

## IN BRIEF - INTERNATIONAL TRADE



### I. TRADE REMEDIES BY INDIA

Anti-dumping duty imposed on import of Dispersion Unshifted Single-Mode Optical Fiber (SMOF)<sup>1</sup>: The Ministry of Finance (MOF), Government of India (GOI) on August 3, 2023 issued a Notification imposing anti-dumping duty on the imports of SMOF from China, Korea and Indonesia, as recommended by the Directorate General of Trade Remedies (DGTR). Anti-dumping duty ranging from US\$ 122.41- 857.23/KFKM (1KFKM = 1,000 fibre kilometer) has been imposed for a period of 5 (five) years.

The DGTR conducted the anti-dumping investigation and issued the recommendation on June 30, 2023. The investigation was initiated based on an application filed by Birla Furukawa Fibre Optics Pvt. Ltd., supported by Corning India Technologies Ltd.

Anti-dumping duty extended on the import of certain Fishing Nets from China and Malaysia<sup>2</sup>: The MOF on August 29, 2023 issued a Notification continuing the anti-dumping duty on the imports of certain fishing nets from China and Malaysia for an additional five years (till August 28, 2028). The duty imposed by the MOF is based on the final findings issued by the DGTR in an expiry review on June 8, 2023.

DGTR recommended imposition of anti-dumping duty on the imports of Toughened Glass from China PR<sup>3</sup>: The DGTR issued the final findings on

August 28, 2023, recommending the MOF to levy anti-dumping duty on the imports of “toughened glass for home appliances” from China PR for a period of five years. This investigation was initiated based on an application filed by the Federation of Safety Glass (FOSG) wherein the DGTR recommended a Nil rate of duty for certain producers and duty of USD 243/MT for non-participating producers.

### II. JUDICIAL PRONOUNCEMENTS

The Commissioner of Customs, Chennai vs. Hyderabad Chemicals Ltd<sup>4</sup>: An appeal was filed by the Commissioner of Customs before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) against the order passed by the Commissioner of Customs (Appeal).

Hyderabad Chemicals Ltd., an importer appeared as the respondent before the CESTAT. The appeal was filed against the order of the Commissioner of Customs (Appeal) setting aside the demand notice for the payment of anti-dumping duty on the imports of Diethyl Thio Phosphoryl Chloride (DETPC) from China, along with the applicable interest.

#### Facts:

Hyderabad Chemicals Ltd. imported DETPC and had filed the bill of entry for warehousing on July 15, 2009. Pursuant thereto, the GOI had issued an anti-dumping notification, in relation to DETPC, on June 22, 2009 and the bill of entry for home consumption was filed by the importer on June 29, 2009. As the bill of entry for home consumption was filed after the issuance of the anti-dumping notification, the Commissioner had considered the importer liable for anti-dumping duty, along with interest.

#### Analysis:

The CESTAT held that Section 9A(8) of the Customs Tariff Act, 1975 was amended, w.e.f. August 19, 2009, adopting the provisions of Section 15 of the Customs Act, 1962, those relating to the date of determination of the rate of duty assessment. In accordance with amended Section 9A(8) of the Customs Tariff Act, 1975, anti-dumping duty on warehouse goods shall be payable on the date of clearance from warehouse.

<sup>1</sup> Notification No. 07/2023-Customs (ADD) G.S.R. 586(E) issued on August 3, 2023

<sup>2</sup> Notification No. 08/2023-Customs (ADD) G.S.R. 634(E) issued on August 29, 2023

<sup>3</sup> Notification No. 6/10/2022-DGTR issued on August 28, 2023

<sup>4</sup> Order dated 16th August 2023 by CESTAT Chennai in Customs Appeal No. 42118 of 2013

Considering the timeline and nature of amendment, it was held that Section 15 of the Customs Act, 1962 is not applicable prior to August 19, 2009 for determining the date on which anti-dumping duty is payable.

