Circular No. 9/2006-Cus.

F.No. 523/2/2004-Cus.(TU)

GOVERNMENT OF INDIA

MINISTRY OF FINANCE

DEPARTMENT OF REVENUE

(TARIFF UNIT)

23rd January, 2006

Subject:- Retrospective levy of definitive Anti-Dumping Duty (ADD)-reg.

I am directed to say that divergence of opinion in the field formations regarding retrospective levy of final anti-dumping duty has come to the notice of the Board.

2. The matter has been examined in the Board's office. The issue under doubt is whether anti-dumping duty (ADD) under Section 9A of the Customs Tariff Act, 1975 is payable during the interregnum period between the date of expiry of provisional anti-dumping duty and imposition of final ADD, and whether it should be applied retrospectively from the date of imposition of provisional levy.

3. Section 9A of the Customs Tariff Act 1975 provides for levy of ADD. Sub-section (2) of this Section stipulates that pending determination in accordance with provisions of this Section and the rules made thereunder, the Central Government may impose an anti-dumping duty on the basis of provisional estimates. Rule 13 of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as ADD rules) provides for levy of provisional anti-dumping duty for a period of six months and is extendable by the Central Government for a further period of three months. However, under rule 17 the Designated Authority may submit the final findings regarding imposition of definitive anti-dumping duty on any product within 12 months from the date of initiation of investigation or extended period of another 6 months. Therefore, there may be a time gap during which no ADD is in operation because provisional anti-dumping duty notification may have lapsed and final ADD notification may not have been issued based on such final findings.

4. As per Rule 21(2) of the Anti-Dumping Duty Rules, if the final anti-dumping duty (imposed w.e.f. the date of provisional anti dumping duty) is less than the provisional duty, the difference is to be refunded. If, on the other hand, the final ADD is more than the provisional duty, the difference is not to be collected from the importer.

5. An opinion has been expressed by some commissionerates as well as by the Ministry of Commerce & Industry that going by the spirit of Rule 21(1) of the anti-dumping duty rules, ADD should not be recovered for the period when there was neither provisional nor final anti-dumping duty in operation and therefore at the material time, rate of anti-dumping duty on that product may be treated as 'nil'. Hence, if later, final ADD is imposed on that product for the period under consideration, the difference should not be collected.

6. Board had referred the matter to the Ministry of Law & Justice on this issue. Law Ministry in its opinion (copy enclosed) had concluded that even if no provisional duty was collected during the intervening period after six months of the provisional duty, the goods shall attract the duty on imposition of final duty with a difference that the duty shall be collected on imposition of final duty.

7. The matter has since been decided by the principal bench of CESTAT in matter of Nitco Tiles Ltd. V/s Designated Authority {2006(193) ELT 17(Tri.-Del.)}. The Hon'ble Court has held that *"Rule 20(2)(a) is intra vires the provisions of the said Act and the anti-dumping duty has been validly imposed with effect from the date of imposition of the provisional anti-dumping duty and would continue to operate even during the 'interregnum period'.*

8. Board has examined the issue in detail and it is felt that in the matters of interpretation of Law or Statute, opinion of the Law Ministry would prevail over any other technical opinion. Moreover, the opinion of the Law Ministry has been endorsed by the Tribunal. Therefore, it has been decided to follow the advice of the Ministry of Law in this matter.

9. It is accordingly clarified that in cases where finally determined anti dumping duty is imposed with a retrospective effect from the date of imposition of provisional anti-dumping duty, then the final antidumping duty would be payable even for the interregnum period subsequent to the expiry of the provisional duty period.

10. Trade and Industry should be suitably advised in this matter.

11. Pending assessments may be finalized accordingly.

Extract of Law Ministry's Opinion:

"In substance, the question is that if for any person the investigagtion leading to final determination takes more than six months after imposition of the provisional duty, would it disable the Central Govt. to impose duty even

after final determination so as to frustrate the very object of the Act and create dis-harmony with other Rules, for example, Rule 17, which provides a period of one year for completion of investigation.

It is well settled that the Rules are to be so interpreted as to promote the object of the Act - *ut res magis valeat quem pereat*. Further a harmonious reading needs to be given to the various Rules. Furthermore, the Rule cannot limit the operation of the Act. The Act has not created any such limitation as suggested as it would have created a gap between the periods of imposition of anti-dumping duty.

Apart from the above, from a strictly grammatical angle the word "from" preceding "the date of imposition of provisional duty" is important when read against other possible expressions like "for the period of". The word 'from' indicates only a starting point running through all the events thereafter, whereas the expressions "for the period", "during the period" etc., convey two points of time, the start and the end, usually of the same event or a chain of events. Section 9(2) and the word "from" in Rule 20(2) (a) leave no doubt as to the Government's capacity to impose final anti dumping duty 'from' the date of imposition of the provisional duty without any break thereafter.

In the light of the above we are of the view that finally determined anti-dumping duty is payable from the date of imposition of provisional duty even after six months of the provisional duty."

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