports from subject countries has increased in both absolute and relative terms. The imports from the subject countries are undercutting the prices of the domestic industry. The imports from the subject countries are depressing the prices of the domestic industry. The production, sales, capacity utilization and market share of the domestic industry has declined in the POI. The performance of the domestic industry has significantly deteriorated in respect of profits, cash profits and return on capital employed. The domestic industry has suffered financial losses, cash losses and negative return on investments in the POI.**

177. The Authority notes that the investigation was initiated and notified to all interested parties and adequate opportunity was given to the domestic industry, exporters, importers and other interested parties to provide positive information on the aspect of dumping, injury and causal link. Having initiated and conducted the investigation into dumping, injury and causal link in terms of the provisions

laid down under the Anti-Dumping Rules, the Authority considers it necessary and recommends the imposition of anti-dumping duty on imports of subject goods from the subject countries.

178. In terms of provision contained in Rule 4(d) of the Rules, the Authority recommends imposition of ADD equal to the lesser of margin of dumping and the margin of injury, so as to remove the injury to the Domestic Industry. Taking into account the factual matrix of the case, and having regard to information provided, and submissions made by interested parties, it is considered appropriate to recommend benchmark/reference form of anti-dumping duties. **The Authority recommends imposition of definitive anti-dumping duties on import of subject goods originating in or exported from subject countries from the date of notification to be issued in this regard by the Central government, as the difference between the landed value of subject goods and the reference price indicated in column 7 of the table below, provided the landed value is less than the value indicated in column 7.** No benchmark/reference price has been recommended for JSR Corporation, as injury margin for this producer is negative."

(emphasis supplied)

5. An office memorandum dated 20.07.2021 was then issued by the Ministry of Finance to convey the decision of the Central Government not to impose anti-dumping duty. It is reproduced below:

"Government of India
Ministry of Finance
(Department of Revenue)
Tax Research Unit

Room No. 146(G), North Block,
New Delhi, dated the 20th July, 2021

OFFICE MEMORANDUM

Subject: Anti-Dumping Investigation concerning imports of "Acrylonitrile Butadiene Rubber (NBR)" originating in or exported from China PR, European Union (EU), Japan and Russia – reg

> **The undersigned is directed to refer to your email dated 13th May, 2021 and the subject Final Findings issued by the Directorate General of Trade Remedies vide Final Findings No. 6/18/2020-DGTR dated the 12th May, 2021 in the subject anti-dumping investigation and to inform that the Central Government has decided not to impose the anti-dumping duty on** imports of 'Acrylonitrile Butadiene Rubber (NBR)' originating in or exported from China PR, European Union (EU), Japan and Russia, **proposed in the said Final Findings**.
>
> Technical Officer, TRU"
>
> **(emphasis supplied)**

Sterlite Technologies Ltd

6. The records reveal that the appellant, as a domestic industry, had filed an application before the Director General (Safeguard) under provisions of the Tariff Act, 1975 and the Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997[3] for imposition of safeguard duty on imports of the subject goods from the subject countries. A public notice dated 23.09.2019 was issued for initiation of safeguard investigation. Oral hearing were conducted and the parties that attended the whole hearings were asked to file written submissions on the view expressed orally. The interested parties, including the appellant, filed comments and thereafter preliminary findings were issued on 06.11.2019 recommending immediate imposition of provisional safeguard duty. The final finding were thereafter issued on 28.01.2020 confirming the preliminarily findings that the increased imports were causing serious injury to the domestic industry and recommendation was made for imposition of the safeguard duty of ten percent for a period of one year on the import of

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3. 1997 Safeguard Rules

subject goods. The conclusions drawn in the final findings are as follows:

> "53.1 **During the period of investigation there was an overall deterioration in the functioning of the DI, which is indicative of the serious injury and threat of serious injury in future.** The parameter-wise finding of the serious injury suffered by the DI on account of enhanced imports of the PUC is summarized as under:
>
> (a) The volume of imports of the PUC have increased significantly during POI mainly in 2018-19 and Q1 of 2019-20.
>
> (b) The imports in Q2 and Q3 of 2019-20 are at comparable level of 2016-17 and 2017-18 in terms relative to production.
>
> (c) **The DI's market share has declined, whereas the market share of imports has increased.**
>
> (d) **The increased imports of the PUC have substituted for the market share of DI**;
>
> (e) The capacity utilization has decreased significantly in POI despite increase in demand;
>
> (f) **The Domestic sales of the DI has declined significantly during the most recent period with their lost market been taken over by the imports**;
>
> (g) The DI was earning profit in 2017-18 are in significant losses during 2018-19 and Post POI:
>
> (h) The inventories of the PUC have increased significantly;
>
> (i) **There is significant price underselling and price suppression due to imports of PUC.**
>
> (j) **On an overall basis, DI has suffered serious injury during POI due to increased imports.**"

7. An office memorandum dated 18.11.2020 was then issued by the Ministry of Finance to convey the decision of the Central Government not to impose safeguard duty. It is reproduced below:

"Ministry of Finance
Department of Revenue
Tax Research Unit

***

Room No. 146-G, North Block,
New Delhi, dated the 18th November, 2020

OFFICE MEMORANDUM

Subject: Minutes of the Board of Safeguard on Preliminary Findings in respect of Safeguard investigation concerning import of Single Mode Optical Fibre-reg.

The undersigned is directed to refer to the Final Findings dated 21st August, 2020 issued by the Directorate General Trade Remedies in the case of Safeguard investigation concerning import of 'Single Mode Optical Fibre' vide F.No.22/5/2019 dated 21.8.2020.

2. In this regard, the undersigned is directed to state that the Central Government has examined the recommendation of Designated Authority and a decision has been taken to not accept the recommendation to impose safeguard duty @10% on imports of "Single Mode Optical Fibre" falling under customs tariff heading 9001 10 00.

Deputy Commissioner/OSD
Tax Research Unit"
(emphasis supplied)

8. The main contention that has been advanced by the learned counsel appearing for the appellants is that the office memorandums, communicating the decision of the Central Government not to impose anti-dumping duty/safeguard duty, despite a recommendation having been made by the designated authority in the final findings to impose anti-dumping duty/safeguard duty, deserve to be set aside for the reason that the principles of natural justice have been violated and even otherwise the decision is arbitrary, unreasoned and bad in law. The contention advanced on behalf of the respondents is that the appeals are not maintainable under section 9C of the Tariff Act and

that the exercise of power by the Central Government under section 9A of the Tariff Act read with rule 18 of the 1995 Anti-Dumping Rules is legislative in nature and so neither the principles of natural justice are required to be complied with nor a reasoned order is required to be passed.

9. In order to examine these submissions it would be useful to first examine the relevant provisions of the Tariff Act, the 1995 Anti-Dumping Rules and the 1997 Safeguard Rules.

10. Anti-dumping duty is imposed by the Central Government under section 9A of the Tariff Act. It provides that where any article is exported by an exporter or producer from any county 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. The margin of dumping, the export price and the normal price have all been defined in section 9A(1) of the Tariff Act.

11. Sub-section (5) of section 9A provides that anti-dumping duty imposed shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition.

12. Sub-section (6) of the section 9A of the Tariff Act provides that the margin of dumping has to be ascertained and determined by the Central Government, after such enquiry as may be considered necessary and the Central Government may, by notification in the Official Gazette, make rules for the purpose of this section.

13. Section 9C of the Tariff Act deals with Appeal and sub-section (1) of section 9C is reproduced below:

"9C. Appeal

(1) An appeal against the order of determination or review thereof shall lie 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), in respect of the existence, degree and effect of-

(i) any subsidy or dumping in relation to import of any article; or

(ii) import of any article into India in such increased quantities and under such condition so as to cause or threatening to cause serious injury to domestic industry requiring imposition of safeguard duty in relation to import of that article."

14. Section 8B of the Tariff Act deals with power of Central Government to apply safeguard measures and the relevant portion is reproduced below:

"8B. Power of Central Government to apply safeguard measures.

(1) If the Central Government, after conducting such enquiry as it deems fit, is satisfied that any article is imported into India in such increased quantity and under such conditions so as to cause or threaten to cause serious injury to domestic industry, it may, by notification in the Official Gazette, apply such safeguard measures on that article, as it deems appropriate.

