IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. I

Anti Dumping Appeal No. 53579 of 2018

Arising out of Notification No. 14/23/2015-DGAD, Dated: 02.09.2017
Passed by Designated Authority Directorate General of Anti-dumping and Allied Duties, New Delhi

Date of Hearing: 09.10.2019
Date of Decision: 12.02.2020

M/s JINDAL POLY FILM LTD
DIVISION & GLOBAL NON WOVENS PLOT NO. 12, SECTOR-B-1
LOCAL SHOPPING COMPLEX, VASANT KUNJ, NEW DELHI

Vs

1) DESIGNATED AUTHORITY DIRECTORATE
GENERAL OF ANTI-DUMPING AND ALLIED DUTIES
DEPARTMENT OF COMMERCE & INDUSTRY, PARLIAMENT STREET
JEEVAN TARA BUILDING, 4TH FLOOR, NEW DELHI-110001

2) UNION OF INDIA, MINISTRY OF FINANCE
SECRETARY-REVENUE GOVERNMENT OF INDIA
NORTH BLOCK, NEW DELHI

Appellant Rep by:
Ms Reena Khair, Shri Rajesh Sharma, Ms Rita Jha & Ms Shreya Dahiya, Advs. Shri Ameet Singh and Shri Amit Randev, Advs. & G Pradha, Director (Cost)
Respodent Rep by: Shri Sunil Kumar, AR (DR), Shri Dhruv Gupta & Ms Greetika Francis, Advs.

CORAM: Dilip Gupta, President
C L Mahar, Member (T)
Rachna Gupta, Member (J)

Anti Dumping Duty -
Whether the Designated Authority [DA] can give final findings contrary to the essential facts stated in the disclosure statement without even apprising the domestic industry.

Held:
In the present case, the challenge to the final finding is principally based on the contention that the DA placed reliance upon certain material and facts for concluding the issue against the appellant, which facts did not form part of the disclosure statement and to which the appellant had no opportunity to deal with -the contention of the Appellant, therefore, has merit -failure to make available to material on which the decision is based is clearly violation of principles of natural justice -it rather amounts to placing reliance on such data not made known to the party concerned -the Supreme Court in Reliance Industries Ltd. - **2006-TIOL-120-SC-AD**
held that proceedings before the DA determine a lis between Domestic Industry on the one hand and the importer of foreign goods on the other -the Supreme Court further clarified that when a decision is not in consonance to the "essential facts under consideration" as were "disclosed" to the interested parties, including the domestic industry, it was incumbent upon the Designated Authority to specify the reasons for such diversion -any additional data/information/submission or methodology used by the DA while coming to such a decision was required to be made known by DA to the interested parties, including the domestic industry prior to taking a final decision- absence of the requisite disclosure of information amounts to violation of the principles of natural justice as the DA -in Nirma Ltd. - **2017-TIOL-2183-HC-AHM-CUS**
, the Gujarat High Court held that if any additional data or information was to be used by the Designated Authority, it was incumbent upon the DA to put the parties to notice in respect of such additional information -the non sharing of the data on which reliance has been placed by the

DA while recording final findings is a breach of the principles of natural justice -it is, therefore, considered appropriate that the matter be dealt by the DA after disclosing complete "essential facts under consideration" to all the interested parties, including the appellant/domestic industry - the matter is remanded to the Designated Authority for: (i)issuing a fresh disclosure with complete details/data/information/methodology which may constitute "essential facts under consideration" (ii)to afford an opportunity to the interested parties to submit their comments (iii)after analysing the disclosure statement and the comments, if any, give fresh final findings and (iv)liberty is also given to the DA to reconsider the status of the Malaysian exporter and the genuineness of its representation -as a result of the above, the final findings and the notification issued by the Central Government are set aside -the DA shall give final findings in the light of the directions stated above, where after the Central Government shall issue a fresh notification -the present appeal is allowed in terms of the directions indicated above : CESTAT [para37, 38, 39, 40]

Matter remanded

Case laws cited:

Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors. (1978) 1 SCC 405... Para 12

Trinseo Euro GmbH vs. Union of India - 2018-TIOL-1595-CESTAT-DEL... Para 17

Union of India vs. Meghmani Organics Ltd - 2016-TIOL-170-SC-CUS-LB... Para 23

J.K. Industries Ltd. vs. Union of India reported in 2005 (186) ELT 3 (Raj.)... Para 24

Nirma Ltd. Vs. UOI - 2017-TIOL-2183-HC-AHM-CUS... Para 33

Reliance Industries Ltd. Vs. Designated Authority - 2006-TIOL-120-SC-AD... Para 37

FINAL ORDER NO. 50231/2020

Per: Rachna Gupta:

1. The present appeal has been filed against the final findings dated 2 September 2017 issued by the Designated Authority.

