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Remand power of CESTAT in anti-dumping cases

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The issue of remand arises when the finding of the authority is under appellate review. If the appellate authority finds that the decision of the original authority which passed the order was wrong, it may modify, annul or remit the matter back to such authority for *de novo* consideration. Applicable appeal provisions in a statute provide the primary reference point for determining the powers of the Appellate Tribunal to pass the orders, on disposing the appeal, including remand.

With regard to anti-dumping, Section 9C of the Customs Tariff Act, 1975 provides for appeal or the judicial review of the orders issued by the designated authority. Section 9C (3) provides as below:

> (3) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

The aforesaid provision does not expressly provide the power to remand the matter back to the designated authority. Section 9C was enacted in the year 1995. The appeal provision in Section 35C in the Central Excise Act, 1944, for comparison, is reproduced below:

> **Section 35C. Orders of Appellate Tribunal. —** (1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

The aforesaid provision expressly provided the power to the Tribunal to refer the case back to the authority. Similarly, Section 129B of the Customs Act, 1962 provides expressly the power to the Appellate Tribunal to remand the matter back to the authority.

> **Section 129B. Orders of Appellate Tribunal. –** (1) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

When the legislature intended to confer the power of remand, it has stated so explicitly in the provision. Thus, it seems that the departure in the case of Section 9C is conscious.

But in the case of *Union of India* v. *Umesh Dhaimode*[1], the Supreme Court analysed Section 128(2) of the Customs Act, 1962, as it then stood which did not include power to remand. It observed that authority with powers to "pass such order as it deemed fit confirming,

[1] 1998 (98) E.L.T. 584 (S.C.)

modifying or annulling the decision" appealed against includes the power to remand as well.

The issue was not contended before the Supreme Court as no one appeared on behalf of the respondent and the Court decided the issue *ex parte*. Also, one may note that anti-dumping investigations are time bound. Under Rule 17 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on Dumped Articles and for Determination of Injury) Rules, 1995 (AD Rules), anti-dumping investigation cannot extend beyond 18 months period. This requirement is enforced pursuant to the binding obligations under WTO Anti-dumping agreement. Article 5.10 of the Anti-dumping Agreement provides that investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation. Arguably, the designated authority would become *functus officio* once the decision is issued and the time for investigation has expired. Unless the findings of the designated authority are issued well in advance and on appeal the order of the CESTAT is issued within 18 months from the date of initiation of investigation, remand order, in effect, in all likelihood would amount to an implied extension of the time limit applicable for original investigation.

In the case of *Haldor Topsoe A/S* v. *Designated Authority, Ministry Of Commerce*[2], CESTAT, Delhi analysed the power of the CESTAT while disposing the appeal under Section 9C (3) of the Customs Tariff Act. Based on primarily the considerations noted herein, the Tribunal observed,

> Apart from the three types of orders mentioned in this clause, namely, confirming, modifying or annulling the order of the appellate authority, no other power that is conferred on this Tribunal under Section 129B is mentioned there. This restricted appellate power conferred on this Tribunal supports the argument that this Tribunal is not to remand the matter to the Designated Authority for fresh adjudication or decision. On account of the nature of the dispute involved and on account of the fact that an early decision on the issues is called for, the legislature in its wisdom took away the power of remand. Questions relating to the international trade have to be decided as expeditiously as possible and it is not to hang on before the Designated Authority and the appellate Tribunal for unduly long periods. Taking into consideration these aspects of the matter, we are inclined to take the view that in anti-dumping matters, this Tribunal is not to remand the issue to the Designated Authority for *de novo* consideration and decision. Accordingly, we now proceed to consider the merits of the case.

The decision of the Tribunal was reversed by the Supreme Court in appeal based on issues other than power to remand. The observations made by the CESTAT on remand as quoted

[2] 2000 (116) E.L.T. 377 (Tribunal)

above were not specifically reversed. However, on several occasions, CESTAT has remanded the matter back to authority.