(2) The safeguard measures referred to in sub-section (1) shall include imposition of safeguard duty, application of tariff-rate quota or such other measure, as the Central Government may consider appropriate, to curb the increased quantity of imports of an article to prevent serious injury to domestic industry:

Provided that no such measure shall be applied on an article originating from a developing country so long as the share of imports of that article from that country does not exceed three per cent or where the article is originating from more than one developing country,

> then, so long as the aggregate of the imports from each of such developing countries with less than three per cent. import share taken together, does not exceed nine per cent. of the total imports of that article into India:
>
> Provided further that the Central Government may, by notification in the Official Gazette, exempt such quantity of any article as it may specify in the notification, when imported from any country or territory into India, from payment of the whole or part of the safeguard duty leviable thereon.
>
> xxxxxxxxx
>
> (7) The safeguard duty imposed under this section shall be in addition to any other duty imposed under this Act or under any other law for the time being in force.
>
> (8) The safeguard measures applied under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such application:
>
> Provided that if the Central Government is of the opinion that the domestic industry has taken measures to adjust to such injury or threat thereof and it is necessary that the safeguard measures should continue to be applied, it may extend the period of such application:
>
> Provided further that in no case the safeguard measures shall continue to be applied beyond a period of ten years from the date on which such measures were first applied."

15. In exercise of the powers conferred by sub-section (6) of section 9A and sub-section (2) of the section 9B of the Tariff Act, the Central Government framed the 1995 Anti-Dumping Rules.

16. The duties of the designated authority are contained in rule 4 and the relevant portion is reproduced below:

> **"4. Duties of the designated authority.-**
>
> xxxxxxxxxxx
>
> (d) to recommend to the Central Government-
>
> (i) the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, after considering the principles laid down in the Annexure III to these rules; and
>
> (ii) the date of commencement of such duty;"

17. Rule 2 deals with initiation of investigation to determine the existence, degree and effect of any alleged dumping.

18. Rule 6 deals with the principles governing investigation and it is reproduced below:

> **"6. Principles governing investigations.-**
>
> (1) 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 and such public notice shall, inter alia, contain adequate information 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 authority 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 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.

Explanation: For the purpose of this sub-rule, the notice calling for information 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 industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, injury where applicable, and causality.

(6) The designated authority may allow an interested party or its representative to present the information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented to it by one interested party to

the other interested parties, participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedesthe 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."

19. Rule 10 deals with determination or normal value, export price and margin of dumping and it is reproduced below:

"10. Determination of normal value, export price and margin of dumping-

An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules."

20. Rule 11 deals with determination of injury and it is reproduced below:

"11. Determination of injury. –

(1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their

effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

(i) there is a concentration of dumped imports into an isolated market, and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market."

21. Rule 17 deals with final findings. It is reproduced below:

"Final findings.-

(1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit to the Central Government its final finding –

(a) as to, -

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

xxxxxxx

(b) Recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry after considering the principles laid down in the Annexure III to rules."

22. Rule 18 deals with levy of duty and the relevant portion is reproduced below:

> **"18. Levy of duty.-**
>
> (1) The Central Government may, within three months of the date of publication of final findings by the designated authority under rule 17, impose by notification in the Official Gazette, upon importation into India of the article covered by the final finding, anti-dumping duty not exceeding the margin of dumping as determined under rule 17."

23. Annexure-I to the 1995 Anti-Dumping Rules deals with the principles governing the determination of normal value, export price and margin of dumping. It provides that the designated authority while determining the normal value, export price and margin of dumping shall take into account the principles contained in clauses (1) to (8) of the Annexure.

24. Annexure-II to the 1995 Anti-Dumping Rules deals with the principles for determination of injury. It provides that the designated authority while determining the injury or threat of material injury to domestic industry or material retardation of the establishment of such an industry, and causal link between dumped imports and such injury, shall inter alia, take the principles enumerated from (i) to (vii) of Annexure II under consideration.

25. Annexure-III to the 1995 Anti-Dumping Rules deals with the principles for determination of non-injurious price.

26. Rule 4 of the 1997 Safeguard Rules that have been framed by the Central Government under section 8B (5) of the Tariff Act deals with the duties of the Director General. While rule 5 deals with initiation of investigation, rule 6 deals with the principles governing

investigations. Rule 8 deals with determination of serious injury or threat of serious injury and it is reproduced below:

> **"8. Determination of serious injury or threat of serious injury. -** The Director General shall determine serious injury or threat of serious injury to the domestic industry taking into account the following principles, namely:-
>
> (1) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry, the Director General shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the article concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
>
> (2) The determination referred to in paragraph (1) shall not be made unless the investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the article concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports. In such a cases, the Director General may refer the complaint to the authority for anti-dumping or countervailing duty investigations, as appropriate."

27. Rule 11 deals with final findings and is reproduced below:

> **"11. Final findings. -** (1) The Director General shall, within 8 months from the date of initiation of the investigation or within such extended period as the Central Government may allow, determine whether,-

(a) the increased imports of the article under investigation has caused or threatened to cause serious injury to the domestic industry, and

(b) a causal link exists between the increased imports and serious injury or threat of serious injury.

(2)(a) The Director General shall also give its recommendation regarding amount of duty which, if levied, would be adequate to prevent or remedy serious injury and to facilitate positive adjustment.

(b) the level of tariff rate quota, if imposed as a measure, may be determined having regard to the following conditions, namely:-

(i) maintaining traditional trade flow of the article over the representative period;

(ii) the existing and likely demand supply scenario in the country; and

Any other condition that may be considered relevant:

Provided that the tariff rate quota applied shall not reduce the quantity of imports below that level of the recent period, which shall be the average of imports in the last three years for which statistics are available, unless a different level is deemed necessary to prevent or remedy serious injury;

(c) tariff rate quota may be global or country specific;

(d) specific tariff rate quota may be allocated to counties with substantial interest, considering the proportion of the share of imports of the article concerned into the country during a representative period, and having regard to all relevant factors which may have or are likely to affect the trade in the article;

(e) in a case where the tariff rate quota is country specific, a residual tariff rate quota shall be provided for all other countries and in case the countries with specific tariff rate quota exhaust their specific tariff rate quotas, such countries may use the residual tariff rate quota available;

(f) any unused tariff rate quota may be carried forward and added to the tariff rate quota for the progressive liberalisation adequate to facilitate.

(3) The Director General shall also make his recommendations regarding the duration of levy of (measure):

Provided that where the period recommended is more than one year, the Director General shall also recommend progressive liberalisation adequate to facilitate [* * *] adjustment.

(4) The final findings if affirmative, shall contain all information on the matter of facts and law and reasons which have led to the conclusion.

(5) The Director General shall issue a public notice recording his final findings.

(6) The Director General shall send a copy of the public notice regarding his final findings to the Central Government in the Ministry of Commerce and in the Ministry of Finance."

28. Rule 12 deals with levy of measure and it is reproduced below:

"12. Levy of measure. - (1) The Central Government may, impose by a notification in the Official Gazette, upon importation into India of the product covered under the final finding, a safeguard duty not exceeding the amount which has been found adequate to prevent or remedy serious injury and to facilitate positive adjustment.
(2) It the final finding of the Director General is negative, that is contrary to the prima facie evidence on whose basis the investigation was initiated, the Central Government shall within thirty days of the publication of final findings by the Director General under rule 11, withdraw the provisional duty imposed, if any."

29. It is keeping in mind the aforesaid legal provisions that the submissions advanced by the learned counsel for the appellants and the learned counsel for the private respondents, as also the learned authorised representatives appearing for the respondent Union of India have to be considered.

