A SHENYANG MASTSUSHITA S. BATTERY CO. LTD.

v.

M/S. EXIDE INDUSTRIES LTD. AND ORS.

FEBRUARY 23, 2005

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

Customs Tariff Act, 1975; Section 9A/Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for determination of Injuries) Rules, 1995; Annexure 1 to the Rules; Notification dated 15.7.99 and 31.5.2001 notifying amendments in Annexure-I :

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Anti-dumping duty—Filing of petition by respondents/domestic industry for initiation of anti-dumping investigation against foreign companies—Designated Authority held that anti-dumping duty not leviable as dumping margin was negative—Challenge to—Imposing anti-dumping duty, Tribunal observed that the Designated Authority had failed to conduct the normal value investigation in accordance with the Rules—On appeal, held: Sufficient material furnished by the foreign-company to justify that it was operating in accordance with market conditions—Tribunal imposed duty on the foreign company without examining the injury, if any, caused to the domestic industry by the foreign companies—Finding of the Tribunal is erroneous, hence set aside.

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'Normal value'—Meaning of in the context of anti-dumping duty.

The question which arose for determination in this appeal was as to whether the appellant, a foreign company, manufacturer and exporter of lead acid batteries in India, operated on Market Economy Principles for the purpose of levy of anti-dumping duty under the Customs Tariff Act and the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injuries) Rules, 1955.

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Appellant-foreign company contended that since the Designated Authority did not follow the procedure prescribed either under paragraph 7 or paragraph 8 of the Annexure I to the Rules, it could not subsequently follow the same provisions for the purpose of levying anti-dumping duty without serving them any notices.

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Respondents submitted that China was in fact a non-market economy and there was no question of applying paragraph 8 of the Annexure I to the Rules as introduced by the second notification for amendment in the Rules as the period of investigation was prior to the issuance of that notification; that since non-market economy had to be decided country-wise, any individual foreign company could not be separately represented; and that since the normal value of a non-market economy is country specific, uniform rate was applicable to all exporters and it was not open to appellant, an individual foreign company to claim that it was run according to market economy principles.

Allowing the appeal, the Court

HELD : 1.1. It is not necessary to decide whether a Company was to be treated as a non-market economy during the period of investigation or whether the normal value should be decided on a country-wise basis, as respondent No. 1-domestic industry is not allowed to take up what is clearly an inconsistent stand before the Tribunal and also before this Court that the final finding of the Designated Authority could not be sustained because it was in clear violation of the Rules as amended by the notifications dated 15th July, 1999 and 31st May, 2001. Indeed that was the basis on which respondent No. 1's appeal had been allowed by the Tribunal. If the Tribunal was correct, then, even according to the Tribunal, under the second notification dated 31st May, 2001, market driven units in non-market economy countries could prove that they were operating according to market principles. This exception has been provided to the rule of uniform normal value for all exporters in non-market economy countries. [342-F-G-H; 343-A-B]

Designated Authority v. *Haldar Topsoe A/S,* [2000] 6 SCC 626, held inapplicable.

1.2. The only ground on which the Tribunal upset the final finding of the Designated Authority is that they had not physically verified the information given by the appellant. That was factually erroneous since the appellant-foreign company had already produced sufficient material before the Designated Authority to justify the finding that the appellant was operating according to market conditions. The Designated Authority had already visited the manufacturing units of the appellant in China and verified the information produced by the appellant and since the

A **Designated Authority had verified the data prior to submitting its final finding, there was no question of the Designated Authority re-verifying the information given by the appellant. [343-C-D]**

1.3. Having found that the Designated Authority had violated the B **notifications, the Tribunal chose to rectify the situation by issuing an order directing the Designated Authority to comply with the notifications. Since neither of the parties have impugned that order, it was then not open to the Tribunal to proceed on the basis that there was a violation of the notifications. [343-G]**

C **1.4. The Tribunal did not address itself to the question whether there was sufficient evidence to support the Designated Authority's finding that there was no dumping by the appellant. It held that the appellant was liable to pay dumping duty without considering the injury, if any, to the domestic industry and the causal connection between the alleged dumping and the** D **injury. [343-H; 344-A]**

2. The Designated Authority had initiated, conducted and concluded the proceedings under Rules 1 to 6. If non-market economy principles have now to be applied then the entire process would have to start from scratch. Hence, no purpose would be served in remanding the matter back to the E **Tribunal. [344-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6371 of 2003.

