

Customs, Excise and Gold Tribunal - Delhi

M/S. Agfa Gavaert A.G. vs Designated Authority And Addl. ... on 18 May, 2001

Equivalent citations: 2001 (130) ELT 741 Tri Del

ORDER C.N.B. Nair

1. Notification No. 149/2000 -Customs dated 21.12.2000 imposed Anti-dumping duty on black and white Photographic Paper, both resin coated and fibre based, falling under sub-heading No.3703.10 and 3703.90 of the First Schedule to the Customs Tariff Act, originating in, or exported from the U.K. France and Hungary and imported into India. The rate of duty imposed was the difference between the amount mentioned in the corresponding entry in column 5 of the table annexed to the notification and the landed value of imported photographic paper. The amount mentioned in column 5 was the Reference Landed Value of the imported Black and White Photo graphic paper per sq. mtr. Thus, the Reference Landed Value mentioned in column No.5 constituted the reference price for determining whether there was dumping and where the Landed Value of an imported consignment was less than the Reference Landed Value, the difference between Reference Landed Value and the landed value of the imported consignment became payable as anti-dumping duty. Notification No. 149/2000-Customs was issued pursuant to the Final Findings of the Designated Authority, Ministry of Commerce published in the Gazette of India, extra-ordinary Part-1, Section - 1 dated 24th October, 2000. The present appeal is directed against the imposition of duty under the Customs Notification No.149/2000 dated 21.12.2000. The appellant is aggrieved with the imposition of duty under Sl.No. 2 of the Notification in respect of their imports of Black and White Photographic Paper in Jumbo rolls of French Origin. The reference price fixed in respect of such jumbo roll was US \$ 2.87 per sq. mtr. of black and white photographic paper.

2. The appellants have submitted that Anti-dumping duty has been recommended by the Designated Authority without making available to them, the data constituting the basis of computation of Anti-dumping duty. He submitted that basis of calculation of injury margin & Non-injurious price for the domestic industry had not been supplied to them and the Reference Landed Value of 2.87 fixed in the Final Findings of the Designated Authority and adopted in the notification imposing Anti-dumping duty was in excess of the dumping margin. As against this, the learned Counsel representing the Designated Authority stated during arguments on 14.5.01 that Anti-dumping duty had been imposed based on the Non-injurious price worked out for the domestic industry. He also pointed out that the appellants had been furnished the basis of computation of reference price through the Disclosure Statement sent to them before the end of the investigation. He also stated that the authority would have no objection in showing the computation to the appellants at this stage also. Thereupon, hearing of the case was adjourned to the afternoon of 14.5.01 to enable both the sides to verify the data.

3. When the hearing resumed, the Learned Counsel for the appellant submitted that even according to the data shown to him on 14.5.01 the reference price should not exceed US\$ 2.81 Per Sq. Mtr. as the landed value was 2.547 US \$ Per Sq. Mtr. and the dumping margin was 10.2% according to the Final Findings. He also submitted that the Designated authority had erred in working out the Non-injurious price for the domestic industry based on the cost of production of M/s New India Industry, inasmuch as New India Industry could not form part of domestic industry.

4. The Learned Counsel representing the Designated Authority submitted that even though M/s New India Industry was excluded from domestic industry, such exclusion constituted no bar for taking their data into consideration for the purpose of arriving at Non-injurious price of the domestic industry. He referred to Rule 6 of the Anti dumping Rules and submitted that for determining the Non-injurious price of the domestic industry the Designated Authority was at liberty to take into account data produced before him by domestic industry as well as interested parties. In the present case, though M/s New India Industry was not treated as part of the domestic industry, their data was the most reliable information for ascertaining the cost of production of an efficient unit in the country and the Designated Authority had gone by their data in order to ensure that Anti-dumping duty is based on the fair selling price of the domestic industry rather than the very high cost of production of an inefficient domestic unit. He clarified that Designated Authority did not take into account the production cost of M/s Hindustan Photofilm Ltd. as their cost of production was found to be high and if Anti-dumping duty was fixed based on their cost of production the rate of duty would have been too high.