Maintainability of appeal under section 9C of the Tariff Act

30. The submission advanced on behalf of the respondents is that an appeal under section 9C of the Tariff Act shall lie only against an **order of determination or review thereof, in respect of the existence, degree and effect of any subsidy or dumping** in relation to import of any article **or** import of any article into India in such increased quantities and under such condition so as to cause or threatening to cause serious injury to domestic industry requiring imposition of safeguard duty in relation to import of that article. Learned counsel underlined the significance of the aforesaid bold portion and submitted that the expression has been deliberately used by the Parliament in section 9C, unlike section 128 of the Customs Act 1962, wherein an appeal lies against **any decision or order**. The submission is that in view of the provisions of section 9A of the Tariff Act read with the provisions of the 1995 Anti-Dumping Rules, the power to investigate and determine the existence, degree and effect of any dumping in relation to import of any article vests with the designated authority and, therefore, by corollary, the final findings issued by the designated authority would constitute an "order of determination in respect of the existence, degree and effect of any dumping" in relation to import of any article. In support of this submission, learned counsel placed reliance upon the decision of the Delhi High Court in **Jindal Poly Film Ltd.** vs. **Designated Authority** [4] . Learned counsel, therefore, submitted that the office memorandum issued by the Central Government can at best be described as an order or decision not to impose duty and it cannot in any manner be treated as an "order of determination in respect of the existence, degree and effect of any

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4. (2018) 362 E.L.T. 994 (Delhi)

dumping". Learned counsel also submitted that the issuance of the office memorandum, which is an inter-departmental communication conveying the decision of Central Government in the Ministry of Finance not to impose anti-dumping duty, is not envisaged under the provisions of the Tariff Act or the 1995 Anti-Dumping Rules. Thus, section 9C of the Tariff Act cannot possibly contemplate an appeal against an order which does not flow from any of the provisions of the Tariff Act or the 1995 Anti-Dumping Rules. Learned counsel also submitted that the final findings are in the nature of recommendation and anti-dumping duty can be imposed only by the Central Government by issuance of a notification. The notification only would, therefore, gives a cause of action for filing an appeal before the Tribunal. According to the learned counsel, the actual challenge by the domestic industry or the importers/exporters is to the determination contained in the final findings issued by the designated authority since the reasoning as to the existence, degree and effect of dumping is only found in the final findings of the designated authority and in an appeal before the Tribunal, the challenge is always made to the final findings of the designated authority. Learned counsel pointed out that the consequential notification is also challenged, which in the process gets set aside or modified, only to make the appellate remedy effective for the appellant. It is for this reason that the learned counsel submitted that it is only the final findings issued by the designated authority, acting on behalf the Central Government under section 9A (6) read with the 1995 Anti-Dumping Rules, that constitute an "order of determination in respect of existence, degree and effect of any alleged dumping".

31. Learned counsel for the appellants however, submitted that the office memorandum clearly conveys the decision of the Central Government not to impose any anti-dumping duty and, therefore, an appeal would lie under section 9C of the Tariff Act, for it is an order of determination in respect of the existence, degree and effect of any subsidy or dumping in relation to import of any article. The determination which is required to be made, in terms of section 9C of the Tariff Act, is by the Central Government and the word 'determination' qualifies the word 'order' thereby restricting the right of appeal to those orders which are determinative and final. In the case of a negative opinion, the recommendation of the designated authority is a determinative opinion or order. In the case of a positive opinion, however, the final findings of the designated authority is neither determinative nor final, and no appeal lies against such order. In this connection reliance has been placed on the judgment of the Supreme Court in **Saurashtra Chemicals Ltd.** vs. **Union of India**[5].

32. Learned counsel for the appellants also placed reliance upon the judgment of the Delhi High Court in **Jindal Poly Film** and submitted that if the Central Government accepts the recommendation of the designated authority, a notification is issued for the imposition of anti-dumping duty, which is a composite determinative order in respect of the existence, degree, and effect of dumping, against which an appeal lies to the Tribunal, but if the Central Government decides to reject the recommendation, then there is no occasion to issue a notification, and an office memorandum is issued containing the determinative order on the aforesaid aspects. The aforesaid notification and the office

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5. 2000 (118) E.L.T. 305 (S.C.)

memorandum are thus orders in respect of the existence, degree and effect of dumping, subject to appeal under section 9C of the Act. In this connection learned counsel for the appellants also placed reliance upon the judgments of the Supreme Court in **Association of Synthetic Fibre Industry** vs. **J.K Industries Ltd.**[6] and **Designated Authority** vs. **Sandisk International Ltd**[7].

33. Learned counsel for the appellants also submitted that if the contention of the respondents that no appeal lies against an office memorandum and an appeal can only be filed only against positive determination is accepted, then the provisions of appeal would be available only to foreign importers when the Central Government decides to impose anti-dumping duty, and would not be available to the domestic industry when the Central Government decides not to impose anti-dumping duty. This would clearly be against the purpose and object the Tariff Act, which is to shield the domestic industry where any article is exported by an exporter or producer to India at less than its normal value.

34. Learned counsel for the appellant, therefore, submitted that the office memorandum contains the final order of determination passed by the Central Government, after due consideration of the recommendation made by the designated authority in the final findings and, therefore, an appeal would lie to the Tribunal under section 9C of the Tariff Act.

35. The submissions advanced by the learned counsel for the appellants and the learned counsel for the respondents on the

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6. 2006 (199) E.L.T. 196 (S.C.)
7. 2017 (347) E.L.T. 577 (S.C.)

maintainability of the appeal under section 9C of the Tariff Act have been considered.

36. The issue that arises for consideration is as to whether an appeal would lie to the Tribunal in a case where the decision of the Central Government not to impose any anti-dumping duty is conveyed through an office memorandum, despite a positive recommendation made by the designated authority in the final findings for imposing anti-dumping duty. It has also to be considered whether an appeal would lie to the Tribunal in a case where despite a positive recommendation made by the designated authority for imposition anti-dumping duty, the Central Government does not take any decision, which decision has to be taken under rule 18 of the 1995 Anti-Dumping Rules within a period of three months from the date of publication of the final findings by the designated authority.

37. It would, therefore, be necessary to examine section 9C of the Tariff Act. It provides that an appeal against the **order or determination** shall lie to the Tribunal, **in respect of** the existence, degree and effect of any subsidy or dumping in relation to import of any article. Sub-section (1) of section 9A of the Tariff Act provides that where any article is exported by an importer or producer from any 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. 'Margin of dumping' means the difference between the export price of the article and the normal value. Sub-section (6) of section 9A of the Tariff Act provides that the margin of dumping, as referred to in sub-

section (1), shall be ascertained and determined by the Central Government, after such enquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of the section. Such rules may provide for the manner in which the export price, the normal value and the margin of dumping in relation to such articles can be determined and for the assessment and collection of such anti-dumping duty. As noticed above, the 1995 Anti-Dumping Rules have been framed by Central Government in exercise of such powers and these rules confer upon the designated authority power to not only initiate an investigation to determine the existence, degree and effect of any alleged dumping but also contain the principles governing investigations for determination of normal value, export price and the margin of dumping. The said Rules also contemplate determination of injury.

38. The final findings are submitted by the designated authority to the Central Government after determining as to whether or not the article under investigation is being dumped in India. The final findings contain the export price, normal value and the margin of dumping. It is, thereafter, that under rule 18 the Central Government may, within three months of the date of publication of the final findings by the designated authority, impose by notification in the Official Gazette, upon importation in India of the article covered by the final findings, anti-dumping duty not exceeding the margin of dumping determined under rule 17.

39. A perusal of section 9C of the Tariff Act, as amended on 01.08.2019, would show that an appeal would lie to the Tribunal against the order of the determination in respect of the existence,

degree and effect of any subsidy or dumping in relation to import of any article. The word 'determination' qualifies the word 'order'. Thus, an appeal would lie only against such orders which are determinative and final in respect of the existence, degree and effect of any subsidy or dumping in relation to import of any article.

40. It would be useful to examine the meaning of the expression **in respect of** occurring in section 9C of the Tariff Act. It is defined in P Ramanatha Aiyar's-The Law Lexicon 3rd Edition as follows:

> "**In respect of**. Seeing that; as regards.
>
> The expression "in respect of"is wider in its connotation than word "in" or "on". Therefore a class of municipal tax, though not a tax on the premises or buildings will never-theless be a tax in respect of the premises or building used for the business. I.T. Commissioner vs. Chunilal, AIR 1968 Pat 364 at 367."

41. It is, therefore, clear that the expression 'in respect of' is of wide connotation than the word 'in', making an order of determination as regards the existence, degree and effect of any subsidy or dumping amenable to an appeal to the Tribunal under section 9C of the Tariff Act.

42. The provisions of section 9C of the Tariff Act, as they existed prior to 01.08.2019, are as follows:

> "(1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Service Tax Appellant Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellant Tribunal)."

43. It would be seen that prior to 01.08.2019, an appeal would lie to the Tribunal under section 9C of the Tariff Act against the order of determination **regarding** the existence, degree and effect of any subsidy or dumping in relation to import any article. The word 'regarding' has been defined in Oxford English Reference Dictionary (Indian Edition) as follows:

"regarding /prep.- about, concerning; in respect of."

