Issue 2 of 2020 *February*

ADHYATAN

TPM Newsletter
Special Budget Edition:
Amendments in Trade Remedies

The definition of domestic industry as provided under Rule 2(b) of the Countervailing Duty Rules has been amended. Earlier, the Rules provided for an automatic exclusion of any producer who imported the subsidized goods, that is imports from subject countries, from the scope of domestic industry. Further, any producer related to an importer or exporter of the subsidized goods was excluded. The Authority did not have any discretion to consider such a producer within the scope of domestic industry, irrespective of the circumstances of imports. The provision caused unnecessary hardships to the industry and was not in line with the provisions of the Agreement on Subsidies and Countervailing Measures as well. Therefore, there were repeated requests from the industry for amendment to the definition.

However, by Notification No. 10/2020 – Customs (N.T.), the definition of domestic industry has been restricted further. While earlier only imports or exports (by the producer itself or its related parties) from subject countries resulted in exclusion from the scope of domestic industry; now even imports or exports from other countries, not subject to the investigation, would result in an automatic exclusion.

Need for discretion to Authority

The need for discretion arose from the fact that a producer may have been forced to import the product for any bona fide reason. For instance, a producer may have imported certain product types as samples or for research and development. Or a producer may have imported the goods only for a limited period for meeting prior orders, when its plant was shut down, etc. Further, a producer may be merely related to an exporter in a non-subject country, that is not exporting the product to India at subsidized prices. In all such cases, it would not be reasonable to deny a producer remedy against unfair subsidized imports. Therefore, there was a clear need to allow the Authority discretion in this regard, in that, any producer taking undue advantage of subsidized imports is excluded; while a bona fide producer importing the goods, or related to producer or importer is not excluded.

Scope of domestic industry under anti-dumping law

Interestingly, even under the anti-dumping law, the definition earlier provided for an automatic exclusion for such producers, who have imported the product or are related to producers or importers. However, taking cognizance of the unjust nature of the provision, the Government had amended the same in 1999 to provide discretion to the Designated Authority to consider such producers within the scope of domestic industry.

It must be considered that there is no rationale behind the different eligibility criterion under anti-dumping and anti-subsidy law; when in effect, both the measures are intended to provide remedy to injury caused by unfair imports. Therefore, whether the imports are unfairly priced due to dumping or due to subsidies, should not have an impact on the ability of a domestic producer to apply for a remedy. Therefore, there is a need to amend the Countervailing Duty Rules in line with the provisions of Anti-Dumping Rules.

Amendment not in line with WTO Agreement

It may also be seen that the amendment made is inconsistent with the provisions of the Agreement on Subsidies and Countervailing Measures as well. The Agreement provides due discretion to the Authority to consider any producer, who has imported the goods or is related to exporter or importer of the goods. Even other countries such as Australia, Brazil, Canada, European Union, USA, etc. provide discretion to their investigating authorities in this regard. Therefore, the amendment introduced is not in keeping with the spirit of the Agreement and with the practice followed by other WTO members.

Path forward

Since the provision is inconsistent with the WTO Agreement, it is doubtful whether it can stand judicial scrutiny. However, at the application stage, it may cause undue hardship to the domestic producers. Thus, there is a need for immediate amendment to the definition, to bring it in line with the provisions of the WTO Agreement and Anti-Dumping Rules.

Introduction of definition of like article

The Countervailing Duty Rules did not provide for the definition of like article. The same has now been introduced in line with that under the Anti-Dumping Rules.

Introduction of definition of period of investigation

The Central Government has also introduced a definition for "period of investigation" in Anti-Dumping Rules and Countervailing Duty Rules. Period of investigation means the period for which the existence of dumping or subsidy is examined. However, explanation to the definition provides that period of investigation should not be older than 6 months at the date of initiation. Further, the period of investigation should be of 12 months, though the Authority may consider any period of not less than 6 months and not more than 18 months, for reasons to be recorded in writing.

However, in case of anti-subsidy investigation, it may take more than month for consultations with governments of subject countries to be completed. Therefore, in such cases, the period of investigation proposed by the domestic industry may be older than 6 months on the date of initiation. Accordingly, the Authority would have to change the period of investigation at initiation, resulting in the domestic industry being required to update the data in the application.