2. The relevant facts in brief are that M/s. Jindal Poly Films Limited (Division - Global Non Wovens), the appellant herein is a major producer of non woven fabrics made of polypropylene of GSM 25 or less. The appellant filed an application/petition dated 17 March 2016 before the Designated Authority under the Customs Tariff Act 1975, (hereinafter referred as the Act) and Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (referred as Anti-Dumping Rules hereinafter) praying for initiation of anti-dumping investigation concerning imports of "non woven fabric made of polypropylene of GSM 25 or less" originating in or exported from Malaysia, Indonesia, Thailand, Saudi Arabia and China PR (referred as subject countries hereinafter).

3. On the said application/petition a notification dated 15 June 2016, published in Gazette of India, was issued for initiating the subject investigation in accordance with Rule 5 of the Anti-Dumping Rules to determine existence/degree and effect of alleged dumping of the subject goods, originating in or exported from the subject countries and to recommend the amount of anti-dumping duty which, if levied, would be adequate to remove the alleged injury to the domestic market. Keeping in view the history of production by domestic industries, the period of investigation was selected as 1 July 2015 (date of commercial production by the appellant) to 31 March 2016 which would be nine months.

4. After the issuance of the aforesaid notification dated 15 June 2016, the Designated Authority followed the procedure as laid down under Rule 6 of Anti-Dumping Rules seeking information from the concerned/interested parties. After Verification of the information furnished by various interested parties to the extent deemed appropriate and necessary, a disclosure statement dated 2 August 2017 as contemplated under Rule 16 of the Anti-Dumping Rules was issued containing such essential facts under consideration which would form the basis of the final findings. The said disclosure statement with regard to the product under consideration is summarised as follows:

S. No.	Producer	Dumping Margin	Injury Margin
		Range	

2	Hubei Gold Dragon Nonwoven Fabrics Co. Ltd. China	(5-15)	Negative
3	All others producers/exporters from China PR	15-25	10-20
4	Toray Polytech Jakarta, Indonesia	0-10	5-15
5	All other producers/exporters from Indonesia	15-25	5-15
6	All producers/exporters from Malaysia	15-25	20-30
7	Saudi German Co. for Nonwoven products, Saudi Arabia	0-10	0-10
8	All others producers/exporters from Saudi Arabia	5-15	0-10
9	Asahi Kasei Spunbond (Thailand) Co. Ltd. through Itochu Thailand Ltd./Itochu India Ltd.	0-10	Negative
10	All other producers/exporters from Thailand	10-20	

5. Comments to the said disclosure statement was submitted by the appellant. It is thereafter that the Designated Authority issued the final findings dated 2 September 2017 concluding as follows:

> ***"The Authority notes that there is no causal link between the dumped imports material injury to the domestic industry due to reasons given above. Therefore, in terms of Rule 14(b), (e) and Rule 17(1)(iii) read with Rule 11(2) and paragraph V of Annexure II of the Anti Dumping Rules, the Designated Authority decides to terminate the present investigation which was initiated vide Notification no. 14/23/2015-DGAD dated 15.6.2016."***

6. The Designated Authority also noted that in case of most of the participating exporters from subject countries, the dumping margin was de-minimus or negative except Toray Polytech (Nantong) Company Limited, China and Asahi Kasei Spunbound (Thailand) Co. Ltd. However, in some cases though the dumping margin was positive, the injury margin was negative. The Designated Authority also corrected the errors said to have inadvertently occurred in the calculation of dumping and injury margin in some cases.

7. It is thereafter that the appellant filed a writ petition bearing No. 8202/17 before the High Court of Delhi. However, the said writ petition was dismissed on 20 September 2018 holding that the writ petitioner (the appellant) had an efficacious alternate remedy to challenge the impugned order under section 9C of the Customs Tariff Act before the Appellate Tribunal and so liberty was given to file an appeal under Section 9C before this Tribunal. It was also observed that Appellate Tribunal will give due consideration to the time taken by the petitioner before the High Court.