44. There is, therefore, no difference in the meaning of the expression 'in respect of' or 'regarding', and an order of determination concerning the existence, degree and effect of any subsidy or dumping would give a cause for filing an appeal before the Tribunal.

45. The Delhi High Court in **Jindal Poly Film** pointed out that the scope and ambit of an appeal under section 9C of the Tariff Act is wide and broad and that section 9C ex facie does not restrict the right to appeal to specific category of orders, except that the order should determine the existence, degree and effect of subsidy or dumping in relation to imports in India. The High Court noted that the designated authority had in affirmative recommended imposition of anti-dumping duty, which question had not attained finality and was required to be considered by the Central Government. Hence, the order passed by the designated authority remained a mere recommendation and had not fructified into final determination. On the other hand, when the designated authority holds and gives a final finding in negative i.e. no anti-dumping duty is required to be imposed, the order of the designated authority is final and no further examination is mandated and required. Negative final finding order is determinative, and not a

mere recommendation as in the case of positive finding proposing imposition of anti-dumping duty.

46. The Delhi High Court further pointed out that the Tariff Act uses the expression "Central Government'' and does not use the expression "designated authority" which expression is to be found and defined in the 1995 Anti-Dumping Rules, but the designated authority is nothing but part and parcel of the Central Government. The term "designated authority" has been used in the Rules for clarity in view of the two tier procedure in the form of objective and reasoned recommendation to be followed by further examination and issue of notification in the Gazette which is necessary to impose and levy any tax, including anti-dumping duty. The designated authority acts for and on behalf of the Central Government and has been bestowed with the powers vested and conferred on the Central Government under the Tariff Act. The designated authority, when it performs the functions under the Tariff Act, acts for and on behalf of the Central Government and not as an independent and a distinct third party. The role of the designated authority can, therefore, clearly be connected with the power and role of the Central Government under the main enactment i.e. the Tariff Act read with the mandate of the 1995 Anti-Dumping Rules.

47. It is in this context that the Delhi High Court observed that a provision conferring right to appeal has to be read in a manner that it effectuates the legislative purpose in a reasonable, practical and liberal manner since it is remedial and the right to appeal should not be restricted or denied unless such a construction is unavoidable. Thus, the right to appeal conferred should not be forfeited or abandoned

unless the Statute so states and can be inferred on reasonable and practical interpretation. Section 9C of the Tariff Act should, therefore, be interpreted in a manner that it would effectuate and not frustrate the purpose of the legislation that a party should have a right of appeal against the quasi-judicial determination in relation to orders determining existence, degree and effect of any subsidy or dumping of articles imported into India. Section 9C does not state and provide that an appeal is maintainable only against a customs notification.

48. In this connection it would also be appropriate to refer to the judgment of the Supreme Court in **Saurashtra Chemicals** and it is as follows:

> "We see no reason whatsoever to entertain these special leave petitions. It is perfectly clear now that we have seen the provisions of the Act that the order of the Designated Authority is purely recommendatory. **The appeal that lies is against the determination and that determination has to be made by the Central Government.** For this reason, we decline to exercise jurisdiction under Article 136 of the Constitution of India and dismiss the special leave petitions."
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> **(emphasis supplied)**

49. In **Association of Synthetic Fibre Industry,** the Supreme Court observed:-

> "The same are directed to be vacated. The Designated Authority may submit its final findings to the Central Government and the same shall also be available for being published by way of notification. The Central Government may take its own decision on such findings in accordance with law. Needless to say, all these steps including the imposition of anti-dumping duty, in the event of the Central Government forming an opinion to do so, would be subject to the result of the writ petition pending in the High Court and the High Court does have power to grant an interim relief at any stage of the proceedings subject to

> a case in that regard being made out. That is what the law is. The decision of the Central Government in the matter of anti-dumping duty is appealable and also subject to writ jurisdiction on well settled parameters of constitutional law."

50. An anomalous situation would arise if the contention advanced by the learned counsel for the respondents that an appeal under section 9(C) of the Tariff Act would lie only against the final findings of the designated authority is accepted. This is for the reason that in such a situation if a positive recommendation is made by the designated authority and the Central Government decides not to impose anti-dumping duty, which decision is communicated by issuance of an office memorandum, the domestic industry at whose instance the entire exercise was initiated would have no right to appeal and it will only be the foreign exporters or producers who would have the right to appeal if the Central Government accepts the recommendation of the designated authority and issues a notification for imposition of Anti-Dumping Duty.

51. As noticed above, the designated authority performs functions under the Tariff Act on behalf of the Central Government and not as an independent authority. Section 9(C) of the Tariff Act does not restrict the right of appeal to specific category of orders, except that the orders should determine the existence, degree and effect of subsidy or dumping in relation to imports of articles in India. The provisions of section 9(C) of the Tariff Act conferring right to appeal have to be read in a manner that it effectuates the legislative purpose in a reasonable, practical and liberal manner since it is remedial and the right to appeal should not be restricted or denied unless such a construction is unavoidable. The right to appeal should not be denied, unless the

Statute so specifically states nor should it be read so as to frustrate the purpose of providing an appellate remedy in relation to orders determining existence, degree and effect of any subsidy or dumping of articles imported into India as the expression 'in respect of' is of wide connotation.

52. It is true that right of appeal is a statutory right, as has also been contended by the learned counsel for the respondents, but as discussed above, section 9C of the Tariff Act provides for an appeal to the Tribunal if the Central Government takes a decision not to impose anti-dumping duty, even though the designated authority had made a recommendation in its final findings for imposition of anti-dumping duty.

53. It is also not possible to accept the contention of the learned counsel for the respondents that since an appeal is not specifically provided under section 9C of the Tariff Act against an office memorandum containing the decision of the Central Government not to impose anti-dumping duty, the appeal filed by the domestic industry would not be maintainable. This is for the reason that the decision of the Central Government not to impose anti-dumping duty is in respect of the existence, degree and effect of any subsidy or dumping in relation to import of articles into India.

54. The contention advanced by the learned counsel for the respondents that since a notification is not issued by the Central Government when it decides not to impose anti-dumping duty, it would mean that the domestic industry cannot file an appeal before the Tribunal under section 9C of the Tariff Act cannot also be accepted. It is the decision of the Central Government that would give a cause to

a domestic industry to file an appeal since that decision is in respect of the existence, degree and effect of any subsidy or dumping in relation to import of any article.

55. There are two options that can be exercised by the Central Government when it receives a recommendation in the final findings of the designated authority for imposition of anti-dumping duty. It can either accept the recommendation and issue the notification for imposition of anti-dumping duty, in which case the foreign producers of the article or the importers of such article can file an appeal to the Tribunal to challenge the notification **or** the Central Government can take a decision not to accept the recommendation of the designated authority and an office memorandum is issued conveying the decision of the Central Government. In this latter situation there is no reason as to why the domestic industry should be denied the right to file an appeal to the Tribunal against this decision of the Central Government since it would be in respect of the existence, degree and effect of any subsidy or dumping in relation to import of the article. The determination contemplated in rule 18 of the 1995 Anti-Dumping Rules would include a negative determination as well as a 'nil' determination. Further, the determination of the "existence, degree and effect" of dumping or subsidy or surge in imports, includes determination of non existence of dumping, subsidy or surge in imports.

56. This precise issue as to whether an appeal would be maintainable under section 9C of the Tariff Act was examined by the Tribunal in **Jubilant Ingrevia Limited** vs. **Union of India**[8] and it was held:

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8. Anti-Dumping Appeal No. 50461 of 2021 decided on 27.10.2021

> "18. It is, therefore, clear that a discretion is vested in the Central Government to either impose anti-dumping duty or not impose anti-dumping duty. In the present case, an Office Memorandum dated 14.12.2020 was issued in connection with the final findings of the designated authority notified on 25.08.2020 and it states that the Central Government has decided not to impose anti-dumping duty on imports of subject good from the subject countries. There is, therefore, no manner of doubt that the Central Government had made a determination regarding the existence, degree and effect of dumping in relation to import of any article. An appeal would clearly lie to the Tribunal under section 9C of the Tariff Act."

57. It is, therefore, not possible to accept the contention of the learned counsel for the respondents that an appeal would not lie to the Tribunal under section 9C of the Tariff Act against the decision of the Central Government, contained in the office memorandum, not to impose anti-dumping duty.