From the Judgment and Order dated 3.6.2003 of the Central Excise, Customs and Gord (Control) Appellate Tribunal, New Delhi in F.O. No. 4/ F 2003-AD in A.No. C/198 of 2002-AD.

Ms. Meenakshi Arora, Dr. Aman Hingorani, Ms. Priya Hingorani and Ms. Reema Bhandari for the Appellant.

R.F. Nariman and T.S. Doabia, Ms. Manu Nair, Dhruv Dewan, Manish G Sharma and D.S. Mahara for the Respondents.

The Judgment of the Court was delivered by

RUMA PAL, J. The appellant-company carries on the business of manufacturing lead acid batteries in Shenyang, China. It is a subsidiary of H Mastsushita S. Electric Industries Corporation, a multinational company

registered in Japan. A

The dispute in this appeal is whether the appellant-company operated on Market Economy Principles during the period 1st January 2000 to 30th September 2000 for the purposes of the Customs Tariff Act and the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injuries) Rules, 1995. (referred to hereafter as 'the Rules'). B

The principle behind anti dumping laws is to protect the domestic industry from being adversely affected by import of goods at export prices which are below the normal value of the goods in the domestic market of the exporter. Anti dumping duty is leviable under Section 9A of the Customs Tariff Act, 1975 (referred to as 'the Act') read with the Rules which are framed under Section 9A (6). The duty is calculated on the margin of dumping which is the difference between the export price and the normal value. C

The phrase " 'normal value' in relation to an article has been defined in clause (c) to the Explanation to Section 9A (1) as meaning: D

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

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

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

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

A The Rules provide *inter alia* for the assessment of the anti dumping duty by the Designated Authority. The principles to be followed by the Designated Authority for determination of normal value, export price and margin of dumping have been set out in Annexure I to the Rules.

Initially paragraphs 1 to 6 of Annexure I provided for the principles B which relate generally to the determination of normal value for all countries on the assumption that they operate on market economy principles. A distinction was drawn in 1999 for the first time between market economies and non-market economies. Annexure I was amended by two notifications referred to by the Tribunal which were dated 15.7.1999 and 31.5.2001. The C first notification introduced paragraph 7 after paragraph 6 in Annexure-I :

> "In case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including India, or where it is not possible, on any D other reasonable basis, including the price actually paid or payable in India for the like product, duly adjusted if necessary, to include a reasonable profit margin. An appropriate market economy third country shall be selected by the designated authority in a reasonable manner and due account shall be taken of any reliable information made available at the time of the selection. Account shall also be taken E within time limits; where appropriate, of the investigation if any made in similar matter in respect of any other market economy third country. The parties to the investigation shall be informed without unreasonable delay the aforesaid selection of the market economy third country and shall be given a reasonable period of time to offer their comments."

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By this notification a separate procedure was prescribed for determining the normal value of non-market economies. Paragraph 7 to Annexure I now provides for the determination of the normal value with reference to the price paid by a third country with a market economy to India of a like product. If such a third country is selected, the Designated Authority has to inform the G exporters of the selection and grant them a reasonable period to offer their comments. It is only if this procedure is not possible that the Designated Authority can act on any other 'reasonable basis'. In other words, the Designated Authority must exhaust the first method before moving to the alternative procedure.

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The second notification dated 31.5.2001 inserted a further paragraph after paragraph 7 as paragraph 8 in Annexure-I to the following effect :-

" The term "non market economy country" subject to the Note to this paragraph means every country listed in that note and includes any country which the designated authority determines and which does not operate on market principles of cost of pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise. While making such determination, the designated authority shall consider as to whether:-

(i) the decisions of concerned firms in such country regarding prices, costs and inputs, including raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand and without significant State interference in this regard, and whether costs of major inputs substantially reflect market values;

(ii) the production costs and financial situation of such firms are subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other writ-offs, barter trade and payment via compensation of debts;

(iii) such firms are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of the firms, and

(iv) the exchange rate inversions are carried out at the market rate :

Provided that in view of the changing economic conditions in Russia and in the Peoples' Republic of China, where it is shown on the basis of sufficient evidence in writing on the factors specified in this paragraph that market conditions prevail for one or more such firms are subject to anti-dumping investigations, the designated authority may apply the principles set out in paragraphs 1 to 6 instead of the principles set out in this paragraph.

Note :- For the purposes of this paragraph, the list of non market economy countries is Albania, Armenia, Azerbaijan, Belarus, Peoples' Republic of China, Georgia, Kazakstan, North Korea, Kyrghyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. Any country among them seeking to establish

A that it is a market economy country as per criteria enunciated in this paragraph, may provide all necessary information which shall be taken due account by the designated authority".