8. Consequent thereto, the present appeal was filed mainly on the ground that the Designated Authority recorded completely positive disclosure statement stating that margin of dumping was more than de minimus in case of most of the exporters but still issued a negative final finding in a complete departure from the said disclosure statement and rather in contradiction thereof. Violation of the principles of natural justice has also been alleged. The appellant is also aggrieved by the fact that though the period of investigation was restricted to nine months by the Designated Authority, yet it has observed in the final findings that this period was too short to judge the alleged dumping of the

impugned goods. The Designated Authority has failed to correctly appreciate the meaning of the term "material retardation to the establishment of any industry in India". It has also been submitted that the termination of investigation under Rule 14, when there was no change in the factual matrix, was not justified. The appellants have, accordingly, prayed for quashing the final findings notified on 2 September 2017 and have prayed for recommending imposition of anti-dumping duty, adequate enough to remove the injury on account of dumped imports and for a direction upon the Central Government to issue an appropriate notification imposing Anti-Dumping Duty.

9. We have heard Ms. Reena Khair, Shri Rajesh Sharma, Ms. Rita Jha and Ms. Shreya Dahiya, Advocates for the appellant, Shri Ameet Singh and Shri Amit Randev, Advocate and G. Pradha, Director (Cost) for the Designated Authority, Shri Sunil Kumar, Authorised Representative (DR) for the Revenue. Shri Dhruv Gupta and Ms. Greetika Francis, Advocates have appeared for the Respondent No. 3.

10. It is submitted on behalf of appellant that it set up a unit for the manufacture of non woven fabrics in Nashik, Maharashtra. The trial production started in February 2015, whereas commercial production started in July 2015. The application for initiating anti-dumping investigation was filed in March 2016. The investigation initiated w.e.f. June 2016 in respect to the subject countries for a period of 9 months (1 July 2015 to 31 March 2016) as a period of investigation. It is impressed upon that the disclosure statement dated 2 August 2017 disclosed the following essential facts:

i. Barring Hubei Gold Dragon, China and Asahi Kasei (Thailand), positive dumping margin was found for all exporters and for all countries.

ii. The period of data collection was adequate for making a determination of injury, and that appellant was entitled to claim material retardation for establishment of domestic industry.

iii. Despite increase in production and sales, the losses suffered by the domestic industry have increased. iv. The dumping margin is quite significantly high, and with such high magnitude of dumping margin, the imports are causing material injury to the domestic industry.

v. There is a finding of material injury to the domestic industry.

vi. The Authority found that there are no factors, other than the imports causing injury.

11. It is impressed upon that when the final findings dated 2 September 2017 were issued they were altered, without justification. The major alteration as impressed upon are as follows:

i. The positive dumping margins in the disclosure are converted to de minimus dumping in the final findings, consequent to a correction of an alleged inadvertent error.

ii. The positive injury margins underwent a dramatic change, on account of an inadvertent error.

iii. In the disclosure statement, the Authority evaluated the injury parameters, on the basis of data for the POI (9 months) and the Post POI data (12 months), and came to a conclusion that there is material injury to the domestic injury. In the final findings, however, the Authority concluded that the period of investigation was too short to evaluate injury.

iv. While noting that the domestic industry is suffering losses, it is observed that 9 months is too short to judge the performance, as the losses could be due to teething problems as the applicant is a new manufacturer of subject goods.

v. The Authority held that negative profitability, negative cash flows, and negative return on investment, indicate that the ability to raise new investment is jeopardised.

vi. The Authority did not recommend duty, as there was no causal link between the dumped imports and material injury to the domestic industry.

12. It is further impressed upon that there is no cogent reason nor any sound explanation for recording contradictory findings. It is further impressed upon that the final finding, despite referring to the positive evidence about the existence of dumping margin and material injury with respect to import from China PR, still did not recommend for imposing duty at least with respect to imports from China nor has been imposed in the final findings. The observation of no causal link is contended to be absolutely false. The reasoning in this respect that volume of goods from China PR is extremely low and incapable of impacting the domestic industry is also contended to be a wrong finding. It has been

submitted that findings cannot be supported by fresh reasons not contained in the order. Decision of the Supreme Court in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors. (1978) 1 SCC 405*** has been relied upon in this respect. It is impressed upon that as per Rule 14 (d) of Anti-Dumping Rules, the imports which are more than 3% of the total imports are actionable and dumping is required to be redressed by imposition of duty. The final findings regarding the said import is in the range of less than 20% of the total imports and, therefore, much above the threshold given in Rule 14(d). The findings about such volume of imports to be still insignificant and as such to have no causal link is, therefore, impressed upon to be contrary to the statute.