Is the determination by the Central Government legislative in character or quasi-judicial in nature

58. Section 9A of the Tariff Act provides that where any article is exported by an exporter or producer from any country 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. Under sub-section (6) of section 9A, the margin of dumping has to be ascertained and determined by the Central Government, after such inquiry as it may consider necessary. It also empowers the Central Government to make rules for the purposes of this section. The Central Government has framed the 1995 Anti-Dumping Rules which contain an elaborate procedure regarding the principles governing investigation; the determination of

normal value, export price and margin of dumping; the determination of injury; the disclosure of information; and the recording of final findings. Rule 18 provides that the Central Government may, within three months, impose upon importation into India of the article covered by the final findings, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.

59. The contention of the learned counsel for the appellants is that the functions performed by the Central Government under section 9A of the Tariff Act read with rule 18 of the 1995 Anti-Dumping Rules are quasi–judicial in nature, while that of learned counsel appearing for the respondents is that the said functions are legislative in character.

60. This issue was considered by the Supreme Court in **Reliance Industries Ltd.** vs. **Designated Authority**[9] and it was held that the functions performed by the Central Government are quasi-judicial in nature and not legislative. The observations are as follows:

> "37. We are of the opinion that the nature of the proceedings before the DA are quasi-judicial, and it is well-settled that a quasi-judicial 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.
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> 38. **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

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9. 2006 (202) E.L.T. 23 (S.C.)

> CESTAT. This also makes it clear that the proceedings before the DA are quasi-judicial."
>
> **(emphasis supplied)**

61. The aforesaid view was reiterated by the Supreme Court in **Union of India** vs. **Kumho Petrochemicals Company Ltd.**[10].

62. Learned counsel for the respondents, however, placed reliance upon a three judge bench decision of the Supreme Court in **Haridas Exports** vs. **All India Float Glass MFRS. Association**[11] and pointed out that this decision was rendered by the Supreme Court prior to the decision of the two judge bench decision of the Supreme Court in **Reliance Industries**, but it was not placed. Learned counsel, therefore, contended that in view of the decision of the Supreme Court in **Haridas Exports**, the functions performed by the Central Government under section 9A of the Tariff Act are legislative in nature and in support of this contention, learned counsel also placed reliance upon the decision of the Gujarat High Court in **Alembic Ltd.** vs. **Union of India**[12].

63. In **Haridas Exports**, the challenge was to the orders passed by the Monopolies and Restrictive Trade Practices Commission whereby Indonesian manufacturers of float glass had been restrained from exporting the same to India at allegedly predatory prices. It is while examining the contention raised by the appellants therein that the jurisdiction of the Monopolies and Restrictive Trade Practices Commission is not ousted by the anti-dumping provisions of the Tariff Act, that the Supreme Court observed:

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10. 2017 (351) E.L.T. 65 (S.C.)
11. 2002 (145) E.L.T. 241 (S.C.)
12. 2013 (291) E.L.T. 327 (Guj.)

"48. There is in this case no challenge to the import policy allowing import of float glass and even if such a challenge was to be there it would hardly succeed. **The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such a challenge will amount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have.** It is not a Court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to decide whether the action of the Government in permitting import of float glass even at predatory prices is valid or not. The Commission cannot prohibit import, it's jurisdiction commences after import is completed and any restrictive trade practice takes place.

49. **Customs duty on import of any goods is levied under the provisions of the Customs Tariff Act. The rate at which the import duty is to be levied is a matter of policy. The rate of duty is determined by the schedule to the Customs Tariff Act and is subject to such exemption as may be granted under that Act. Thus the rate of import duty which is imposed is a legislative act and is thus not amenable to the jurisdiction of the MRTP Commission. A party cannot contend before the MRTP Commission that the rate of duty is too high or too low. In fact, such a challenge is hardly likely to succeed in a Court of law and the question of the MRTP Commission having such a jurisdiction does not arise.**

50. **Apart from the rate of duty the value of the goods imported has to be determined for the purpose of levy of duty. The customs authorities are required to determine whether the value of the goods imported has been correctly declared.** In case of wrong valuation, the customs authorities can determine the correct value and levy duty thereon. Normally the goods are valued at the price at which they are actually purchased. Then that will be the value at which the duty will be imposed. It is not the case of the respondents that the appellants are guilty of under-valuing the goods imported. It is the low price which has been charged by

> the Indonesian exporter which is really the object of attack.
>
> 51. **The levy or non-levy of anti-dumping or other duty being a legislative act pursuant to the exercise of powers under the Customs Tariff Act can also not be a subject-matter of judicial review by the MRTP Commission.** The two Acts substantially operate in different fields. ******"
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> **(emphasis supplied)**

64. It is seen that it was in connection with the levy of Customs duty on import of any goods that the Supreme Court observed that the rate of duty which is imposed is a legislative act and thus not amendable to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission. However, the Supreme Court also observed that the levy or non-levy of anti-dumping duty or other duty, being a legislative act pursuance to the exercise of powers under the Tariff Act, cannot be a subject matter of judicial review by the said Commission.

65. The Supreme Court in **Reliance Industries** had elaborately examined the provisions of the Tariff Act and the Rules framed thereunder and thereafter held that the issuance of the notification under section 9A of the Tariff Act is not legislative. The Supreme Court noticed that the designated authority determines the lis between the domestic industry on the one hand and the importer of foreign goods from the foreign supplier on the other hand. The determination of the recommendation of the designated authority and the notification on its basis is also subject to an appeal before the Tribunal. The Supreme Court opined that this would also make the proceedings quasi-judicial in nature.

66. What also needs to be noticed is that Delhi High Court in **Jindal Polyfilm** pointed out that there was no conflict between the opinion expressed by the Supreme Court in **Reliance Industries** and **Haridas Exports**, as they both referred to two different facets of legislation in question, which require both quasi-judicial adjudication and in case of positive finding, imposition of anti-dumping duty by a delegated legislative enactment in the form of issue of a notification. In this context paragraph 30 of the judgment of the Delhi High Court in **Jindal Poly Film** needs to be referred to and it is reproduced below:

> "30. Before us reference was made to the Supreme Court in Union of India and Anr. v. Kumho Petro Chemicals Company Ltd. & Anr., (2017) 8 SCC 307 = 2017 (351) E.L.T. 65 (S.C.), where it was held that the exercise undertaken by the Central Government under sunset review was somewhat different from the initial exercise to determine whether Anti-dumping duty was to be levied or not. In case of sunset review the focus would be on the issue whether withdrawal of the Anti-dumping duty would lead to continuation or recurrence of dumping as well as injury to the domestic industry. **In this context reference was made to Reliance Industries Limited v. Designated Authority & Ors,** (2006) 10 SCC 368 = 2006 (202) E.L.T. 23 (S.C.), **wherein it has been held that the proceedings before the Designated Authority were quasi-judicial and therefore must be in accordance with the principles of natural justice. Hence, reasons must be disclosed by the Designated Authority for its decision. It was also observed that the notification of the Central Government under Section 9A would not be a purely legislative act, but a quasi-judicial in nature.** In the case of Alembic Ltd. (supra) the Gujarat High Court had noticed **Haridas Exports v. All India Float Glass Manufacturers' Association,** (2002) 6 SCC 600 = 2002 (145) E.L.T. 241 (S.C.), which **decision had held that the levy or non-levy of Anti-dumping duty or other duty cannot be made subject matter of judicial review before the Monopolies and Restrictive Trade Practices**

> **Commission. In this context, the Supreme Court had observed that levy or non-levy of Anti-dumping duty is a legislative act.** In Alembic Ltd. (supra), the Gujarat High Court has observed that levy or non-levy of Anti-dumping duty or any other duty under the CT Act, i.e. Customs Tariff Act, as explained in Haridas Exports (supra) was in the context of Monopolies and Restrictive Trade Practices Commission, whose jurisdiction has been invoked. **Haridas Exports (supra) had held that Monopolies and Restrictive Trade Practices Act and the CT Act substantially operate in different fields and distinct spheres and there was no conflict between the two. We however, do not perceive and accept any conflict between the opinion expressed in Reliance Industries Limited (supra) and Haridas Exports (supra) as they both refer to two different facets of the legislation in question, which requires both quasi-judicial adjudication and on positive finding for imposition of Anti-dumping duty a delegated legislative enactment in the form of issue of notification."**
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> **(emphasis supplied)**

67. This decision of the Delhi High Court in **Jindal Poly Film** noticed that the Gujarat High Court in **Alembic Ltd.** had held that the Monopolies and Restrictive Trade Practices Act and the Tariff Act operate in different fields and distinct spheres and there is no conflict between the two.

