

International Trade

amicus

February 2023 / Issue -139

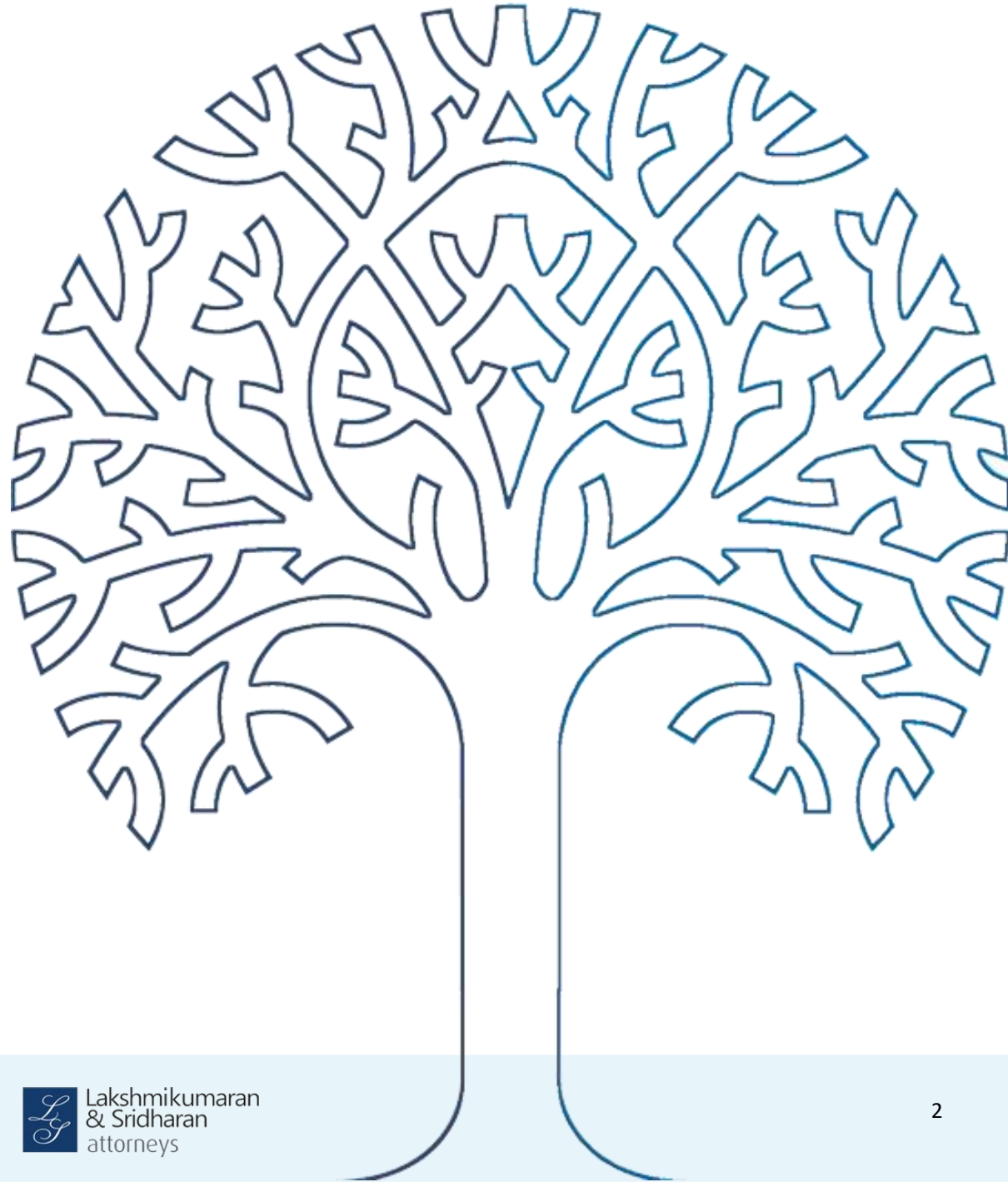


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An e-newsletter from
Lakshmikumaran & Sridharan, India