13. It is also impressed upon that final findings have actually not denied injury to the domestic market but the imposition of anti-dumping duty is denied on the ground that the said injury is due to the teething problems, the appellant manufacturing unit being at a nascent stage of production. It is submitted that no specific teething problem has been pointed out by the Designated Authority in its final finding. The contention that there is no causal link is also alleged to be faulty. It is submitted that the causal link analysis is carried out by first excluding all other factors than the dumped imports which may be causing injury to the domestic industry. If after excluding the effect of all such other factors, the inescapable conclusion is that the injury is a result of dumped imports, the Authority would be justified in imposing Anti Dumping Duties. Learned counsel has relied upon Article 3.5 of WTO Appellate Body Report i.e. Anti Dumping Agreement.

14. Learned Counsel for applicant also submitted that the Designated Authority has failed to indicate the methodology for determination of the dumping margins, nor even for the residual category i.e. non co-operative exporters and producers. It is submitted that the methodology to be followed by the Authority for making its determination can never be confidential as it affords an opportunity to the effected parties to enable themselves to offer their comments. The non disclosure thereof is, therefore, contended to be in violation of the principles of natural justice. It is submitted that the disclosure of methodology was more so important when merely on account of certain inadvertent errors (not subsequently detailed and disclosed), the substantial positive dumping margins in the disclosure statement have become negative in the final findings.

15. Learned Counsel has also emphasised that the Designated Authority has determined the dumping margin based on highest normal value and lowest export price, with respect to non co-operating producers and exporters in Malaysia, where the highest normal value of the co-operative exporters has been considered as their normal value. For factual export price, the lowest export price of co-operative exporters with adjustments as adaptive in the case of co-operative exports has been taken into consideration while determining the dumping margin with respect to Malaysia as 15-20%. For all other non co-operative producers and exporters from EU, the highest domestic selling price of co-operative exporter without any adjustment has been taken into consideration for calculation of normal value.

16. It is submitted that as regards Malaysia, the response furnished by the exporter had been rejected by the Authority as unreliable as is evident from paragraph 53 of the final findings. Hence, no reliance could be placed thereon. The Malaysian exporter was found to have filed a malafide representation suppressing vital information from the Authority. Thus, the only material available to the Authority for determination of normal value and export price was the information submitted by the appellant (all the other exporters being non co-operative). Non-consideration of the submissions of the appellant by the Designated Authority and its silence as to the normal price, dumping margin and injury margin for Malaysian exporter is another reason for setting aside the final findings.

17. The Learned counsel, in addition, has also impressed upon that the test of material retardation as provided for in section 9B of the Act read with rule 11 of the Anti-Dumping Rules has not been correctly applied by the Designated Authority. It is submitted that examination of material retardation can only be done for the period during which domestic industry exist and was making efforts for its establishment. There can be no past performance of domestic industry which can form a benchmark for an evaluation about the performance of domestic industry to either have improved or deteriorated during the period of investigation. It was in the knowledge of the Designated Authority since beginning that the appellant is a new establishment for which there can be no data for past performance available. During the course of investigation, domestic industry information for further period of two months was also furnished. Thus the performance of appellant for a total period of 21 months i.e. 9 months of POI and 12 months post POI was available for being examined by the Designated Authority. It is the position of Authority itself in the final findings that in the case of nascent industries, the Authority is supposed to consider such shorter period for which the domestic industries existed. Yet, the final finding concluded by holding that the period of data collection is too short to come to a definitive conclusion towards injury suffered by the domestic industry. Learned Counsel has placed reliance upon the decision of this Tribunal in the case of ***Trinseo Euro GmbH vs. Union of India reported in 2019 (366) ELT 1065 (Tri-Del) = 2018-TIOL-1595-CESTAT-DEL*** , wherein it was held that material injury is for an existing unit, while retardation is an injury for a possible establishment of a new unit.

18. Finally, it has been submitted that Rule 16 of the Anti-Dumping Rules mandates that the Authority shall disclose essential facts that would form the basis of its decision and though the Authority is not bound by such disclosure and it can render findings at variance thereof, but it is mandatory for the Authority to bring to the notice of the parties concerned any fresh material/argument/omission etc. as may be considered by the Designated Authority for arriving at a different conclusion than that contained in the disclosure statement. It is impressed upon that Rule 16 is not for the Authority to give a faulty disclosure and to make so called corrections based on own scrutiny and not on basis of comments filed by any of the party.