68. It needs to be remembered that there is a difference between the levy of customs duty and levy of anti-dumping duty. Although anti-dumping duty is levied and collected by the customs authorities, it is entirely different from the customs duties not only in concept and substance but also in purpose and operation. The main differences between the two are:

(i) Conceptually, anti-dumping and the like measures in their essence are linked to the notion of fair trade. The object of

these duties is to guard against situation arising out of unfair trade practices, while customs duties are a means of raising revenue;

(ii) Customs duties fall in the realm of trade and fiscal policies of the Government, while anti-dumping and anti-subsidy measures are trade remedial measures;

(iii) The object of anti-dumping and allied duties is to offset the injurious effect of international price discrimination, while customs duties have implications for the government revenue;

(iv) Anti-dumping duties are not necessarily in the nature of a tax measure since the authority is empowered to suspend these duties in case of an exporter offering a price undertaking. Thus, such measures are not always in the form of duties/taxes;

(v) Anti-dumping and anti-subsidy duties are levied against exporter/country since they are country-specific and exporter specific as against the customs duties which are general and universally applicable to all imports, irrespective of the country of origin and the exporter. Further, customs duties are not levied as a result of an investigation, to determine the extent of dumping by an exporter in the past. The anti-dumping duties are after an extensive investigation and are intended to correct an unfair trade practice. It is a measure for shielding domestic producers from unfair competition; and

(vi) Thus, there are basic conceptual and operational differences between the customs duty and the anti-dumping duty. In fact, anti-dumping duty is levied over and above the normal customs duty chargeable on the import of goods in question.

69. Learned counsel appearing for the respondents have also placed reliance upon a decision of the Gujarat High Court in **Alembic Ltd.**, and submitted that the function performed by the Central Government is legislative in nature. A perusal of paragraphs 27 and 28 of the judgment of the High Court leaves no manner of doubt that the issue

as to whether the Central Government performs legislative functions or quasi-judicial functions was not decided and only for the purpose of the petition it was accepted that the Central Government exercises quasi-judicial powers.

70. It would also be useful to refer to decision of the Supreme Court in **Union of India and another** vs. **Cynamide India Ltd. and another**[13], wherein while examining the notifications issued by the Central Government under the provisions of the Drugs (Prices Control) Order, 1979 fixing maximum prices at which indigenously manufactured bulk drugs could be sold by the manufacturers, the Supreme Court observed that ordinarily price fixation is a legislative activity but it may also assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. The Supreme Court also observed that there is a very thin line dividing the legislative and administrative functions but still it can be said that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, while an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy. The relevant observations of the Supreme Court are as follows:

> "7. **The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other.** It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an

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13. (1987) 2 SCC 720

illusion. **Administrative, quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity.** Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it is necessary that the line must sometimes be drawn as different legal fights and consequences may ensue. **The distinction between the two has usually been expressed as 'one between the general and the particular'.** 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.' It has also been said "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". ******** **Price fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals.** Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. **In such situations the determination of price may acquire a quasi-judicial character. Otherwise, price fixation is generally a legislative activity."**

(emphasis supplied)

71. Learned counsel for the appellants, in the alternative, submitted that even if it is assumed that the Central Government performs legislative functions when it decides not to impose anti-dumping duty despite a positive recommendation made by the designated authority, then too the principles of natural justice and the requirement of a reasoned order have to be complied with, since the Central Government would be performing the third category of conditional legislation contemplated in the judgment of the Supreme Court in **State of Tamil Nadu** vs. **K. Sabanayagam and another**[14].

72. It would, therefore, be necessary to examine this decision of the Supreme Court in **K. Sabanayagam**. The issue that arose for consideration was whether the Payment of Bonus Act, 1965[15] will be applicable to the employees of the Tamil Nadu Housing Board during the relevant accounting year. In this connection, section 36 of the Payment of Bonus Act was considered by the Supreme Court and it is reproduced below:

> "36. Power of exemption.-If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of the provisions of this Act thereto, it may, be notification in the official Gazette, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of establishments from all or any of the provisions of this Act."

73. It is while exercising the aforesaid powers conferred under section 36 of the Payment of Bonus Act that the State of Tamil Nadu issued a government order directing that the Tamil Nadu Housing

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14. (1998) 1 SCC 318
15. the Payment of Bonus Act

Board would be exempted from all the provisions of the Payment of Bonus Act. The Supreme Court noticed that section 36 was a piece of conditional legislation and in the case of conditional legislation, a legislation would be complete in itself but its operation is made to depend on the fulfillment of certain conditions and what is delegated to an outside authority is the power to determine, according to its own judgment, whether or not those conditions are fulfilled. The Supreme Court drew a distinction between conditional legislation and delegated legislation proper where some portion of the legislative power of the legislature is delegated to an outside authority, but pointed out that in either case the delegatee may in a given case, be required to consider the view point of rival parties likely to be affected by the exercise of such power.

74. The Supreme Court further pointed out that conditional legislation can broadly be classified into three categories. The **first category** is when the legislature has completed the task of enacting a Statue but its future applicability to a given area is left to the subjective satisfaction of the delegatee. The **second category** is when the delegatee has to decide whether and under what circumstance the Act, which has come into force, is to be partially withdrawn from operation in a given area so as not to be applicable to a given class of persons, who are otherwise governed by the Act. In both the aforesaid two categories, the Supreme Court held that the delegatee, who exercises conditional legislation, acts on its pure subjective satisfaction regarding the existence of conditions precedent for exercise of such power. The **third category** of cases, the Supreme Court pointed out, would be those where the exercise of conditional legislation would

depend upon the satisfaction of the delegatee on objective facts placed by one class of persons seeking the benefit of such an exercise with a view to deprive the rival class of persons, who otherwise have already got statutory benefits under the Act. The Supreme Court pointed out that in this category the legislature fixes objective conditions for the exercise of power and this exercise is not a mere ministerial exercise. After having held that section 36 of the Payment of Bonus Act would be a legislation falling in the aforesaid third category of the conditional legislative, the Supreme Court held that since the legislature had prescribed objective standards and had permitted the delegatee to grant exemption and to withdraw the benefit enjoyed by persons, the principles of fair play or consultation or natural justice cannot be totally excluded. The relevant portions of the judgment of the Supreme Court are reproduced below:

> "14. ******It is thus obvious that in the case of conditional legislation, the legislation is complete in itself but its operation is made to depend on fulfilment of certain conditions and what is delegated to an outside authority, is the power to determine according to its own judgment whether or not those conditions are fulfilled. In case of delegated legislation proper, some portion of the legislative power of the Legislature is delegated to the outside authority in that, the Legislature, though competent to perform both the essential and ancillary legislative functions, performs only the former and parts with the latter,** i.e., the ancillary function of laying down details in favour of another for executing the policy of the statute enacted. **The distinction between the two exists in this that whereas conditional legislation contains no element of delegation of legislative power and its, therefore, not open to attack on the ground of excessive delegation, delegated legislation does confer some legislative power on some outside authority and is**

therefore open to attack on the ground of excessive delegation. In this connection we may also refer to a decision of this Court rendered in the case of Sardar Inder Singh v. State of Rajasthan [AIR 1957 SC 510] wherein it is laid down that when as appropriate Legislature enacts a law and authorities an outside authority to bring it into force in such area or at such time as it may decide, that is conditional and not delegated legislation.

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16. ******The aforesaid observations clearly show that even while exercising a delegated legislative function or while acting in exercise of conditional legislative power the delegate may in a given case be required to consider viewpoint of rival parties which may be likely to be affected by the exercise of such power. **We must keep in view that Section 36 is not held to be a piece of delegated legislation as authoritatively ruled by the Constitution Bench of this Court in Jalan Trading Co.'s case. Therefore, we must proceed on the basis that it is a piece of conditional legislation only.**

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19. **Conditional legislation can, therefore be broadly classified into three categories –**

In the first category when the Legislature has completed its task of enacting a Statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate who being satisfied about the conditions indicating the ripe time for applying the machinery of the said Act to a given area exercises that power as a delegate of the parent legislative body.

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20. **However, there may be second category** of conditional legislations wherein the delegate has to decide whether and under what circumstances a completed Act of the parent legislation which has already come into force is to be partially withdrawn from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act.