Table of Contents

Article	3
Retrospective amendments to Tribunal’s appellate jurisdiction under trade remedy laws: To be or not to be!	4
Trade Remedy News.....	8
Trade remedy measures by India.....	9
Trade remedy measures against India.....	9
WTO News.....	11
India Customs & Trade Policy Update	13
Ratio Decidendi	16





Article

Retrospective amendments to Tribunal's appellate jurisdiction under trade remedy laws: To be or not to be!

By **Devinder Bagia and Aayush Rastogi**

The retrospective amendments proposed by the Finance Bill, 2023 to Section 9C and other related provisions of the Customs Tariff Act, 1975 have tried to resolve the dispute regarding powers of the CESTAT to entertain appeals against the Ministry of Finance's refusal to impose the trade remedy measures despite receiving positive recommendations from the DGTR. The article in this issue of International Trade Amicus traces the background of the issue, the previous jurisprudence thereon, the recent amendments proposed, and concludes with some comments for the readers. The authors opine that if the amendments have their intended effect, the domestic industry in India will not have a statutory appeal remedy against the MoF's decisions not to impose the measures despite going through the full rigors of the investigation process before the DGTR. However, it is possible that such decisions can still be questioned before the constitutional courts under Article 226 of the Constitution of India. They also raise few pertinent questions which according to them have been left unanswered, and state that the precedents on the issue and the wordings of amendment could also give rise to further litigation.

Retrospective amendments to Tribunal's appellate jurisdiction under trade remedy laws: To be or not to be!

By Devinder Bagia and Aayush Rastogi

The imposition of trade remedial measures in India is a two-step process – the investigation conducted by the Directorate General of Trade Remedies ('**DGTR**') under the Ministry of Commerce and the final imposition of measures by the Department of Revenue under the Ministry of Finance ('**MoF**'). This division of powers is clearly laid out in the Customs Tariff Act ('**CT Act**') read with the rules issued thereunder.

The appeal provision for any trade remedial measure is contained in Section 9C of the CT Act. It provides for an appeal to the Customs Excise and Service Tax Appellate Tribunal ('**Tribunal**') against the 'order of determination or review' regarding the existence, degree and effect of any subsidy or dumping. The last two to three years have seen a vigorous court battle on the powers of Tribunal to entertain appeals under Section 9C against the MoF's refusal to impose the measures in spite of receiving positive recommendations from the DGTR. Much controversy has centred around interpretation of the phrase 'order of determination' – whether this phrase covers the orders issued by the DGTR or the decision of the MoF? The retrospective amendments proposed by the Finance Bill, 2023 to Section 9C and other related provisions have made an attempt to resolve this dispute. This article traces the background of the issue,

the previous jurisprudence thereon, the amendments made and finally concludes with some comments for the readers.

Background

Under the law, DGTR is tasked with the responsibility to investigate and, if necessary, recommend the imposition of measures, such as the anti-dumping duties. If it reaches a positive determination regarding the existence of conditions for imposition of measures, it issues an order in the form of a 'final finding' which is a recommendation to the MoF to impose the measure. The law provides final decision-making power to the MoF who may then decide to impose or not to impose the measure.

The history shows that between 1995 and 2020, MoF has mostly accepted the recommendations of DGTR barring a few instances such as Penicillin-G¹ and Newsprint² cases wherein the MoF decided not to impose the measure despite a positive finding from the DGTR. The two contrary decisions of MoF were arguably on the grounds of larger public interest considering the nature of commodities involved and its impact on people at large.

¹ *Anti-Dumping Investigation concerning imports of Penicillin-G Potassium originating in or exported from China PR and Mexico and 6-APA originating in or exported from China PR*, Final Findings dated 20 January 2011.