19. Appellant finally has objected to the locus of the non co-operative Malaysian exporter/respondent no. 3. It is submitted that since the representation filed by the Malaysian exporter was rejected by the Designated Authority in paragraph 53 of the impugned findings, the exporters stand excluded from investigation for all intents and purpose and would have no locus standi to participate in proceedings except by way of an appeal. It is impressed upon that participation of exporters, who rendered malafide representations in the investigation process, would only encourage non cooperation of various exporters/producers. Hence, no opportunity of being heard should be provided to the Malaysian exporter. As appeal has not been filed by him against the said representation, he has no locus standi to appear and submit before this Tribunal in this appeal. With these submissions, learned counsel prayed that the impugned final findings be modified to the extent of imposing the requisite Anti-Dumping duty.

20. While rebutting these arguments, it has been submitted on behalf of Designated Authority as follows:

20.1 From the data provided by the appellant there is an increased production capacity as well as utilisation and that the per matrix losses kept decreasing. These findings were sufficient to falsify any apparent injury to the appellant, that too on account of dumping. There is no infirmity in the finding of the Designated Authority that though some losses were being suffered by the appellant, but they were due to the teething problems of the appellant, being a new manufacturer. With regard to the main grievance of the domestic industry about contradictions in the final findings and what was disclosed in the disclosure statement, it has been submitted by the learned counsel that the facts at the stage of final findings pointing dumping margin, injury and a causal link to injury were due to the methodology of taking highest export price and the lowest normal value at that stage. However, at the stage of disclosure statement, the error in the said methodology was detected that Product Control Number (hereinafter called as PCN) wise analysis was not carried out at the earlier stage. It, being an inadvertent error, the same was rectified at the stage of final findings by making a PCN to PCN comparison. It is however, acknowledged that this change of methodology was not disclosed to the domestic industry. It has also been acknowledged that the final findings are silent about adopting the PCN to PCN methodology comparison. However, it is impressed upon that since the methodology adopted at the stage of disclosure statement was merely an inadvertent error, no prejudice has been caused to the domestic industry while correcting the said error suo moto at the stage of final findings. The final findings and the subsequent notification, therefore, does not suffer from any infirmity and the appeal is liable to be dismissed.

21. Respondent no. 3, who is a manufacturer and exporter based in Malaysia, has submitted that though the locus standi has been objected on the ground that representation submitted by it was rejected by the Designated Authority, but in terms of Rule 5(2)(c) of CEGAT Procedure Rules 1996, any person who had submitted representations to Designated Authority during the course of investigation can be joined as a respondent. Since respondent no. 3 had submitted a representation and has been impleaded as a respondent by appellant, it has a locus to make submissions.

22. In rebuttal, it has been submitted that though the capacity and sale of the appellant has increased, but still the appellant is not able to fetch a price above the cost price of its production. The Appellant is sustaining the continuous losses and such loss making sales will actually compel the appellant to shut down its unit, thereby fulfilling the objective of the exporters. It is also impressed upon that increased capacity utilisation and increased sale are rather sufficient to falsify the observation of Authority in the final findings that the injury is due to the teething problems. It is further impressed upon that had the issue been only of teething problems, the industry being at nascent stage, even capacity utilization and sale could not have increased. It is submitted that disclosure is clearly showing positive dumping, positive injury and link thereto with respect to all the exporters and even the final findings show the same with respect to two exporters namely Toray Polytech (Nantong) Company Limited, China and all other producers/exporters from China PR but still the final finding are silent about the imposition of anti-dumping duty.

23. Though the Authority has contended that an error in disclosure statement crept in as PCN analysis was not carried out by making a PCN to PCN analysis comparison at the time of disclosure statement, the aforesaid inadvertent error was rectified, but the said PCN to PCN analysis is warranted only when a co-operative exporter makes a claim for a fair comparison. It is impressed upon that there is no material on record as to which PCN, the non co-operative exporters are selling in their home market or in India and therefore, the analysis has to be done for the product as a whole and not for the PCN. It is alleged that the methodology adopted is therefore inconsistent with the established practice of the Authority. The Authority otherwise also did not disclose as to whether the consistent methodology of adoption of highest normal value and lowest export price was followed in the final findings. The decision of Supreme Court in
Union of India vs. Meghmani Organics Ltd. reported in 2016 (340) ELT 449 (SC) = ***2016-TIOL-170-SC-CUS-LB***
has been relied upon wherein it was held that "when two competing public interest are involved, one is to supply all relevant information to the

parties concerned except for the confidential information. It was clarified that the proper course of action would be to leave in favour of public action, that is least respective of individual rights."