5. The Learned Counsel representing M/s Hindustan Photofilm Ltd. and M/s New India Industries submitted that it is not in dispute in the present case that imported goods were being dumped and the domestic industry suffered injury on account of such dumping. He submitted that Anti-dumping duty in such circumstances was fully justified and the Designated Authority and gone by the best data available. He submitted that the appellant could not have any objection to the method adopted by the Designated Authority inasmuch as fixing the rate of Anti-dumping duty based on the Non-injurious price of M/s New India Industry has worked to the benefit of the appellant. He pointed out that if the Designated Authority had fixed rate of Anti-dumping duty based on the Non-injurious price of M/s HPF, the duty would have been very much higher. He also submitted that it was in the discretion of the Designated Authority to recommend the rate of Anti-dumping duty based on the best data forthcoming during the investigation. In the present case, since M/s New India Industry was an efficient unit with an economical cost of production, the Designated Authority chose to go by the data. He also submitted that the purpose of imposition of Anti-dumping duty is to protect the domestic producers from unfair competition caused by dumping goods. In the present case M/s New India Industry was also a domestic producer of the goods and therefore there was no illegality in adopting their cost of production. In this context he referred to provision in Rule 6 (b) of the Anti-Dumping Rules which allows the Designated Authority to consider informations produced by interested parties.

6. Anti-dumping duty has been imposed under Notification No. 149/2000-Customs on black and white photographic paper based on the Final Findings published by Designated Authority in the Gazette of India dated 28.4.2000. It is a specific requirement under Rule 17 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on dumped articles and for determination of injury) Rules 1995 that the Final Findings determined whether or not the Article under investigation is being dumped into India, whether domestic industry has suffered material injury and whether there was a causal link between dumped imports and injury to domestic industry. Upon reaching a finding that dumping and injury exist and there is causal link between dumped imports and injury, the Designated Authority is to recommend the amount of duty, which, if levied, would be adequate to remove the injury caused to the domestic industry. Thus,

anti-dumping duty is imposable only if dumping from abroad existed, India industry suffered material injury and there was a causal link between the dumping and the injury suffered by domestic industry. Dumping by itself is not sufficient under the law for imposition of Anti-dumping duty. Similarly, injury suffered by domestic industry by itself is no sufficient ground for imposition of Anti-dumping duty. Existence of dumping and material injury together are also not enough. Only if causal link between dumping of imported goods and injury to domestic industry is established, imposition of Anti-dumping can be resorted to. This position is also clear from "Principle for Determination of Injury" contained in Annexure II to the Anti-dumping Rules. The Annexure stipulates that the Designated Authority, while determining the injury to domestic industry and causal link between dumped imports and such injury, shall carry out an objective examination of both the volume of the dumped imports and effect of dumped imports on prices in the domestic market for like article and the consequent impact of these imports on domestic producers of such products. Clause (iv) of Annexure -II states that the examination of the impact of dumped import on domestic industry shall include an evaluation of all relevant economic factors and indices having bearing on the state of the industry. Clause (v) of the said Annexure states that it must be demonstrated that the dumped imports are, through the fact of dumping, causing injury to domestic industry. This Clause also states that the demonstration of causal relationship between the dumped imports and the injury to domestic injury shall be based on an examination of relevant evidence before the Designated Authority. The Clause further states that the Designated Authority shall also examine any known factors other than the dumped imports which at the same time cause injury to the domestic industry and the injury caused by these other factors must not be attributed to the dumped imports. Factors relevant in the respect, inter alia, include productivity of the domestic industry. We read Clauses (iv) and (v) of "Principles for Determination of Injury" as they are crucial for understanding the present case:

"(iv) The examination of the impact of the dumped imports on the domestic industry concerned, shall include an evaluation of the relevant economic factors and indices having a bearing or the state of the industry, including natural and potential decline in sales, profits, output market share, productivit, return on investments or utilisation of capacity; factors affecting domestic prices, the magnitude of the margin of dumping; actual and potential negative effects on cash flow inventories, employment, wage, growth, ability to raise capital investments."

"(v) It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraph (ii) and (iv) above, causing injury to the domestic industry. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of relevant evidence before the designated authority. The designated authority shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injury caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter-alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the fporeign and domestic producers, developments in technology and the export performance and the productivity of the domestic industry."