² *Anti-dumping investigation concerning import of Newsprint from the United States of America, Canada and Russia*, Final Findings dated 20 December 1996.

However, this position changed drastically between 2020 and 2022. During this period, the MoF has not only rejected numerous positive findings of the DGTR but also rescinded several existing trade remedy measures on commodities such as steel. In several sectors, ranging from rubber chemicals to pharma and textile among others, the MoF either did not issue any notification imposing the duty within the prescribed timeline of three months or simply issued an inter-departmental communication to the DGTR in the form of an office memorandum stating that MoF has decided not to accept the recommendations of the DGTR.

Aggrieved by the MoF's decision, the domestic industry has appealed the MoF's decisions in several cases before the Tribunal.

Court interventions

Section 9C of the CT Act confers appellate jurisdiction to the Tribunal against the orders of determination regarding the existence, degree and effect of any subsidy or dumping. Section 9C, as it stands today, is as follows –

*'SECTION 9C. Appeal. — (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 Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal).'*

Before the Tribunal, the preliminary issue was whether the MoF's decision refusing imposition of measures amounted to an 'order of

determination' which dealt with the existence, degree, or effect of dumping or subsidy.

In some cases the domestic industry challenged the office memorandum while in other cases it was claimed that silence of MoF amounted to a decision refusing to impose the measure. In both cases, the decisions of MoF were challenged under Section 9C of the CT Act.

Relying on the Hon'ble Supreme Court's decision in *Saurashtra Chemicals*³, the Tribunal in a series of decisions, including in the cases of *Jubilant Ingrevia*⁴ and *Apcotex*⁵, interpreted the phrase 'order of determination' as the final determination of the Central Government (MoF), against which an appeal shall lie to the Tribunal under Section 9C of the CT Act. In *Saurashtra Chemicals*, the Supreme Court held that the DGTR's orders are only recommendatory and hence an appeal shall lie against the final determination of the Central Government.

The Tribunal in *Jubilant Ingrevia* went on to hold that the MoF exercises a quasi-judicial function while making its decision to impose or not to impose the measures, repelling the contention that the MoF's powers are legislative in nature. Hence, the office memorandum was set aside with a direction to the MoF to issue a reasoned order. What is noticeable is that the MoF has not issued any reasoned orders till date despite a series of Tribunal orders following *Jubilant Ingrevia* and *Apcotex*. A writ against the Tribunal's decision in *Jubilant Ingrevia* is also currently pending before the Hon'ble Delhi High Court⁶.

³ *Saurashtra Chemicals Ltd. v. Union of India*, 2000 (118) ELT 305 SC.

⁴ *Jubilant Ingrevia Limited v. the Union of India*, Final order in Anti-Dumping Appeal No. 50461 of 2021.

⁵ *Apcotex Industries Limited v. Designated Authority*, Final order in Anti-Dumping Appeal No. 51048 of 2021.

⁶ Writ Petition (Civil) No. 5185 of 2022.

Retrospective amendments introduced through the Finance Bill, 2023

While the above litigation ensues, the Parliament, under the Finance Bill, 2023, has sought to make retrospective amendments to Section 9C and other relevant provisions of the CT Act. These changes are sought to be introduced as clarificatory amendments with an objective to bring an end to the ensuing litigation discussed above. The amendments are as under:

i. Amendments to Section 8B, 9, and 9A (trade remedial provisions concerning safeguards, countervailing and anti-dumping duties):

The amendments to Section 8B, 9, and 9A clarify that the Central Government (MoF) merely 'considers' the 'determination' or 'review' that is conducted by the DGTR under the rules framed under these sections.

ii. Addition of an explanation under Section 9C which states that: *'Explanation. – For the purposes of this section, 'determination' or 'review' means the determination or review done in such manner as may be specified in the rules made under sections 8B, 9, 9A and 9B.'*

It is noteworthy that the rules framed under Sections 8B, 9, and 9A provide for 'determination' or 'review' to be conducted by the DGTR. Hence, the explanation intends to clarify that an appeal shall only lie against the 'determination' or 'review' by the DGTR. In other words, the amendments intend to imply that an appeal shall not lie against the decisions of the MoF wherein MoF only considers (and

not determines) the imposition of measures. These proposed amendments are applicable retrospectively from 1 January 1995 (i.e., the day on which CT Act was amended to add provisions relating to trade remedial measures).