24. With respect to respondent no. 3, it is submitted that though a representation was filed by respondent no. 3, but the same was rejected with a finding that the documents provided by respondent no. 3 have not disclosed complete information. Infact, it was found that there was a deliberate attempt on part of the respondent no. 3 to suppress information, particularly with regard to existence of its office in India. Therefore, the information provided by respondent no. 3 was held to be unreliable and was consequently rejected. The said order of rejection was not challenged by respondent no. 3. The submission of the said respondent, in terms of Rule 5 of CEGAT Rules, cannot be considered. Decision of the Rajasthan High Court in ***J.K. Industries Ltd. vs. Union of India reported in 2005 (186) ELT 3 (Raj.)***
would not be applicable to facts and circumstances of the present case as in that case importers had participated through association and were treated as co-operative importers, whereas in the present case the response of the Malaysian exporter was rejected.

25. All the parties have been heard and the records have been perused.

26. The appellant herein, the domestic industry admittedly has set up its industry for manufacturing non woven fabrics in Nashik in January 2015 and conducted the trial production from February 2015. The Commercial production therein started in July 2015. It is eight months after the said commercial production that the appellant filed an application dated 17.3.2016 requesting for initiation of investigation under Rule 5(1) of Anti-Dumping Rules 1995 for determination of the existence, degree and effect of the significant dumping and injury, that materially retarded the establishment of the appellant. In furtherance whereof investigations were initiated by the Designated Authority vide notification dated 15.6.2016 issued in terms of Rule 5(3) of Anti-Dumping Rules. The Rule clarifies that the initiation notice shall be given after Designated Authority satisfies itself that the applicant is a domestic industry and after it examines the accuracy and adequacy of evidence as provided in the application and finds it to be sufficient evidence to its satisfaction regarding dumping, injury and a causal link between such dumped imports and the alleged injury to justify the initiation of an investigation. We find that in the impugned notification, the Designated Authority noted as follows:

i. The production of the appellant constitutes a major proportion in the total production in India, and the appellant satisfies the standing as domestic industry.

ii. The investigation was initiated in respect of Malaysia, Indonesia, Thailand, Saudi Arabia and China PR.

iii. The evidence indicates prima facie that the subject goods are being dumped into India.

iv. That there is prima facie evidence of dumping, injury and causal link between the dumping and injury to the domestic industry.

v. The period of investigation was fixed from 1July 2015 to 31 March 2016.

27. Vide office memorandum dated 6.6.2017 time limit for completion of investigation upto 14.9.2016 was extended. Opportunity of public hearing thereafter was granted to interested parties on 10 May 2017. It is thereafter that the disclosure statement as required under Rule 16 of Anti-Dumping Rules was issued on 2.8.2017. A perusal of the said disclosure statement shows that the Designated Authority noted the following essential facts:

i. Non injurious Price was fixed in terms of Annexure III to the Anti-Dumping Rules.

ii. The injury analysis has been done on the basis of quarter to quarter comparison of actual performance and projected estimates/targets.

iii. The volume of imports from subject countries is very significant in absolute terms as well as in relation to total imports and the overall demand in the country. The imports have been increasing significantly over the injury period. In fact, imports from subject countries have increased seven times as compared to the base year.

iv. Share of imports from the subject countries in total imports is quite significant over the entire injury period. The imports from subject countries constitute 98% of the total imports during injury period.

v. Imports of the product under consideration from subject countries have increased in relation to production and consumption in India.

vi. The production of the Domestic Industry increased during the investigation period and in the post POI. The capacity utilization of the Domestic Industry improved within the investigation period. Sales volumes of the Domestic Industry improved within the investigation period and further in the post POI period. However, sales volumes are still materially below the total demand in the country.

vii. The cost of sales has decreased over the investigation period as also the selling price. Further, selling price is far below the cost of sales.

viii. The domestic industry has been suffering significant losses. The extent of cash loss is quite significant. The extent of cash losses suffered by the Domestic Industry increased over the period.

ix. The Domestic industry is suffering negative return on capital employed throughout the period.

x. Despite increase in production and sales, the losses suffered by the Domestic Industry increased.

xi. Inventories of the Domestic Industry increased in the investigation period and even in the Post POI period. Further, the increase in inventories is despite the production restrictions employed by the Domestic Industry.

xii. The growth of the Domestic Industry was positive with regard to volume parameters and negative with regard to price parameters."