7. It is clear from the various provisions of the Anti-dumping Rules and Principles governing determination of injury that presence of dumping from abroad and injury to domestic industry and a causal link between dumped imports and such injury to the domestic industry are pre-conditions for imposition of Anti-dumping duty. A recommendation for imposition of Anti-dumping duty can be made only if investigation established the existence of these criteria. In the present case, the investigation was taken up based on an application filed by M/s. New India Industry & M/s Hindustan Photo Films (HPL). It is a requirement under Rule 5 of Anti-Dumping Rules that such an application is by or on behalf of domestic industry and that the application enjoys the required support from domestic industry. On the basis of information and evidence provided, the Designated Authority concluded that there were only two domestic producers in India, namely, the applicant New India Industry and HPL. The Designated Authority also concluded that New India Industry was required to be excluded from the scope of domestic industry and that with the exclusion of New India Industry, HPL is the sole domestic industry. This finding of the Designated Authority was in view of the definition of domestic industry as contained in Rule 2(b) of the Anti-dumping Rules. This definition of domestic industry, which is reproduced below specifies that excluded domestic producers "shall not form part of domestic industry".

Rule 2 (b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers shall be deemed not to form part of domestic industry:

Provided that....."

The consequence of the Finding regarding exclusion of New India Industry is that, for the purpose of determining injury to domestic industry and causal link between dumping and injury to domestic industry, only HPL could be treated as the domestic industry. The Designated Authority's findings regarding injury and causal link are required to be seen from this position. The finding of the authority under heading J- "Injury and CAUSAL LINK" is as under:-

"For the examination of the impact of the imports on the domestic industry in India, we may consider such indices having a bearing on the state of the industry as production, capacity utilisation, sales quantum, stock, profitability, net sales realisation, the magnitude and margin of dumping, etc. in accordance with Annexure II(iv) of the rules supra.

The authority has also examined factors other than dumped imports viz. closure of HPF, its sickness as cited which might be injuring the domestic industry at the same time."

The authority also observed as under with regard to HPL under Sl.No.7 of the Final Findings.

"vii) the capacity utilisation of M/s HPF which has been to an order of 40% since 1991 has dropped to 11-22% in 1997-98 and to 3.2% in 98-99%."

It is clear from the above observations that the Designated Authority reached the Finding during the investigation that HPL had been functioning for quite some time prior to the investigation period (1.4.98 to 30.6.99) itself as an inefficient unit, it had turned sick and that its productivity was very low. Presumably for this reason, analysis regarding injury to domestic industry and causal link has been made in the investigation without regard to HPL. The files of the Designated Authority also show that Non-injurious price for the manufacture of black and white photographic paper for the domestic industry has been worked out solely from the cost of production data of the excluded producer namely New India Industry. M/s. HPF does not find a place in the investigation. The authority has specifically stated in the Final findings that "Authority has therefore, calculated NIP by referencing and normalising the cost data furnished by M/s. New India Industry." Thus, in the present case, injury analysis for domestic industry and causal link between dumping and injury to domestic industry has shown that there was no causal link between the dumped imports and injury to the sole domestic industry, namely, HPF.

8. As already noted earlier in this order, injury to domestic industry and causal link between that injury and dumped imports is a sine qua non for imposition of anti-dumping duty. In the present case, the sickness and inefficiency of the only domestic industry, namely HPL was not caused by the dumped imports of Black & White Photographic Paper. Thus, circumstance permitting imposition of anti-dumping duty on dumped imports of Black & White Photographic Paper did not exist. Imposition of Anti-dumping duty in such a situation, based on the injury suffered by an excluded producer and his Non-injurious price was not legally permissible. Therefore, the recommendation for Anti-dumping duty made in the Final Findings of the Designated Authority has to be held as legally not tenable. Duty imposed pursuant to such a recommendation also can not be upheld. The anti-dumping duty imposed is required to be vacated. Accordingly, the present appeal is allowed and Notification No. 149/2000-Customs dated 21.12.2000 where under Anti-dumping duty was imposed on black and white photographic paper is quashed.