Conclusion

The amendments seek to clarify legislative intent that the Tribunal never had the jurisdiction to entertain the appeals against the MoF decisions. What the amendments could also mean is that in case the Tribunal had such an appellate jurisdiction (subject to the outcome of the Delhi High Court's decision in *Jubilant Ingrevia*), the Parliament has retrospectively taken away the appellate powers of the Tribunal to entertain such appeals.

If the amendments have their intended effect, the domestic industry in India will not have a statutory appeal remedy against the MoF's decisions not to impose the measures despite going through the full rigors of the investigation process before the DGTR. However, it is possible that such decisions can still be questioned before the constitutional courts under Article 226 of the Constitution of India. It will have to be seen whether such a remedy is effective given the discretion of courts to entertain such petitions, time taken to pursue the matter and the appreciation of nuanced facts relating to trade remedial measures.

The amendments leave some questions unanswered. First, what happens to the earlier judgments passed by the Tribunal on the same issue? Second, whether the timeline of 90 days to file the appeal before the Tribunal begin from the date of DGTR's final findings? The second question assume significance since the appeals filed by importers / exporters against the DGTR's decision could become

infructuous if the MoF refuses to impose the measures. The precedents on the issue and the wordings of amendment could also give rise to further litigation. It is possible for the domestic industry to still argue based on the Supreme Court's ruling in *Saurashtra Chemicals* that the DGTR's decisions are only recommendatory and

hence an appeal shall still lie against the final decision of MoF. Only time will tell as to how these issues are resolved in courts.

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Trade Remedy News



- Cut-To-Length Carbon Quality Steel Plate from India – USA initiates anti-dumping and countervailing duty sunset reviews
- Fine Denier Polyester Staple Fiber from India – USA initiates anti-dumping and countervailing duty sunset reviews
- Fishing net from China PR – India initiates ADD anti-circumvention investigation in respect of imports from Malaysia
- Forged Steel Fluid End Blocks from India – USA issues preliminary determination of receipt of countervailing subsidies in Countervailing Duty Administrative Review; 2020-2021
- Lined paper products from India – USA initiates anti-dumping and countervailing duty sunset reviews
- Polyethylene Terephthalate Film, Sheet, and Strip from India – USA issues anti-dumping duty administrative review; 2020-2021 determining that M/s. SRF did not make sales at less than normal value
- Saturated Fatty Alcohol from Indonesia, Malaysia, and Thailand – India's DGTR recommends imposition of definitive countervailing duty and continuation of (after sunset review) anti-dumping duty
- Sodium Nitrite from India – USA issues anti-dumping duty and countervailing duty orders
- Steel nails from India – USA's International Trade Commission determines absence of material injury
- Welded Carbon Steel Standard Pipes and Tubes from India – USA issues final negative determination of circumvention of the anti-dumping duty order



Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Fishing net	China PR	F. No. 7/01/2023-DGTR	21 February 2023	ADD Anti-circumvention initiated in respect of imports from Malaysia
Saturated Fatty Alcohol	Indonesia, Malaysia, and Thailand	F. No. 6/18/2021-DGTR	7 February 2023	Definitive countervailing duty recommended to be imposed
Saturated Fatty Alcohol	Indonesia, Malaysia and Thailand	F. No. 7/01/2022-DGTR	2 February 2023	Sunset review recommends continuation of anti-dumping duty