China was expressly notified as a non market economy by this Notification. However in recognition of the fact that the economic conditions B in China and Russia were rapidly changing, paragraph 8 as introduced by the second notification allows particular units of these two countries to show that the four conditions mentioned in the paragraph were satisfied in respect of that unit. If that is done the Designated Authority would then apply the principles enunciated in paragraphs 1 to 6 of Annexure-I which as we have C said are applicable to market economy countries.

The respondent Nos.1 and 2 representing the domestic industry which either manufactures or imports lead acid batteries, filed a petition for initiation of anti dumping investigation concerning import into India of lead acid batteries from Japan, Republic of Korea, Peoples' Republic of China and Bangladesh D under Rule 5(1) of the Rules. On 12th January, 2001, an initiation notification was issued by the Designated Authority of the Directorate General of Anti-dumping and Allied Duties "being satisfied, *prima facie* that the normal value of the lead acid batteries in the subject countries was significantly higher than net export price indicating that the goods were being dumped by the exporters from the subject countries" and that as a result of the allegedly E dumped imports, domestic industry had suffered injury. The period for the purposes of the investigation as indicated in the initiation notice was 1st January, 2000 to 30th September, 2000. The Designated Authority sent a questionnaire to 31 companies situated in the four named countries. Of the 11 companies located in China, the appellant and two others responded to the F initiation notice. The other companies did not participate in the investigation.

On 21st March, 2001, the Designated Authority issued its preliminary findings. As far as the appellant was concerned, it was stated that the appellant had given no information on the type/model of batteries being manufactured by them which were not being exported to India. It was noted that on the G basis of available evidence, the profitability/loss from different types of batteries varied significantly, which, according to the Designated Authority, indicated the "possibility of existence of cross subsidization among various models significantly affecting pricing policy of the company regarding the different models". It was noted that the information given by the appellant was "selective, incomplete and hence not acceptable". In the circumstances, H

the Designated Authority decided not to take into account the information submitted *inter alia* by the appellant on normal value and export price of the lead batteries in China for the purpose of its preliminary findings but to use information given by the domestic industry on the constructed cost of production as the best information available for the purpose of assessing such normal value and to calculate the dumping margin. On the further *prima facie* finding that the domestic industry had suffered material injury and was facing further threat of material injury on account of the dumped imports of the subject goods *inter alia*, from China, the Designated Authority considered it necessary to impose anti dumping duty provisionally subject to a final determination on all imports of lead acid batteries from China, Korea and Japan in order to remove the injury to the domestic industry. The rates of anti-dumping duty were specified in a chart appended to the order. The Designated Authority, however, invited comments on these findings from "all interested parties for the purposes of being considered in the final finding".

It is the appellant's case that pursuant to this preliminary finding the appellant paid the anti dumping duty at the rate specified after the same was notified by the Central Government. The appellant also submitted further material to the Designated Authority.

In the course of the investigation two officers of the Directorate General of Anti Dumping of Allied Duties visited the appellant's manufacturing facilities in China. A disclosure statement was furnished by the authority to all the parties. After investigation and verification, the Designated Authority noted that the appellant had furnished the required information which had been verified. It was held that anti dumping duty was not applicable to the appellant as the dumping margin was negative. A notification was issued to this effect by the Central Government.

The respondent No. 1 challenged the final order of the Designated Authority dated 7th December, 2001 before the Customs Excise and Gold (Control Appellate Tribunal) (CEGAT). One of the points raised by the respondent Nos. 1 and 2 before the Tribunal was that the Peoples' Republic of China was a non-market economy and, therefore, the normal value should be determined on the basis of the amendments effected to the Rules relating to non-market economies.

During the pendency of the respondent's appeal before the Tribunal, on 25th November, 2002, an order was passed by the Designated Authority which reads as follows.

A ".....As per the Appellants the designated authority failed to proceed as per the Rules.....

The Ld. Counsel appearing on behalf of Chinese exporters would submit that they are entitled to an opportunity to produce data to rebut any presumption against the country as non market economy. B They further submit that the data made available to designated authority would be sufficient to rebut any presumption against the country or individual exporter as one following one marketing conditions. They would further contend that inspite of their providing such data, the designated authority had failed to consider the same for which they should not be visited with adverse consequences. C

After hearing both the sides, we feel in the interest of justice certain directions are to be issued to the designated authority before we come to final decision in the matter. We therefore, direct the designated authority to *examine the data made available by the Chinese exporter & file a statement before this Tribunal* as to have satisfied the tests D under Rule 8 as amended by notification 31.5.2001. Since, the matter has been hanging fire for some time & the appellants are complaining that they are facing irreparable injury by continuing dumping by Chinese exporter, we further direct that the report shall be filed by designated authority on or before 2.12.2002. The matter to come up E for hearing on 3.12.2002."