28. Thus it is clear that the essential facts under consideration which would form the basis of final findings as disclosed in the disclosure statement established positive facts with regard to dumping of the product under consideration, injury to domestic industry and existence of causal link between dumping and injury in the manner as has been tabulated by the appellant in their arguments. The comments to the said disclosure statement were submitted by the appellant. It is thereafter that the Designated Authority issued final findings on 2.9.2017 holding as follows:

i. The dumping margin becomes de minimis for most of the exporters.

ii. The performance of the domestic industry could have been impacted by the start up operations.

iii. The imports have increased because the domestic industry started production only in July 2015.

iv. Nine months period is too small a period to judge the trend.

v. The domestic industry is suffering losses, but it could be due to teething problems and not necessarily due to the dumped imports.

vi. No duty is recommended as there is no causal link between the dumped imports and material injury to the dumped imports.

29. A comparison of the findings in the disclosure statement and the final findings reflects that:

i. High magnitude of dumping margin as reflected in the disclosure statement was reduced to de minimis for most of the exporters at the stage of final findings.

ii. The Designated Authority out rightly ignored the disclosure statement regarding positive under selling.

iii. It ignored the disclosure statement that sale of domestic industry was still materially below the total demand.

iv. The Designated Authority held that negative profitability, negative cash flow and negative return on investigation indicate and that the ability to raise investment is jeopardised but still Anti-Dumping duty was not recommended in the final findings.

v. A comparison of disclosure statement and the final findings also reveals that injury margin figures have been significantly reduced in the final findings.

30. The Designated Authority has observed that the said reduction of the injury margin in the final finding is due to certain inadvertent error in computation of dumping and injury margin which was corrected, but the said inadvertent error has not been specified in the final findings. Though learned counsel for Designated Authority has tried to clarify that it was the change of methodology from price comparison to that of PCN to PCN comparison but the said submission cannot be considered as this reason, or for that matter, no reason has been mentioned.

31. Thus, the issue stands restricted to a very narrow comparison namely:

Whether the Designated Authority can give final findings contrary to the essential facts stated in the disclosure statement without even apprising the domestic industry.

32. To decide this issue, the foremost requirement is to understand the scope and object of the disclosure statement issued by the Designated Authority in terms of Rule 16 of Anti-Dumping Rules. This Rule mandates that the Designated Authority shall, before giving its findings, inform all interested parties of the "essential facts under consideration" which form the basis of its decision. In so far as the interpretation of Rule 16 of Anti-Dumping Rules is concerned, the WTO panel and appellate body of WTO decisions relating to interpretation of article 6.9 of the agreement on implementation of article VI of the general agreement on Tariffs and Trade 1994 (ADA) needs to be examined. The said articles 6.9 stipulates that the Authority shall before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures as prayed. Additionally article 6.9 also provides that such disclosure should provide sufficient time to the parties to defend their interest. In the Anti-Dumping investigation, since the Designated Authority has to find whether dumping, injury and causal link exist or not, the "essential facts" underlying the findings and conclusions relating to these elements shall form the basis of the decision under Rule 16 of the Anti-Dumping Rules. These "essential facts" are required to be disclosed to the domestic industry/interested parties. The word used in the Rule is "essential facts under consideration", rather than "essential facts that should reasonably be considered". Thus, the sole object of Rule 16 as well as of said article 6.9 is to allow parties to defend their interests. To render these provisions to be meaningful, the actual facts under consideration are the relevant facts, which facts have to be disclosed so as to afford an opportunity to the concerned parties to challenge omissions or use of incorrect facts, if any.

33. The meaning of word "fact" in various dictionaries is truth, reality and a thing known for certain to have called or to be true and a thing assumed or alleged as a basis for inference and events or circumstances as distinct from their legal interpretations. Thus, the purpose of disclosure of essential facts under Rule 16, in our opinion, is to provide to the interested parties, the necessary information so as to enable them to comment on the completeness and correctness of the facts being considered by the Investigating Authority/Designated Authority. It includes providing additional information or to correct error and comment on or make arguments as to the proper interpretation of those acts. Thus, the "essential facts" referred to in Rule 16 are facts significant in the process of reaching a decision as to whether or not to apply definitive measures as well as those that are salient for a contrary outcome. The High Court of Gujarat in
Nirma Ltd. Vs. UOI reported in 2017 (358) ELT 146 (Gujarat) = ***2017-TIOL-2183-HC-AHM-CUS***
held that such facts have to be disclosed by the Authority in a coherent way so as to permit the interested parties to understand the basis for the decision, for applying definitive measures or not applying them. Such disclosure is paramount for ensuring the ability of the parties concerned to defend their interest.