For example, in *H & R Johnson (India) Ltd.* v. *Designated Authority*[3], CESTAT held that the Tribunal having such wide judicial powers to make the appellate orders of the nature contemplated by Section 9C(3) would have, for the effective exercise of its appellate power of judicial review, the necessary power to remand the matter to the designated authority for its reconsideration. In *Alkali Manufacturers Association of India* v. *Designated Authority*[4], CESTAT remanded the matter back for a fresh determination of non-injurious price and injury margin. However, in these cases the issue of the scope of Section 9C was not contended by the responding parties.

Assuming that the CESTAT has the power to remand matter, another important question arises is whether the power to remand is available in all cases. This is critical as in certain situations the illegality in the order issued by the Designated Authority may not be curable. CESTAT may not have the power to remand in such cases.

Leaving aside the issue of power of remand in general, is it possible that despite having an inherent power to remand, Tribunal in certain fact situation may not have the power to remand?

In a situation where the final finding is vitiated on account of non-observance of the principle of natural justice, the order is required to be set aside. In the case of *Automotive Tyre Manufacturers Asson.* v. *Designated Authority*[5], final findings issued by the designated authority was set aside. Designated authority who passed the order did not grant any opportunity of hearing to the parties. Consequently, the Supreme Court held that such an order was vitiated for non-observance of principles of natural justice and was set aside.

In the case of *Gullapalli Nageswara Rao & Ors.* v. *Andhra Pradesh State Road Transport Corporation & Anr,*[6] State Government did not make the enquiry consistent with the principles of natural justice in approving the scheme and the order approving the scheme was quashed by the Supreme Court. The Court did not specifically observe that illegality of such kind cannot be remedied by the authority upon remand, but it did not remand the matter so as to remedy the illegality in the decision.

Thus, there appears to be no clarity on the issue of remand power of the CESTAT under 9C of the Customs Tariff Act, 1975.

While it may be possible to remedy the incorrectness in the decision pertaining to substantive issues such as assessment of normal value, grant of adjustments in

3 2005 (185) E.L.T. 125 (Tri. - Del.)
4 2006 (194) E.L.T. 161 (Tri. - Del.)
5 2011 (263) E.L.T. 481 (S.C.)
6 AIR 1958 SC 308

the dumping margin calculation, injury determination etc, it may not be possible to remedy or cure the findings which is vitiated and has thereby become *non-est* for the reason of non-observance of the principle of natural justice.

However, in the case of *Huawei Tech. Co. Ltd.* v. *Designated Authority*[7], the issue relating to the scope of Section 9C and the CESTAT's power to remand was challenged especially in a situation where the impugned order is vitiated for non-observance of principle of nature justice. CESTAT expressly ruled that it has power to remand the matter back to the designated authority even in cases where the order suffers from such illegality. It was observed in relation to Section 9C as below:

> A similar provision earlier contained in the Customs Act, 1962 in respect of the powers of the Commissioner (Appeals) was interpreted by the Supreme Court in the case of *Union of India* v. *Umesh Dhaimode* - 1998 (98) E.L.T. 584 (S.C.) holding that the appellate authority has the power of remand. Both provisions being *pari materia,* ratio of *Umesh Dhaimode* (supra) will be applicable for interpreting Section 9C(3) of the CTA. Hence the power of remand of the Tribunal in respect of anti-dumping cases cannot be questioned.
>
> (ix) Rule 41 of the Customs, Excise and Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 specifically provides that the Tribunal may make such orders or give such directions as may be necessary or expedient to give effect in relation to its orders or to prevent abuse of its process or to secure the ends of justice. The words "secure the ends of justice" are wide enough to clothe the Tribunal with powers to pass order of remand as it may deem fit in the facts and circumstances of the case. In addition to this, the power of Appellate Tribunal to confirm, modify or annul the decision or order appealed against also takes in its fold to pass such orders as are necessary in order to aid the main relief sought for in the appeal following the ratio laid down in the case of *Collector of Customs, Madras v. Madras Electro Castings P. Ltd.* - 1994 (71) E.L.T. 646 (Mad.).

