M/S. S & S. ENTERPRISE

v.

DESIGNATED AUTHORITY AND ORS.

FEBRUARY 22, 2005

[RUMA PAL, ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Anti-dumping laws :

Custom Tariff (Anti-Dumping Duty on Dumped Articles and for Determination of Injuries) Rules 1995—Rules 14(d) & Rule 5 :

Investigation under Rule 14(d)—When terminable—Held, the Designated Authority to terminate the investigation, if volume of dumped imports found to be less than the de minimis of 3% of total imports.

'Volume of imports'—Basis of computation—Held, volume of imports is to be computed on the basis of the quantity of imports and not the price of imports—Customs Tariff Act, 1975—Section 9A.

Anti-dumping duty—Imposition of—Purpose and object of—Discussed.

The appellant imported batteries from Bangladesh. On a complaint, Respondent no. 1 conducted investigation and found that the total number of imports made by the appellant was less than 3% of total imports of such batteries. Inspite of such finding, Respondent no.1 continued the investigation and held that the value of imports made by the appellant was exceeding 6% which was more than the de minimis limit of 3% as provided under Rule 14(d) of Custom Tariff (Anti-Dumping Duty on Dumped Articles and for Determination of Injuries) Rules 1995. On appeal, the Central Excise & Gold Control Appellate Tribunal (CEGAT) upheld the order holding that the word 'volume' in the context of Rule 14 meant value. Hence the appeal.

Allowing the appeal, the Court

HELD : 1. The interpretation of Rule 14(d) of the Custom Tariff (Anti-Dumping Duty on Dumped Articles and for Determination of Injuries) Rules, 1995 by Respondent No. 1 and the Tribunal is incorrect

A and contrary to its language. The imposition of dumping duty is under Section 9A of the Customs Tariff Act 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than B the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of dumping duty is a method recognized by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within C the country with the interest of the domestic markets. However a negligible quantity of imports would not be sufficient to cause such injury.

[258-H; 259-A-B, C]

Agreement on implementation of Article VI of the GATT, 1994, Article 5.8, referred to.

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2.1. There shall be immediate termination of investigation in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country E is found to account for less than 3% of imports of the like product in the importing country. [259-D, E]

2.2. The *de minimis* rule as far as the price is concerned is when the dumping margin or the difference between the export price of the article F and its normal value, is less than 2%. In other words the exporter is selling the goods in India at almost the same price that it does in its country. As far as quantity is concerned, if the export accounts for less than 3% of the total imports of the like article into India, it is treated as too trivial for the law and is ignored. The Rules have also distinguished between volume as meaning quantity on the one hand and price on the other.

G [259-G-H; 260-A]

3. The percentage of 3% *vis-a-vis* the quantity is not broad based but determined, with reference to a 'like article'. The consideration of volume would also be limited to such "like articles". Therefore, when Rule 14(d) says that the investigation must be terminated if the 'volume' of the

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dumped imports is less than 3% of the imports of the like product, it must mean that the quantity of dumped imports must account for less than 3% of the total imports. To hold otherwise would mean that if the price is lower than 3%, irrespective of the quantity imported, the investigation would be dropped and it would, lead to the absurd situation that a small number of expensive imports would invite anti-dumping investigation but cheap imports flooding the domestic markets would not. In fact such a situation is exactly what the dumping rules have been framed to prevent.

[260-E, G-H; 261-A]

4. Nobody has questioned the preliminary finding of the Designated Authority that the quantity of the imports from Bangladesh during the period of investigation was less than 3% of the total imports of the 'like article' to India. The investigation therefore should have been promptly dropped against the appellant. The respondents' submission that the preliminary finding was not conclusive of the matter and was subject to a final finding is unacceptable and is against the language of Rule 14(d). The proceedings for investigation, are, under Rule 5, initiated on a written application by the domestic industry. The application is required to be supported by evidence of (a) dumping; (b) injury where applicable; and (c) a causal link between dumping of imports and the alleged injury. The Designated Authority is required on the basis of the evidence as adduced by the domestic industry, to arrive at a *prima facie* conclusion even before initiating the investigation. After collecting such evidence and information which pertain to the ingredients of dumping, the Designated Authority is required "in appropriate cases" to record a preliminary finding regarding export price, normal value and margin of dumping and the injury to the domestic industry under Rule 12. If the Designated Authority is of the opinion on the basis of its preliminary finding that there has been dumping which has caused injury to the domestic industry, it may make a preliminary determination of the margin of dumping. On the basis of the preliminary finding, the Central Government may, under Rule 13, levy provisional duty. It is at this stage that Rule 14 comes into operation when the investigation is yet to be completed finally and the final findings published under Rule 17. As it was incumbent on Respondent No. 1 to have closed the investigation under Rule 14(d) once it held that the volume of dumped imports was less than 3% of the total imports, it is sufficient to set aside the anti dumping duty imposed on the appellant.