34. Though Rule 16 does not prescribe any particular form for disclosure of essential facts but it does require that the Designated Authority should disclose those facts in such a manner that the interested parties are able to clearly understand what data the investigating authority has used and how this data and relevant facts were used to determine the margin of dumping. The disclosure statement, therefore, contains the intermediate findings and conclusions of the Designated Authority on the essential facts which would form the basis for the decision to apply or not to apply definitive measures in the final findings. The stage of disclosure under rule 16 and the final findings under Rule 17 are both after submission of evidence/information and the arguments/submissions of all the interested parties. Thus, the essential facts as contemplated under Rule 16, are not merely a replica of information received by the interested parties but are the analysis by the Designated Authority and, therefore, the final findings must be based on an analysis expressed in the disclosure statement.

35. In the instant case, the conclusion arrived at by the Designated Authority in the disclosure statement clearly shows that their exists positive dumping material injury to the domestic industry and also a causal link between the dumped imports and the said material injury. Still the conclusions arrived at by the Designated Authority in the final findings are not only at variance with the disclosure statement but are also

contrary to what was stated in the disclosure statement.

36. The Designated Authority, in its final findings, has also recorded that there was an inadvertent error in the disclosure statement with respect to the calculation of dumping and injury margin in some cases, which were corrected, but there is no explanation as to what the said inadvertent error was and how it was corrected. However, it has been explained in the submissions made during the course of hearing that in the disclosure statement PCN wise analysis was not carried out and the final findings are based on a PCN to PCN comparison and this inadvertent mistake that crept in the disclosure statement was rectified. The Supreme Court has emphasised that the order cannot be defended on grounds not mentioned in the order. It would, therefore, not be appropriate to consider this explanation. This apart, there is no material on the record, to indicate as to which PCN were adopted by the Designated Authority for making a comparative study. Otherwise also, PCN wise analysis would be applicable only in case of cooperative exporters and not for the residual category. Above all, a change of methodology was mandatorily to be disclosed to the interested parties including the domestic industry/appellant herein as per Rule 16.

37. In the present case, the challenge to the final finding is principally based on the contention that the Designated Authority placed reliance upon certain material and facts for concluding the issue against the appellant, which facts did not form part of the disclosure statement and to which the appellant had no opportunity to deal with. The contention of the Appellant, therefore, has merit. Failure to make available to material on which the decision is based is clearly violation of principles of natural justice. It rather amounts to placing reliance on such data not made known to the party concerned. The Supreme Court in ***Reliance Industries Ltd. Vs. Designated Authority reported in (2006) 10 SCC 368 = 2006-TIOL-120-SC-AD***
held that proceedings before the Designated Authority determine a lies between Domestic Industry on the one hand and the importer of foreign goods on the other. The determination of the recommendation of the Designated Authority and the subsequent Government notification is subject to an appeal before this Tribunal. This makes it clear that the proceedings before the Designated Authority are quasi judicial in nature. The Supreme Court further clarified that when a decision is not in consonance to the "essential facts under consideration" as were "disclosed" to the interested parties, including the domestic industry, it was incumbent upon the Designated Authority to specify the reasons for such diversion. Any additional data/information/submission or methodology used by the Designated Authority while coming to such a decision was required to be made known by Designated Authority to the interested parties, including the domestic industry prior to taking a final decision.

38. Absence of the requisite disclosure of information amounts to violation of the principles of natural justice as the Designated Authority is a quasi judicial authority. In Nirma Ltd. the Gujarat High Court held that if any additional data or information was to be used by the Designated Authority, it was incumbent upon the Designated Authority to put the parties to notice in respect of such additional information. The non sharing of the data on which reliance has been placed by the Designated Authority while recording final findings is a breach of the principles of natural justice.

39. In view of the above discussion, about the scope and object of the disclosure statement and the non compliance thereof results in violation of the principles of natural justice. It is, therefore, considered appropriate that the matter be dealt by the Designated Authority after disclosing complete "essential facts under consideration" to all the interested parties, including the appellant/domestic industry. The matter is remanded to the Designated Authority for:

i. Issuing a fresh disclosure with complete details/data/information/methodology which may constitute "essential facts under consideration";

ii. To afford an opportunity to the interested parties to submit their comments;

iii. After analysing the disclosure statement and the comments, if any, give fresh final findings; and

iv. Liberty is also given to the Designated Authority to reconsider the status of the Malaysian exporter and the genuineness of its representation.

40. As a result of above discussion, the final findings and the notification issued by the Central Government are set aside. The Designated Authority shall give final findings in the light of the directions stated above, where after the Central Government shall issue a fresh notification. The present appeal is allowed in terms of the directions indicated above.

(order pronounced in the open court on 12.02.2020)