The CESTAT observed that the present case pertains to a period prior to the amendment in force, as interpreted by the Hon'ble Apex Court in *Sneh Enterprises Ltd vs Commissioner of Customs*<sup>5</sup>. In the said judgment, the Apex Court held that the import for the purpose of anti-dumping is complete when the goods enter the territory of the country and not based on the clearance from the customs barrier. This resulted in the dismissal of the appeal filed by the Commissioner of Customs.

*CETC Renewable Energy Technology (India) Private Limited vs. Commissioner of Customs*<sup>6</sup>: CETC Renewable Energy Technology (India) Pvt. Ltd. (the Appellant) filed an appeal before the CESTAT Chennai in challenge to adjudication order passed by the Commissioner of Customs confirming affirming the demand, as proposed in a notice issued under Section 28(8) of the Customs Act, 1962, along with applicable interest.

The Commissioner of Customs had also assessed a fine and had mandated forfeiture after rejecting the Appellant's classification of the imported goods.

#### Facts:

The Appellant was importing blue wafers/ diffused silicon wafers from China PR. While filing the bill of entry, the Appellant categorized the imported items under 'CTH 3818'. A pre-consultation notice was then issued by the Commissioner of Customs, believing the imported products to be solar cells, subjected to safeguard duty. Additionally, the Commissioner of Customs took samples and suggested reclassifying the imports under 'CTH 8541', for imposition of safeguard duty. The Appellant filed its reply to the pre-consultation notice and also attended the hearing.

The Commissioner of Customs then issued the Appellant a show-cause notice after being unsatisfied with the Appellant's explanation and response, suggesting reclassifying the products as solar cells, levy of a safeguard duty, confiscation of the imported products and payment of fine, amongst others. In addition to appearing before the Commissioner of Customs, the Appellant filed a reply to show cause notice. The Appellant disputed the show-cause notice, arguing that solar cells and blue wafers differ in numerous aspects, including electrical conductivity, technical standards, value addition and Ministry of New and Renewable Energy (MNRE) requirements. The Appellant further sought for the Tax Research Unit (TRU) to provide a reference for the examination of the imported goods.

The Commissioner of Customs concluded that the blue wafers/ silicon wafers

demonstrated a photovoltaic effect, capable of producing electric energy from sunlight after completing a particular process, based on a report from IIT, Madras. The Commissioner of Customs rejected the declared classification by applying the General Rules of Interpretation (GRI), concluding that the imported goods are Solar Cells, subject to safeguard duty and confirmed the demand notice.

#### Contentions:

Before the CESTAT, the Appellant argued that the product subjected to the safeguard investigation (PUC) was a complete solar cell rather than a diffused silicon wafer. Additionally, the Appellant based on applicable ISO standards disputed the testing methodology adopted by the Commissioner of Customs, refuted the findings of the IIT, Madras and emphasized the value-added steps taken by the Appellant after import, while referring to the goal and scope of the safeguard duty measures.

The Commissioner of Customs also supported levy of duty on imports based on the scope of solar cells defined by the as per the World Customs Organization and the Bureau of Indian Standards, while backing the report by the report of IIT Madras.

#### Analysis:

The CESTAT observed that the solar cells classifiable under 'CTH 8541' and the articles imported by the Appellant both attract the same rate of basic customs duty (BCD). Therefore, there was no attempt to evade the BCD.

The CESTAT cited a prior explanation by the TRU which favoured rigorous interpretation of the Product under Consideration (PUC) in the DGTR's determination, concerning applicability of safeguard duty on cold-rolled stainless steel. The TRU noted that the product description in the DGTR notification, not the tariff classification, should be taken into consideration while determining whether to impose an anti-dumping charge on imported goods. The CESTAT also cited an earlier decision in which it had upheld the imposition of anti-dumping duties on imported CFL with or without a choke, noting that the imported product possessed all essential characteristics of CFL defined as the PUC in the anti-dumping duty notification.

The PUC in the safeguard investigation was described as "Solar Cells, whether or not assembled in modules or panels". The Commissioner of Customs also requested assistance from the DGTR to obtain clarity on the classification of the imported goods and the subsequent levy of the safeguard duty. In its response, the DGTR referenced the final findings and had advised the Commissioner of Customs to approach the TRU for its comments and views. Based on the DGTR's final findings, the Commissioner of Customs evaluated all the submissions of the Appellant and confirmed the demand.