The Designated Authority submitted a report on the available data on 2nd December, 2002 in compliance with the order of the Tribunal reiterating the stand taken by it earlier and stating that the appellant had complied with all the criteria set out in paragraph 8 in Annexure-1 to the Rules. In other F words the conclusion of the Designated Authority was that the appellant operated on market economy principles therefore market economy principles contained in paragraphs 1 to 6 would apply. The final finding submitted earlier was therefore supported and reaffirmed.

G On 3rd June, 2003 the Tribunal allowed the appeals filed by the Respondent No. 1 accepting its submission and holding that the Designated Authority had failed to conduct the normal value investigation in accordance with the Rules applicable to non-market economy units. It was said that the applicable notifications for the determination of normal value and in particular notification dated 31.5.2001 provided that even in non market economy H countries, market driven units could prove that they were operating according

to market principles. It was noted that pursuant to the interim order of the Tribunal, the Designated Authority had examined the matter from the perspective of requirements under the amended provisions for non market economy countries and had placed a statement before the Tribunal. But the Tribunal rejected the report of the Designated Authority on the ground that it was incumbent on the appellant and the other two units excluded from anti dumping duty to establish that they are run according to market principles and that no verification had been carried out at the premises of the exporters to satisfy itself that the data summary filed in the questionnaire responses correctly reflected the transaction as per the books of account of the individual units and that the accounts satisfied Generally Accepted Accounting Standards (GAAS) of the country. The exclusion of the appellant from the purview of anti-dumping duty, had, according to the Tribunal been done without the necessary scrutiny and, therefore, it was unsustainable. The Tribunal therefore came to the conclusion that the appellant and the other two units had to be treated in the same manner as other manufacturers located in the Peoples Republic of China. In conformity with the provisions of Section 9-A(1)(c) of the Customs Tariff Act. The Tribunal, however, made it clear that if the units (including the appellant) were convinced about the merits of their claim that they are run according to market economy principles they could seek a review of their cases before the Designated Authority. In the circumstances the exemption from anti dumping duty granted to the three Chinese exporters including the appellants by the Designated Authority was set aside and the three units including the appellant were subjected to anti dumping duty.

There is no dispute that the first notification was operative before the initiation notice was issued. The second notification was issued during the investigation proceedings.

There is also no dispute that the Designated Authority followed paragraphs 1 to 6 of Annexure I not only in connection with the investigation but also with regard to the final finding. The appellant's grievance is that the Designated Authority not having followed the procedure prescribed either under paragraph 7 or paragraph 8 its case could not subsequently be considered according to those paragraphs as neither any notice was given by the Designated Authority that the appellant would be treated according to non market economy principles nor was any specific issue raised in this regard. This is admitted in the counter affidavit filed on behalf of the respondent No. 1 where it is said that the respondent No. 1 did not raise the issue of non market economy in its written submissions because the domestic industry

A was not aggrieved by the preliminary finding which imposed anti-dumping duties on exports from China. However, it is stated that the respondent No. 1 had mentioned in its petition and rejoinder that China was a non market economy. In fact it was the respondent No. 1's stand in its appeal from the final finding of the Designated Authority that the Designated Authority had failed to apply the principles applicable to non-market economy countries to B the Chinese exporters including the appellant as introduced by the two notifications.

Learned counsel appearing on behalf of the respondent No. 1 submitted strenuously that China was in fact a non-market economy and there was no C question of applying paragraph 8 as introduced by the second notification on 31.5.2001 as the period of investigation was prior to the issuance of that notification. It is submitted that since non- market economy had to be decided on a country wise basis, individual concerns could not be separately represented. According to the Respondent No. 1 in the decision of this Court *Designated Authority* v. *Haldar Topsoe A/S,* [2000] 6 SCC 626 it has been D held that the normal value of a non-market economy is country specific. Therefore a uniform rate was to be taken for all Chinese exporters and it was not open to an individual unit to claim that it was run according to market economy principles. It is submitted that the preliminary finding of the Designated Authority was in the circumstances correct. According to the E respondent No. 1, the verification conducted by the Designated Authority at the appellant's unit in China was questionable.