[261-B-D, F-H; 262-A]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9012 of 2003.

From the Judgment and Order dated 3.6.2003 of the Central Excise, Customs and Gold (Control) Appellate Tribunal, New Delhi in F.O. Nos. 4-6/2003-AD in A. No. C/2004/2002-AD.

B Dr. Aman Hingorani, Ms. Priya Hingorani, Ms. Reema Bhandari, M/s. Hingorani & Associates the Appellant.

T.S. Doabia, Manish Sharma and D.S. Mahara Respondents.

The Judgment of the Court was delivered by

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RUMA PAL, J. The appellant imported lead acid batteries from Bangladesh during the period 1.2.2000 to 13.9.2001. The total number of batteries so imported were found to be less than 3% of the total imports of such batteries into India during that period. This was so found by the Designated Authority (the Respondent No. 1), on an investigation consequent D upon a complaint lodged by the private respondent under Rule 5 of the Customs Tariff (Anti-Dumping Duty on Dumped Articles and for Determination of Injuries) Rules 1995 (referred to as 'the Rules').

Rule 14(d) *inter alia* provides that if the Designated Authority determines E that the volume of the dumped imports actual or potential from a particular country accounts for less than 3% of the imports of the like product, he shall terminate the investigation immediately. Nevertheless the Respondent No.1 continued the investigation in respect of the imports from Bangladesh on the finding that the value of imports made from Bangladesh was more than 6% which was more than the *de minimis* limit of 3% as provided under Rule F 14(d). On 7th December, 2001 the Respondent No.1 published the final finding determining that anti-dumping duty was payable in respect of such imports of batteries during the period under investigation. The Ministry of Finance accepted the recommendation of the Respondent No.1 and notified the Anti-dumping Duty by Notification dated 2.1.2002.

G The appellant preferred an appeal before the Central Excise & Gold (Control Appellate Tribunal (CEGAT). The Tribunal rejected the submission of the appellant that the Designated Authority should have computed the volume of exports on the basis of quantity rather than on the basis of price. It held that the word "volume" in the context of Rule 14 meant value.

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In our opinion, the interpretation of Rule 14(d) by the respondent No.1 and the Tribunal is incorrect and contrary to its language. The imposition of dumping duty is under Section 9A of the Customs Tariff Act 1975 and the Rules and is the outcome of the General Agreement on Tariff and Trade (GATT) to which India is a party. The purpose behind the imposition of the duty is to curb unfair trade practices resorted to by exporters of a particular country of flooding the domestic markets with goods at rates which are lower than the rate at which the exporters normally sell the same or like goods in their own countries so as to cause or be likely to cause injury to the domestic market. The levy of dumping duty is a method recognized by GATT which seeks to remedy the injury and at the same time balances the right of exporters from other countries to sell their products within the country with the interest of the domestic markets. Thus the factors to constitute 'dumping', is (i) an import at prices which are lower than the normal value of the goods in the exporting country; (ii) the exports must be sufficient to cause injury to the domestic industry.

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However a negligible quantity of imports would not be sufficient to cause such injury. Article 5.8 of the Agreement on Implementation of Article VI of the GATT, 1994 makes this clear :

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> "An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2%, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports of the like product in the importing Member, unless countries which individually account for less than 3% of the imports of the like product in the importing Member collectively account for more than 7% of imports of the like product in the importing Member."

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The *de minimis* rule as far as the price is concerned is when the dumping margin or the difference between the export price of the article and its normal

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A value, is less than 2%. In other words the exporter is selling the goods in India at almost the same price that it does in its country. As far as quantity is concerned, if the export accounts for less than 3% of the total imports of the like article into India, it is treated as too trivial for the law and is ignored.