The CESTAT thereafter remanded the matter back to the authority and directed the authority to grant a post-decisional hearing.

The appeal against the aforesaid order of the tribunal has been admitted but it is still pending before the Supreme Court.

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[7] 2011 (273) E.L.T. 293 (Tri. - Del.)

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Acetone	Chinese Taipei and Saudi Arabia	Final Findings No. 14/16/2012-DGAD	22-1-2015	Anti-dumping duty recommended to be imposed
Acrylic Fibre	Egypt	F. No. 14/18/2013-DGAD	15-1-2015	Anti-dumping investigation terminated
Flexible Slabstock Polyol	All countries	GSRD 22011/4/2014	13-1-2015	Safeguard investigation terminated
Flexible Slabstock Polyol	Singapore, Australia and EU	Final Findings No. 14/1/2013-DGAD	11-1-2015	Anti-dumping duty recommended to be imposed
Float Glass	China and Indonesia	F.No. 354/211/2002-TRU (Pt. II)	24-12-2014	ADD - Time period for completion of second sunset review extended till 2-7-2015
Methyl Acetoacetate	China and USA	F.No.14/7/2014-DGAD	7-1-2015	Anti-dumping investigation initiated
Poly Vinyl Chloride Paste/Emulsion Resin	Norway and Mexico	Final Findings No. 14/5/2013-DGAD	21-1-2015	Anti-dumping duty recommended to be imposed
Sodium Di-Chromate	All countries	F.No. D-22011/5/2014	15-1-2015	Safeguard investigation terminated
Tyre Curing Presses for Tyres	China	F.No.15/22/2014-DGAD	7-1-2015	ADD - Sunset review initiated

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Certain Lined Paper Products	USA	[C-533-844] Rescission Notice	27-1-2015	Countervailing duty administrative review for the period January 1 – December 31, 2013 rescinded

WTO News

Import restrictions on bird flu concerns - India appeals panel report

India has appealed the findings of the panel in *India-Agricultural Products* (DS430) by filing a Notice of Appeal on 26th January 2015 with the WTO Appellate Body. The dispute concerns India's import prohibition maintained through its Avian Influenza (AI) measures, affecting certain agricultural products from countries reporting Notifiable Avian Influenza (NAI) to the World Organisation for Animal Health (OIE). The measures at issue are the Indian Livestock Importation Act, 1898 and orders issued by the Indian Department of Animal Husbandry, Dairying and Fisheries pursuant to the Livestock Act, in particular, the Statutory Order 1663(E). The Panel had found that India's measures were inconsistent with Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.6, 6.2, 6.1, 7, Annex B(2) and Annex B(5)(a), (b) and (d) of the Sanitary and Phytosanitary (SPS) Agreement.

Appellate Body issues report in Argentina-Import Measures

The WTO Appellate Body has on 15-1-2015 issued its reports in the dispute *Argentina - Import Measures* (DS438, DS444 & DS445). The reports have been adopted by the Dispute Settlement Body on 26-1-2015. The complainants in this case were the European Union, the United States and Japan. The dispute concerned two measures, namely, procedure connected to the Advance Sworn Import Declaration (Declaración Jurada Anticipada de Importación, DJAI), required by the Argentine Government since February 2012 for import of most of the goods into Argentina; and the imposition of the following trade-related requirements (TRRs) by the Argentine authorities, as a condition of import into Argentina in order to achieve the following objectives: (i) to offset the value of imports with an equivalent value of exports; (ii) to limit imports, either in terms of volume or value; (iii) to reach a certain level of local content in domestic production; (iv) to make investments in Argentina; and (v) to refrain from repatriating profits.

TRR measures comprised of the following: (a) declarations required as a condition for the approval of imports; (b) various types of licences required for the importation of certain goods; (c) alleged systematic delay in granting import approval or failure to grant such approval, or the grant of import approval subject to importers undertaking to comply with certain allegedly trade restrictive commitments.