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21. **In the aforesaid first two categories of cases delegate who exercises conditional legislation acting**

on its pure subjective satisfaction regarding existence of conditions precedent for exercise of such power may not be required to hear parties likely to be affected by the exercise of such power.

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22. **But there may be a third category of cases** wherein the exercise of conditional legislation would depend upon satisfaction of the delegate on objective facts placed by one class of persons seeking benefit of such an exercise with a view to deprive the rival class of persons who otherwise might have already got statutory benefits under the Act and who are likely to lose the existing benefit because of exercise of such a power by the delegate. In such type of cases the satisfaction of the delegate has necessary to be based on objective consideration of such power. May be such an exercise may not amount to any judicial or quasi-judicial function, still it has to be treated to be one which requires objective consideration of relevant factual data pressed in service by one side and which could be tried to be rebutted by the other side who would be adversely affected if such exercise of power is undertaken by the delegate. **In such a third category of cases of conditional legislation the Legislature fixes up objective conditions for the exercise of power of by the delegate to be applied to past or existing facts and for deciding whether the rights or liabilities created by the Act are to be denied or extended to particular areas, persons or groups. This exercise is not left to his objective satisfaction nor it is a mere ministerial exercise.** Section 36 of the Act with which we are concerned falls in this third category of conditional legislative functions. A mere look at the said Section shows that before an appropriate Government can form its opinion regarding grant of partial of full exemption to any establishment or class of establishments which are otherwise already covered by the sweep of the Act the following factual conditions must be found to have existed at the relevant time to enable the delegate to exercise its powers under the Act:

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23. ******To instill life in such an exercise and to make it comprehensive** and kicking it has to be held

that before an appropriate Government, which is approached by an establishment or a class of establishments for exempting them from the relevant provisions of the Act for a given accounting year, arrives at any opinion for exercise of such power it must take into consideration the rival version and material evidence in rebuttal furnished by the class of employees who are likely to be affected by such exercise of power of and thereafter if such opinion is arrived at by the appropriate Government on a comprehensive consideration of the rival version and then the power is exercised, such an exercise would not become vulnerable on the ground of nonapplication of mind of relevant facts and subject to the challenge of such exercise on the ground that it was a mala fide or colourable exercise of power of conditions precedent were not satisfied such an exercise of power would not be likely to be found fault with by any competent court before which such an order under Section 36 is brought on the anvil of scrutiny. **Therefore, in the aforesaid third category of cases even though the delegate is said to be exercising conditional legislative power it cannot be said to be entrusted by the Legislature with the function of a purely subjective nature based on its sole discretion, nor can it be said to be exercising such power for binding uniformly the whole class of persons without benefiting one class at the cost of the other class of persons who are subjected to the exercise of such exemption power.** It must, therefore be held that in such third category of cases of exercise of power of conditional legislation objective assessment of relevant data furnished by rival classes of persons likely to be affected by such an exercise cannot be said to be ruled out or a taboo to such an exercise of power. ****** **In the case before us the legislation has prescribed objective standards and has permitted the delegate to grant exemption and to withdraw the benefit of the statute which is being enjoyed by the persons and in our opinion, in such a situation, principles of fair play or consultation or natural justice cannot be totally excluded.**

*******"

(emphasis supplied)

75. Thus, even if it is assumed that the Central Government exercises legislative powers when it imposes anti-dumping duty or has taken a decision not to impose anti-dumping under section 9A of the Tariff Act, it would still be a piece of conditional legislation falling under the third category of conditional legislations pointed out by the Supreme Court in **K. Sabanayagam**. This is for the reason that in the scheme of the Tariff Act and the 1995 Anti-Dumping Rules, the Central Government has necessarily to examine all the relevant factors prescribed in the Tariff Act and the Rules for coming to a conclusion whether anti-dumping duty has to be levied or not. It cannot be that it is only the designated authority that is required to follow the procedure prescribed under the Tariff Act and the Rules framed thereunder for making a recommendation to the Central Government, for while taking a decision on the recommendation made by the designated authority in the final findings the Central Government would have to examine whether the designated authority has objectively considered all the relevant factors on the basis of the evidence led by the parties. This would be more clear from the provisions of section 9A(6) of the Tariff Act which provide that the margin of dumping, which is a relevant factor, has to be ascertained and determined by the Central Government, after such inquiry as it may consider necessary. Rules may have been framed by the Central Government under which the designated authority has to carry out a meticulous examination, but nonetheless when the Central Government has to take a decision on the recommendation made by the designated authority in the final findings such factual aspects

cannot be ignored. There is a clear lis between the domestic industry on the one hand and the foreign exporter and importers on the other hand since the domestic industry desires anti-dumping duty to be imposed for which purpose investigation is carried out by the designated authority, but the foreign exporters and importers resist the imposition of anti-dumping duty. For exercise of such power, a detail procedure has been provided in the Tariff Act, the 1995 Anti-Dumping Rules or the 1997 Safeguard Rules.

76. The Rajasthan High Court in **J.K. Industries** vs. **Union of India** [16] also held that the nature of delegated legislation as contemplated under section 9A of the Tariff Act squarely falls in the third category of conditional legislative function pointed out by the Supreme Court in **K. Sabanayagam**, as a result of which the excise has to be undertaken not on a subjective satisfaction of the delegatee but objectively on facts.

77. The aforesaid decision of the Supreme Court in **K. Sabanayagam** was referred to with approval by the Supreme Court in **Godawat Pan Masala Products I.P. Ltd.** vs. **Union of India and Others**[17]. While examining the validity of notifications issued by the Food (Health) Authority under section 7(iv) of the Prevention of Food Adulteration Act, 1954 by which the manufacture, sale, storage and distribution of pan masala and gutka were banned for different periods, the Supreme Court, after referring to its earlier decision in **K. Sabanayagam**, emphasized that in the third category of conditional legislation, the satisfaction of the delegatee must necessarily be based on objective consideration, irrespective of whether the exercise of such

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16. 2005 (186) E.L.T. 3 (Raj.)
17. (2004) 7 Supreme Court Cases 68

power is judicial or quasi-judicial in nature. The authority has to objectively consider the relevant factual data pressed into service by one side, which can be rebutted by the other side adversely affected. The Supreme Court ultimately held as follows:

> "76. In our view, even if the impugned notification falls into the last of the above category of cases, whatever material the Food (Health) Authority had, before taking a decision on the articles in question, ought to have been presented to the appellants who are likely to be affected by the ban order. The principle of natural justice requires that they should have been given an opportunity of meeting such facts. This how not been done in the present case. For this reason also, the notification is bad in law."

78. It will be evident from the aforesaid judgments that the Central Government, while acting as a delegated legislative body, performs two distinct and separate functions in the context of the levy of anti-dumping and safeguard duty. The first is the function of framing Rules such as the Anti-Dumping Rules 1995 or the 1997 Safeguard Rules, which function is clearly legislative. The second function is the making of a determination under rule 18 of the Anti-Dumping Rules 1995 or rule 12 of the 1997 Safeguard Rules, which function is quasi judicial in nature. While the exercise of the legislative function of framing Rules is not appealable before the Tribunal, the second function of making a determination is expressly made appealable under section 9C of the Tariff Act. The function of making a determination in individual cases by applying the broad legislative framework and policy already set out in the Statute is not at all legislative in character, but clearly a quasi-judicial function requiring the Central Government to follow the principles of natural justice by affording an opportunity to the party likely to be adversely.

79. The Tribunal in **Jubilant Ingrevia Limited** also held that the function performed by the Central Government under section 9A of the Tariff Acts is quasi-judicial in nature and not legislative.

Principles of Natural Justice and Reasoned Order

80. This issue was examined at length by the Tribunal in **Jubilant Ingrevia Limited** and after referring to the judgments of the Supreme Court in **Shri Sitaram Sugar Company Limited and another** vs. **Union of India and others**[18], **S.N. Mukherjee** vs. **Union of India**[19] and **Indian Railway Construction Co. Ltd.** vs. **Ajay Kumar**[20], the Tribunal observed as follows:

> "32. What transpires from the aforesaid decisions of the Supreme Court is that:-
>
> (i) Requirement to record reasons should govern decisions of an authority exercising quasi-judicial functions, though the extent and nature of the reasons would depend on the particular facts and circumstances;
>
> (ii) Reasons should be clear and explicit so as to indicate that the authority has given due consideration to the points of controversy. Discretion, when vested in an authority, has to be excised in a judicious manner and the reasons for exercising discretion must be cogent and convincing and must appear on the face of the record. Discretion must also be exercised in accordance with the rules of reason and justice and should not be arbitrary, vague and fanciful;
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> (iii) The principle of equality enshrined in article 14 of the Constitution must guide every State action while exercising quasi-judicial powers;

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18. (1990) 3 SCC 223
19. (1990) 4 SCC 594
20. (2003) 4 SCC 579

(iv) The power, if exercised on non consideration or non application of mind to relevant factors, will be regarded as erroneous exercise of power; and

(v) An authority has to act in accordance with and within the limits of the legislation with confers power on the authority to act."