The Rules have also distinguished between volume as meaning quantity
B on the one hand and price on the other. For example under Rule 11(2), the Designated Authority is required to determine the injury to the domestic industry taking into account, *inter-alia*, the *volume* of dumped imports and their effect on the *price* in the domestic market for like articles. In Section 14 itself, such distinction is maintained in Rule 14 (c) and (d). Of particular
C significance is Annexure II to the Rules, which deals with the principles for determination of injury. Paragraph 1 provides that :

> "A determination of injury shall involve an objective examination of both (a) the *volume* of the dumped imports and the effect of the dumped imports on *prices* in the domestic market for like article and
D (b) the consequent impact of these imports on domestic producers of such products."

Paragraph 2 speaks of the consideration of whether there has been a significant increase in the dumped imports while examining the volume of dumped imports and whether there has been a significant price under cutting
E by the dumped imports in order to assess the effect on the prices in the domestic market i.e. an increase in quantity and a decrease in the export prices. Again Paragraph 5 which deals with the causal relationship between dumping and the injury to the domestic industry speaks of "the volume and prices of imports" as one of the relevant factors.

F The percentage of 3% *vis-a-vis* the quantity is not broad based but determined, we emphasise, with reference to a 'like article'. The word "like article" has been defined in Rule (2) (d) as :-

> " (d) "like article" means an article which is identical or alike in all respects to the article under investigation for being dumped in
G India or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation."

The consideration of volume would also be limited to such "like articles".

H Therefore, when Rule 14(d) says that the investigation must be

terminated if the 'volume' of the dumped imports is less than 3% of the imports of the like product, it must mean that the quantity of dumped imports must account for less than 3% of the total imports. To hold otherwise would mean that if the price is lower than 3%, irrespective of the quantity imported, the investigation would be dropped and it would, as submitted by the appellant, lead to the absurd situation that a small number of expensive imports would invite anti-dumping investigation but cheap imports flooding the domestic markets would not. In fact such a situation is exactly what the dumping rules have been framed to prevent.

Nobody has questioned the preliminary finding of the Designated Authority that the quantity of the imports from Bangladesh during the period of investigation was less than 3% of the total imports of the 'like article' to India. The investigation therefore should have been promptly dropped against the appellant who imported from Bangladesh.

The respondents' submission that the preliminary finding was not conclusive of the matter and was subject to a final finding is unacceptable and is against the language of Rule 14(d). The proceedings for investigation, are, under Rule 5, initiated on a written application by the domestic industry. The application is required to be supported by evidence of (a) dumping; (b) injury where applicable; and (c) a causal link between dumping of imports and the alleged injury. The Designated Authority is required on the basis of the evidence as adduced by the domestic industry, to arrive at a *prima facie* conclusion even before initiating the investigation. The initiation of the investigation is then publicly notified with copies being sent to the known exporters of the articles alleged to be dumped as well as to the Government of exporting countries and other interested parties, [Rule 6(2)]. Information may be required by the Designated Authority from such persons who are required to supply the same, normally within 30 days from the date of the receipt of the notice. After collecting such evidence and information which pertain to the ingredients of dumping, the Designated Authority is required "in appropriate cases" to record a preliminary finding regarding export price, normal value and margin of dumping and the injury to the domestic industry under Rule 12. If the Designated Authority is of the opinion on the basis of its preliminary finding that there has been dumping which has caused injury to the domestic industry, it may make a preliminary determination of the margin of dumping. On the basis of the preliminary finding the Central Government may, under Rule 13, levy provisional duty. It is at this stage that Rule 14 comes into operation when the investigation is yet to be completed

finally and the final findings published under Rule 17.

As we hold that it was incumbent on the Respondent No. 1 to have closed the investigation under Rule 14(d) once it came to the conclusion that the volume of dumped imports was less than 3% of the total imports it is sufficient to upset the finding of the Tribunal and the Respondent No.1 to set aside the anti dumping duty imposed on the appellant. In the circumstances, it is unnecessary to decide on the further challenge raised by the appellant on the basis of violation of Rule 16.

The appeal is accordingly allowed and the impugned decisions of the Tribunal and the Designated Authority are set aside.

D.G. Appeal allowed.