Trade remedy measures against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Cut-To-Length Carbon Quality Steel Plate	USA	88 FR 2023-02083	1 February 2023	Anti-dumping and countervailing duty sunset reviews initiated
Fine Denier Polyester Staple Fiber	USA	88 FR 2023-02083	1 February 2023	Anti-dumping and countervailing duty sunset reviews initiated

Product	Investigating Country	Document No.	Date of Document	Remarks
Forged Steel Fluid End Blocks	USA	88 FR 2023-02534	7 February 2023	Countervailing Duty Administrative Review; 2020-2021 – Preliminary determination of receipt of countervailing subsidies
Lined paper products	USA	88 FR 2023-02083	1 February 2023	Anti-dumping and countervailing duty sunset reviews initiated
Polyethylene Terephthalate Film, Sheet, and Strip	USA	88 FR 2023-02189	2 February 2023	Antidumping Duty Administrative Review; 2020-2021 - SRF did not make sales at less than normal value
Sodium Nitrite	USA	88 FR 2023-03934	27 February 2023	Anti-dumping duty and countervailing duty orders issued
Steel nails	USA	88 FR 2023-02833	10 February 2023	ADD - Determination of absence of material injury
Welded Carbon Steel Standard Pipes and Tubes	USA	88 FR 2023-04161	1 March 2023	Final negative determination of circumvention of the anti-dumping duty order



WTO News

- Role of digital public infrastructure in promoting e-commerce – India seeks comments

Role of digital public infrastructure in promoting e-commerce – India seeks comments

India has requested WTO Members to share their experiences, comments and suggestions on the subject of role of digital public infrastructure in promoting e-commerce. As per document circulated in the General Council on 9 February 2023, the aspect of public in digital infrastructure means that it has the classical characteristics of non-excludability and non-rivalrousness. Non-excludability means that it is not possible to exclude any individual from using the infrastructure while non-rivalrous means that one's usage of the infrastructure does not affect its availability for others. Some of the guiding questions posted by India are:

1. What are members' experiences on transformational change being brought about through Digital Public Infrastructure?

2. How can Members, having rich experience in the use and development of Digital Public Infrastructure, support other Members in the adoption and use of Digital Public Infrastructure in the promotion of E-commerce?
3. What can be done to leverage Digital Public Infrastructure in E-Commerce and Services delivery?
4. What constraints are faced by the developing countries including LDCs in adoption and use of Digital Public Infrastructure?
5. What role can Digital Public Infrastructure play in promoting global E-Commerce?

The document notes that digital public infrastructure can play a crucial role in ensuring the widest possible dissemination of gains of e-commerce to all segments of the economy. It also talks about ideal features of 'good' digital public infrastructure, while also elaborately discussing the challenges and issues limiting the adoption and use of e-commerce.

India Customs & Trade Policy Update



- High-risk food products can be imported only through specified 79 ports w.e.f. 1 March 2023
- Toys import – Requirement of compliance of BIS standards clarified
- Vessels and other floating structures for breaking up – BCD exempted till 31 March 2025
- Cashew kernel, broken or whole – Minimum Import Price (MIP) conditions relaxed for EOUs and SEZs
- Agri-residue based biomass and briquettes/pellets are 'free' for export
- Areca nuts and supari (betel nut product) – Minimum Import Price raised/prescribed, however EOUs and SEZs exempted subject to conditions

High-risk food products can be imported only through specified 79 ports w.e.f. 1 March 2023

The Central Board of Indirect Taxes and Customs (CBIC) has forwarded an FSSAI Order stating that with effect from 1 March 2023, import of high-risk food products – milk and milk products; egg powder; meat and meat products, including fish and poultry; nutrition or infant foods; and nutraceuticals, health supplements, food for dietary uses, probiotic and prebiotic foods, foods for special medical purpose, can be imported only through specified 79 ports. This requirement was to come into effect from 1st of February 2023 earlier. Instruction No. 5/2023-Cus., dated 8 February 2023 has been issued for the purpose.