The Appellate Body, *inter alia,* held as follows:

- *TRRs Measure:* Argentina appealed the Panel's findings as to the existence of the TRRs measure operating as a single measure. The Appellate Body concluded that the TRRs measure is a single measure, and upheld the Panel's finding that the TRRs measure exists and, as a consequence, also upheld the Panel's findings that the TRRs measure is inconsistent with Articles III:4 and XI:1 of the GATT 1994.

- *DJAI Procedure:* The Appellate Body found that the Panel did not err in its interpretation of Article XI:1 and concluded that Article VIII, relating to import formalities, does not excuse Members from their obligations under Article XI:1 prohibiting certain import restriction. It was held that those formalities that have a limiting effect on the importation are inconsistent with Article XI:1.

Viet Nam appeals panel report on shrimp dispute

On 6th of January 2015, Viet Nam has filed a Notice of Appeal regarding the panel report on *United States – Anti Dumping Measures on Certain Shrimp from Viet Nam* (DS429). The dispute concerned a number of anti-dumping measures by USA on certain frozen warm water shrimp from Viet Nam in two administrative reviews and a sunset review, as well as other US laws, regulations, administrative proceedings and practices, including zeroing. Viet Nam seeks review of the failure of the Panel to find that Section 129(c)(1) of the Uruguay Round Agreements Act constitutes an "as such" inconsistency with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Agreement on Implementation of Article VI of GATT 1994 by limiting administrative redeterminations made to implement adverse DSB recommendations and rulings, as provided for under Section 129 of the URAA, to imports of subject merchandise made on or after the effective date of the determination to implement the adverse WTO ruling. The Panel had, with respect to Viet Nam's "as such" claim concerning zeroing in administrative reviews, taking into account the fact that as of April 2012 the USDOC had modified its calculation methodology in administrative reviews, rejected Viet Nam's claims of inconsistency under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

Circular

Anti-dumping duty – Extension of levy in cases of initiation of sunset review

Indian Ministry of Finance has clarified that anti-dumping duty is effective for a period of five years from the date of imposition of provisional duty, except in cases where the Directorate General of Antidumping and Allied Duties (DGAD) initiates a review before expiry of such five year period. Circular No. 5/2015-Cus., dated 28-1-2015 issued for this purpose, places its reliance on second proviso to Section 9A(5) of the Customs Tariff Act, 1975, and amends earlier Circular No. 28/2011-Cus. It is now stated that the earlier circular, which had clarified that a definitive/final anti-dumping duty can be collected beyond the stipulated period only when a notification extending the levy has been issued before expiry of the parent notification, was in the context of a particular notification (Notification No. 100/2005-Cus.) wherein the Customs authorities were collecting ADD even when the DGAD had not initiated any sunset review. Para 3 of the earlier circular which has been substituted now, had also stated that where the findings in a review are notified after the lapse of the parent notification, the notification in such cases would be effective prospectively from the date of issue of such notification.

Ratio Decidendi

Anti-dumping duty – Full investigation at later stage for separate rate contender

United States Court of International Trade has reversed the decision of the US Department of Commerce to conduct a full individual investigation of one of the parties (contending for single separate rate) that did not receive a rate in the first administrative review. The matter was before the court following a second redetermination and a voluntary partial third redetermination. Noting that a separate rate respondent's AD duty rate must be reasonably related to its economic reality, the court held that it cannot reasonably be said to necessitate a full individual investigation in every instance. It was also observed that the authorities had in the past declined to initiate such investigations due to limited administrative resources. The decision to conduct a full individual investigation at such a late date was held arbitrary and capricious by the court while it remanded in part the matter to Department of Commerce for further consideration. Court here however upheld the decision of the department finding a separate rate more than the *de minimis* rate, and declining to calculate a specific rate in favor of those already calculated for the first administrative review. [*Changzhou Hawd Flooring Co.* v. *United States* – Slip Opinion No. 15-07, decided on 23-1-2015, USCIT]