Introduction of provision for non-publicization of applications

Under Rule 6 of Countervailing Duty Rules, it has been provided that the Designated Authority shall avoid any publicizing of the application, unless a decision has been made to initiate an investigation.

Introduction of provision for consultation with government

The Central Government has also introduced a provision with regard to consultation with government of subject countries before initiation of investigation, in line with the WTO Agreement.

Amendment to provisions regarding price undertaking

The provisions governing effect of violation of undertakings have also been amended in line with the provisions of Anti-Dumping Rules. Under the amended provisions, the Authority would collect information from the producers or importers to monitor the undertaking. Further, if there is any violation of the undertaking, provisional duty would be imposed on the exporter. If any violation is found, retroactive duty may be imposed for a period of upto 90 days before the provisional measure, or the violation of undertaking, whichever is later.

Introduction / amendment of anti-circumvention provisions

The Government had amended Customs Tariff Act in the last budget to provide for anti-circumvention provisions under the anti-subsidy law. The detailed rules with regard to the same have been introduced now. Circumvention has been defined as a change in the pattern of trade, due to imposition of the duty, which results in injury to the domestic industry or undermining the remedial effects of the duty. Circumvention includes the following situations:

(a) Where an article is imported in an unassembled, unfinished or incomplete form and is assembled, finished or completed in India or any third country,

(b) Where an article is imported after being subjected to any process involving alteration of the description, name or composition of the article,

(c) Where an article is imported through any exporter or producer or country not subject to countervailing duty due to change in channels of sales by exporters subject to levy of duty,

(d) Any other manner in which the duty levied is rendered ineffective.

Further, though provisions for anti-circumvention was already provided for under the Anti-Dumping Rules, the same have been amended in line with the above.

Amendment to provision regarding duty to a new shipper

As per proviso introduced to Rule 22, where sampling of exporters was done in the original investigation, a new shipper, filing an application for individual margins, shall be subjected to the same duty as levied on the cooperative non-sampled exporters.

Lesser duty rule retained

The much-anticipated withdrawal of lesser duty rule has not been provided for in this budget. For present, duties shall continue to be levied to the extent of lower of dumping / subsidy margin or the injury margin. This is likely to result in continued hardships to the domestic producers, as the injury margin law in India often results in inadequate protection against unfair imports.

However, it may be seen that no amendment has been introduced with regard to calculation of non-injurious price under the Countervailing Duty Rules, along the lines of the provisions under the Anti-Dumping Rules. It, therefore, shows that the Central Government does not intend to apply the stringent provisions of Annexure – III in the Anti-Dumping Rules, to anti-subsidy investigations. This may bode well for the industry, as in the absence of any provisions, the DGTR is not required to calculate the allegedly "efficient" cost based on assumptions provided under Annexure – III.

About Us

TPM was founded in 1999 at a time when the practice of trade remedies in India was in its infancy and there were only a handful of firms in the field. While other firms added this portfolio in their existing portfolios, TPM dealt exclusively in cases in the domain of trade remedies.

TPM began its journey with a staff of merely 2 professionals. Today, it has a team of more than 40 professionals including Cost Accountants, Chartered Accountants, Company Secretaries, Lawyers, Engineers and MBAs.

From the beginning, TPM was focused on providing consultancy in the field of trade remedies. TPM helps domestic producers suffering due to cheap and unfair imports into India to avail the necessary protection under the umbrella of WTO Agreements. TPM has also assisted the domestic producers in other countries to avail similar measures in their respective countries. Besides assisting domestic producers in India and other countries, TPM also assists exporters and importers facing trade remedial investigations in India or other countries. TPM has assisted Indian exporters facing investigations in a number of jurisdictions such as Argentina, Brazil, Canada, Egypt, European Union, GCC, Indonesia, Korea RP, Turkey and USA.

TPM has an unenviable experience of dealing in the field, of more than 700 cases. Its unique experience in the field sets it apart from other firms. While the firm is primarily dedicated to trade remedies, it also provides services in the field of trade policy, non-tariff barriers, competition law, trade compliance, indirect taxation, trade monitoring and analysis. It also represents industries before the Government in matters involving customs policy.

TPM Consultants

Ish Kriti, J-209, Saket, New Delhi – 17

011 – 4989 2200

info@tpm.in

www.tpm.in

TPM Solicitors & Consultants