Toys import – Requirement of compliance of BIS standards clarified

The CBIC has clarified on requirement of compliance of Bureau of Indian Standards (BIS) standard for toys or parts of toys in case of imports. Taking note of the wide definition of toys in the Toys (Quality Control) Order, 2020 dated 25 February 2020, the CBIC Instruction No.06/2023, dated 13 February 2023 states that not only do the toys as per Toys QCO have a wider definition than what is generally perceived in the HSN, but the toys definition applies also to toy parts including in a completely knocked down (CKD) or semi-knocked down (SKD) condition. The Toys QCO defines 'toys' as '*Product or material designed or clearly intended, whether or not exclusively, for use in play by children under 14 years of age or any other product as notified by the Central Government from time to time*'. The Instruction also

clarifies that even when toy parts are imported for manufacturing toys under IGCRS, 2022 in terms of exemption Notification No. 50/2017-Customs, there is a requirement to ensure, that the manufacturer possesses valid BIS certificate for such manufacturing.

Vessels and other floating structures for breaking up – BCD exempted till 31 March 2025

The Ministry of Finance has exempted vessels and other floating structures imported for breaking up, from basic customs duty (BCD). The exemption will be available from 24 February 2023 till 31 March 2025. Sl. No.555A has been inserted in Notification No. 50/2017-Cus. for this purpose, by Notification No. 13/2023-Cus., dated 23 February 2023.

Cashew kernel, broken or whole – Minimum Import Price (MIP) conditions relaxed for EOUs and SEZs

The Directorate General of Foreign Trade has removed the condition of minimum import price in case of imports by EOUs and SEZ units. The import policy at present prescribes a minimum import price of INR 680/kg for broken cashew kernel and INR 720/kg for whole cashew kernel. Further, as per Notification No. 59/2015-20, dated 21 February 2023, amending Chapter 08 of the Schedule I to the ITC(HS), SEZ units and EOUs will however not be allowed to sell the imported cashew kernel into the domestic tariff area.

Agri-residue based biomass and briquettes/pellets are 'free' for export

Agri-residue based biomass and briquettes/pellets, covered under Heading 1213 of the ITC(HS), have been put under the 'Free' category for the purpose of exports, with effect from 14 February 2023. It may be noted that export of fodder, including wheat, rice straw will continue to be in the restricted for export category. Notification No. 58/2015-20, dated 14 February 2023 has been issued for the purposes.