The CESTAT analysed the activities undertaken by the Appellant to transform the imported products into a complete solar cell (i.e., PUC of the safeguard investigation)

<sup>5</sup> (2006) 7 SCC 714

<sup>6</sup> Order dated 3rd August 2023 by CESTAT Chennai in Customs Appeal No. 40056 of 2023

and observed that the activities undertaken by the Appellant post import of the blue wafers are essential before the sale of the end product in the market to the end user as solar cells. The CESTAT further pointed out that the market does not consider blue wafers as solar cells for practical purposes.

The Supreme Court<sup>7</sup> decision in *M/s. Kesarwani Zarda Bhandar vs. State of UP*, where the test for “manufacturing” was based on a “completely new product” test—i.e., whether the finished product is completely different from the raw material or input—was also cited by the CESTAT. From the stage of the imported commodity through the production of the marketable final product, i.e., solar cells, the Appellant in this case undertakes 8 (eight) steps. This covers busbars, figures, negative electrodes, aluminum BSF, electrode slurry application, screen printing, and more. The CESTAT further cited an earlier GOI notification that recognized blue wafers as components of semiconductor devices and solar cells.

While allowing the appeal, the CESTAT recorded that the had DGTR suggested to the Commissioner of Customs to seek the relevant clarifications from the TRU, but no such efforts were made. The CESTAT observed that there are diverse opinions of experts in this field and the adjudicating authority has failed to refer the issue to the National Institute of Solar Energy. The CESTAT also stressed that the DGTR’s report gives a complete and unambiguous factual position on the scope of the PUC for levy of duty and the classification has no relevance in the determination of the issue at hand.

### III. NEWS AND DEVELOPMENTS

*Changing trend in imposition of trade remedial measures by the Government of India:* The Centre for Digital Economy Policy Research (C-DEP) conducted a study on the changing landscape of the anti-dumping measures imposed by the Ministry of Finance (MOF). It noted a steep decline in the rate of imposition of duty, despite positive recommendations by the DGTR. From inception till August 2020, the DGTR issued positive anti-dumping recommendations in 1039 investigations for imposition with a high success rate of levy - above 99% by the MOF. Post Covid, the MOF accepted 61 recommendations out of a total 141 positive recommendations, leading to a success rate of around 43%.

Data reflects low probability of duty imposition in the sunset/ expiry review final findings recommending continuation of duty beyond the initial imposed for minimum 5 (five) years. The levy of duty leads to an increase in the cost of downstream products and higher inflation. The changed landscape aided MSMEs, downstream consumers as well as Indian exporters.

*Countervailing duty on jute products from Bangladesh:* The Indian Jute Mills Association filed a countervailing duty petition on jute products originating in Bangladesh. The GOI has invited representatives from the Government of

Bangladesh for pre-initiation consultation in accordance with the WTO Agreement on Subsidies and Countervailing Measures. After the consultation process is over, the DGTR will possibly start the investigation.

*G20 Trade and Investment Ministerial Meeting (TIMM):* The G20 TIMM was held in Jaipur from August 24 to 25, 2023, to discuss a variety of issues related to international trade and investment. India proposed to build a framework for ‘Global Value Chains’ to manage risk and obstacles considering recent the difficulties, including the pandemic and geopolitical unrest.

India emphasized the importance of promoting digitalization for international trade and investment, increasing contribution of MSMEs in international trade, and revamping of the WTO dispute settlement mechanism.

India reflected a recent initiative on contemporary initiatives, such as the Unified Logistics Interface Platform (ULIP), which aims to create a transparent, effective, and efficient logistical ecosystem. Other initiatives include the “Open Network for Digital Commerce” digitalizing local markets, Unified Goods and Service Tax promoting interstate trade and commerce, and Government E-Marketplaces to empower the MSME contributing to employment, economy and exports. To reaffirm the rule-based trading system, all member participants deliberated on rebuilding the WTO dispute resolution procedures.

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<sup>7</sup> AIR 2008 SC 2733