It is not necessary to decide whether China was to be treated as a non-market economy during the period of investigation or whether the normal value should be decided on a country-wise basis, as we are not prepared to F allow the respondent No. 1 to take up what is clearly an inconsistent stand. Its submission before the Tribunal as recorded in the Tribunal's order was that the final finding of the Designated Authority could not be sustained because it was in clear violation of the Rules as amended by the notifications dated 15th July, 1999 and 31st May, 2001. The stand has been reiterated before this Court in the counter affidavit filed by the respondent No. 1 where G it is categorically averred that the notification dated 31st May, 2001 had been violated by the Designated Authority and that the Tribunal had rightly come to the conclusion that the Designated Authority had failed to determine the normal value of the Appellants exports in accordance with the Rules applicable to non-market economy units as provided *inter alia* in the notification dated H 31st May, 2001. Indeed that was the basis on which the respondent No. 1's

appeal had been allowed by the Tribunal. If the Tribunal was correct, then, even according to the Tribunal, under the second notification dated 31st May, 2001, market driven units in non-market economy countries could prove that they were operating according to market principles. This exception has been provided to the rule of uniform normal value for all exporters in non-market economy countries. The decision in *Haldor Topsoe* (supra) is inapplicable as it was not rendered with reference to paragraphs 7 or 8 of Annexure I to the Rules.

The only ground on which the Tribunal upset the final finding of the Designated Authority that the appellant operated according to market economy principles was that the Designated Authority had not physically verified the information given by the appellant. That was factually erroneous. It was the clear case of the appellant that it had already produced sufficient material before the Designated Authority to justify a finding that the appellant was operating according to market conditions. It must be remembered that the Designated Authority had already visited the manufacturing units of the appellant in China and verified the information produced by the appellant. The Tribunal had only directed the Designated Authority to consider the data already made available by the appellant in the light of paragraphs 7 and 8 of Annexure I. That is exactly what the Designated Authority did. Since the Designated Authority had verified the data prior to submitting its final finding, there was no question of the Designated Authority re-verifying the information given by the appellant. That this could not have been even within the contemplation of the Tribunal is clear from the fact that the Tribunal had granted only seven days time within which the Designated Authority was to submit its report. The respondent No. 1's contention that the verification was improperly done cannot be gone into at this stage. It is a question of fact, which should have been clearly raised and proved. In fact it does not appear that such a grievance was made before the Tribunal by the respondent No. 1.

Having found that the Designated Authority had violated the notifications, the Tribunal chose to rectify the situation by issuing the order dated 25th November, 2002 which we have quoted earlier. Neither of the parties have impugned that order by which the Designated Authority was directed to comply with the notifications. It was then not open to the Tribunal to proceed on the basis that there was a violation of the notifications.

The Tribunal did not address itself to the question whether there was

A sufficient evidence to support the Designated Authority's finding that there was no dumping by the appellant. It held that the appellant was liable to pay dumping duty without considering the injury if any to the domestic industry and the causal connection between the alleged dumping and the injury.

While the matter was pending before this Court, on 26th October, 2004 B a mid term review was held by the Designated Authority. The Designated Authority determined the normal value of the export from China as per the Rules relating to the non market economy contained in paragraph 7 of Annexure-1 to the Rules, but found that in fact there was a negative dumping margin as far as the appellant was concerned and that therefore it was not C liable to pay anti dumping duty. This mid term review which was carried on 26th October, 2004 is not the subject matter of challenge in this appeal, but it has been contended by the Respondent No. 1 that the appeal has become infructuous.

We think not. For one there may be a question of refund of the anti D dumping duty paid by the appellant pursuant to the preliminary notification. For another we are of the firm view for the reasons stated earlier that the decision of the Tribunal cannot be allowed to stand. The only question that remains is whether the matter should be remanded back to the Tribunal after setting aside the order.

E In our opinion no purpose would be served in remanding the matter back to the Tribunal after setting aside the order at this stage. Admittedly the Designated Authority had initiated, conducted and concluded the proceedings under Rules 1 to 6. If non market economy principles have now to be applied then the entire process would have to start from scratch. Indeed whether F China should have been treated as a non-market economy for the period in question is itself in dispute. Under Rule 17, the Designated Authority is required to submit its final finding within one year from the date of initiation of the notice or at the most by another six months if the Central Government is satisfied that there are special circumstances. The period has long since expired.

G The appeal is accordingly allowed and the decision of the Tribunal is set aside without any order as to costs.

S.K.S. Appeal allowed.