81. In **Jubilant Ingrevia Limited** a similar office memorandum was issued conveying the decision of the Central Government not to impose anti-dumping duty. The Tribunal observed that though a discretion is vested with the Central Government to accept or not accept the final findings of the designated authority, but such a discretion has to be exercised in a judicious manner by a reasoned order in accordance with the principles of natural justice, more particularly because an appeal would lie to the Tribunal against the determination made by the Central Government. The relevant portion of the decision is reproduced below:

"43. ****** **No reasons have been recorded as to why the Central Government decided not to impose anti-dumping duty. No doubt a discretion vested with the Central Government to either accept or not accept the final findings of the designated authority, but that discretion was required to be exercised in a judicious manner by a reasoned order in accordance with the principles laid down by the Supreme Court** in S. N. Mukherjee, Shri Sitaram Sugar Mills Ltd., Hindustan Tin Works and Kranti Associations. **Recording of reasons assumes more importance in the present case, because of the fact that the Tariff Act and the 1995, Anti-Dumping Rules under which such a discretion is required to be exercised by the Central Government, themselves provide for a detailed analysis of host of factors for imposition of anti-dumping duty.** The designated authority had, after a detailed analysis, arrived at a conclusion that anti-dumping duty was required to be imposed and accordingly

> made a recommendation to the Central Government. **It was, therefore, necessary for the Central Government to have examined all the relevant aspects necessary for deciding whether anti-dumping duty was required to be imposed or not and deal with the findings recorded by the designated authority, if the Central Government was to take a view different from the view expressed in the recommendation made by the designated authority.** Recording of reasons, therefore, is a must if the Central Government decides not to follow the recommendation made by the designated authority. **It is also necessary for the Central Government to record reasons in such a situation because an appeal lies to the Tribunal against the determination made by the Central Government."**
>
> **(emphasis supplied)**

82. In view of the judgments of the Supreme Court in **K. Sabanayagam**, **Cynamide India Ltd.** and **Godawat Pan Masala**, and the decision of the Tribunal in **Jubilant Ingrevia Limited**, it has to be held that reasons have to be recorded by the Central Government when it proceeds to form an opinion not to impose any anti-dumping duty despite a positive recommendation made by the designated authority in the final findings for imposition of anti-dumping duty.

83. Learned counsel for the appellants also submitted, in view of the decision of the Supreme Court in **Punjab National Bank and others** vs. **Kunj Behari Mishra**[21], that in case the Central Government is prima facie of the opinion that the recommendation made by the designated authority for imposition of anti-dumping duty has not to be accepted, an opportunity is required to be given to the domestic industry to represent on the tentative reasons recorded by the Central Government for such

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21. (1998) 7 SCC 84

disagreement. In connection with disciplinary enquiry, the Supreme Court observed as follows:

> "19. **The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings.** The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. **The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.** The aforesaid conclusion, which we have arrived at, is also in consonance with the underlying principle enunciated by this Court in the case of Institute of Chartered Accountants (supra). While agreeing with the decision in Ram Kishan's case (supra), we are of the opinion that the contrary view expressed in S.S. Koshal and M.C. Saxena's cases (supra) do not lay down the correct law."
>
> **(emphasis supplied)**

84. In view of the aforesaid decision of the Supreme Court in **Punjab National Bank,** the submission advanced by learned counsel for the appellant deserves to be accepted. Thus, if the Central Government forms a prima facie opinion that the final findings of the designated authority recommending imposition of anti-dumping duty are not required to be accepted then tentative reasons have to be

recorded and conveyed to the domestic industry so as to give an opportunity to the domestic industry to submit a representation. Though the Tariff Act and the 1995 Anti-Dumping Rules or the 1997 Safeguard Rules do not provide for such an opportunity to be provided to the domestic industry, but the principles of natural justice would require such an opportunity to be provided.

Non communication of the decision of the Central Government on the recommendation made by the designated authority

85. Section 9A of the Tariff Act provides that where any article is exported by an exporter or producer from any 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 anti-dumping duty not exceeding the margin of dumping in relation to such article. It is under rule 17 of the 1995 Anti-Dumping Rules that the designated authority is required to, within one year from the date of initiation of an investigation, determine as to whether or not the article under investigation is being dumped in India and submit its final findings to the Central Government. Under rule 18, the Central Government may, within three months of the date of publication of the final findings by the designated authority under rule 17, impose by a notification in the Official Gazette, upon importation into India of the article covered by the final findings, anti-dumping duty not exceeding the margin of dumping as determined under rule 17.

86. In the present case, it is not in dispute that the final findings of the designed authority were published on 12.05.2021. In all the

appeals except twelve appeals, reference of which is given in the first paragraph of this order, an office memorandum was issued by the notifying that the Central Government, after examining the recommendation, had decided not to impose anti-dumping duty. In twelve appeals, the appellants have stated that such an office memorandum was not issued. Learned counsel appearing for the Central Government has also not stated or placed such an office memorandum.

87. The issue that arises for consideration is whether a presumption can be drawn that the Central Government has taken a decision not to impose anti-dumping duty as a decision was not taken within three months by the Central Government from the date of publication of the final findings by the designated authority. On a consideration of the provisions of the Tariff Act and the 1995 Anti-Dumping Rules, it is clear that a presumption can safely to be drawn that the Central Government by keeping silent for a long period of time shall be deemed to have taken a decision not to impose anti-dumping duty and such cases would also fall in the category of those cases where an office memorandum has actually been issued conveying the decision of the Central Government not to impose anti-dumping duty.

88. The inevitable conclusion, therefore, that follows from the aforesaid discussion is that the decision taken by the Central Government not to impose anti-dumping duty despite a recommendation having been made by the designated authority for imposition of anti-dumping duty, cannot be sustained and the matter would have to be remitted to the Central Government for taking a fresh decision on the recommendation made by the designated

authority. Though, only the office memorandum dated 20.07.2021 assailed in Anti-Dumping Appeal No. 51491 of 2021 and the office memorandum dated 18.11.2020 in Anti-Dumping Appeal No. 52174 of 2021 have been reproduced above, but similar office memorandums have been issued by the Tax Research Unit in the remaining Anti-Dumping Appeals, except Anti-Dumping Appeals referred to in the first paragraph of the order.

89. Thus, for the reasons stated above, office memorandums dated 20.07.2021, 18.11.2020, 28.04.2021, 27.10.2021, 30.03.2021, 28.10.2021, 30.03.2021, 27.09.2021, 05.03.2021, 05.03.2021, 01.03.2021, 08.12.2021 and 01.10.2021 in Anti-Dumping Appeal No's. 51491 of 2021, 52174 of 2021, 51492 of 2021, 51829 of 2021, 51830 of 2021, 51878 of 2021, 51879 of 2021, 51880 of 2021, 52102 of 2021, 52172 of 2021, 52072 of 2021, 50134 of 2022 and 50272 of 2022, respectively, are set aside and the matter is remitted to the Central Government to reconsider the recommendation made by the designated authority in the light of the observations made above.

90. It has been stated that in Anti-Dumping Appeal No's. 51836 of 2021, 51877 of 2021, 51922 of 2021, 51923 of 2021, 51924 of 2021, 51925 of 2021, 51926 of 2021, 52100 of 2021, 50017 of 2022, 50060 of 2022 and 50271 of 2022, office memorandums have not been issued, but it has been held that in such cases also the Central Government shall be deemed to have taken a decision not to impose anti-dumping duty. The matters in these twelve appeals are also remitted to the Central Government for taking a decision on the recommendation made by the designated authority in the light of the observations made above.

91. All the aforesaid Anti-Dumping Appeals are, therefore, allowed to the extent indicated above.

(Order pronounced on **30.08.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

(RACHANA GUPTA)
MEMBER (JUDICIAL)

Shreya/ JB