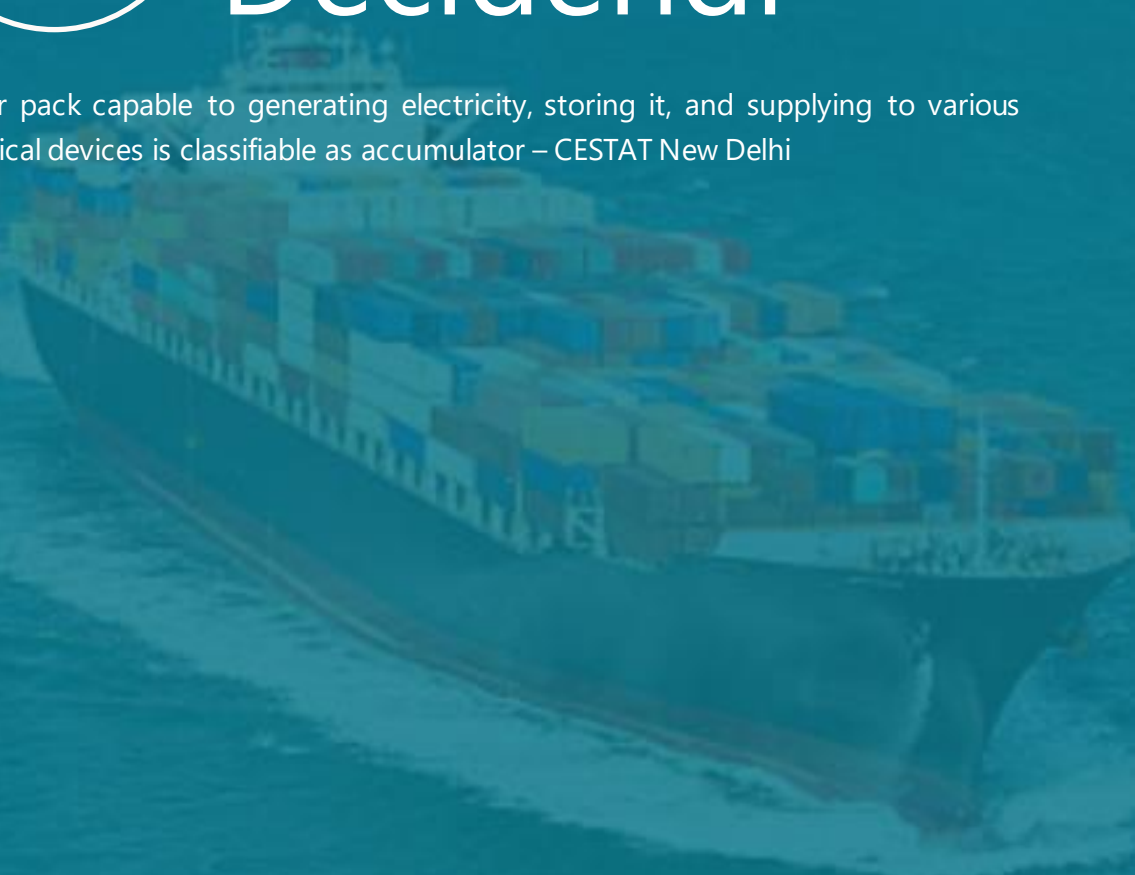
Areca nuts and supari (betel nut product) – Minimum Import Price raised/prescribed, however EOUs and SEZs exempted subject to conditions

The DGFT has revised upwards the minimum import price (MIP) of areca nuts (whole, split, ground and other). MIP has also been prescribed for betel nut product which is known as *supari*. MIP now prescribed is INR 351/kg. It may be noted that EOUs and units in SEZ are however exempted from this MIP, subject to the condition of no DTA sale. Further, the changes while maintain import prohibitions in case of areca nuts, the import of *supari* has now been put under the 'prohibited' for import category. Notification No. 57/2015-20, dated 14 February 2023 has been issued for the purpose.



Ratio Decidendi

- Power pack capable to generating electricity, storing it, and supplying to various electrical devices is classifiable as accumulator – CESTAT New Delhi



Power pack capable to generating electricity, storing it, and supplying to various electrical devices is classifiable as accumulator

The CESTAT New Delhi has held that power pack designed for the purpose of performing several complementary or alternative functions viz. (a) generation of electricity solar energy; (b) storing the electricity so generated or collected through four other different means; and (c) supplying electricity to the in-built LEDs as well as for charging mobiles and running electrical devices, while also having multiple inputs options for charging, is classifiable under Heading 8507 as

accumulator. The Tribunal observed that the heart of the goods was the storage which could be done by five different means, one of which is charging using in-built solar panel. Rejecting the assessee's plea of classification under Tariff Item 8513 10 10 as torch or under TI 8501 31 20 as DC Generator, the Tribunal noted that the power generated could be used for several purposes and not only for using the LED lamps built into it the goods.

Further, the Tribunal was of the view that simply because there are four other alternative means through which they could be charged, it does not mean that the imported goods were not solar power-based devices. Plea of coverage under Sl. No. 234 of Schedule I of Notification 1/2017-Integrated Tax (Rate) was thus upheld. [*JMK Energy v. Commissioner* - Final Order No. 50089/2023, decided on 30 January 2023, CESTAT New Delhi]

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