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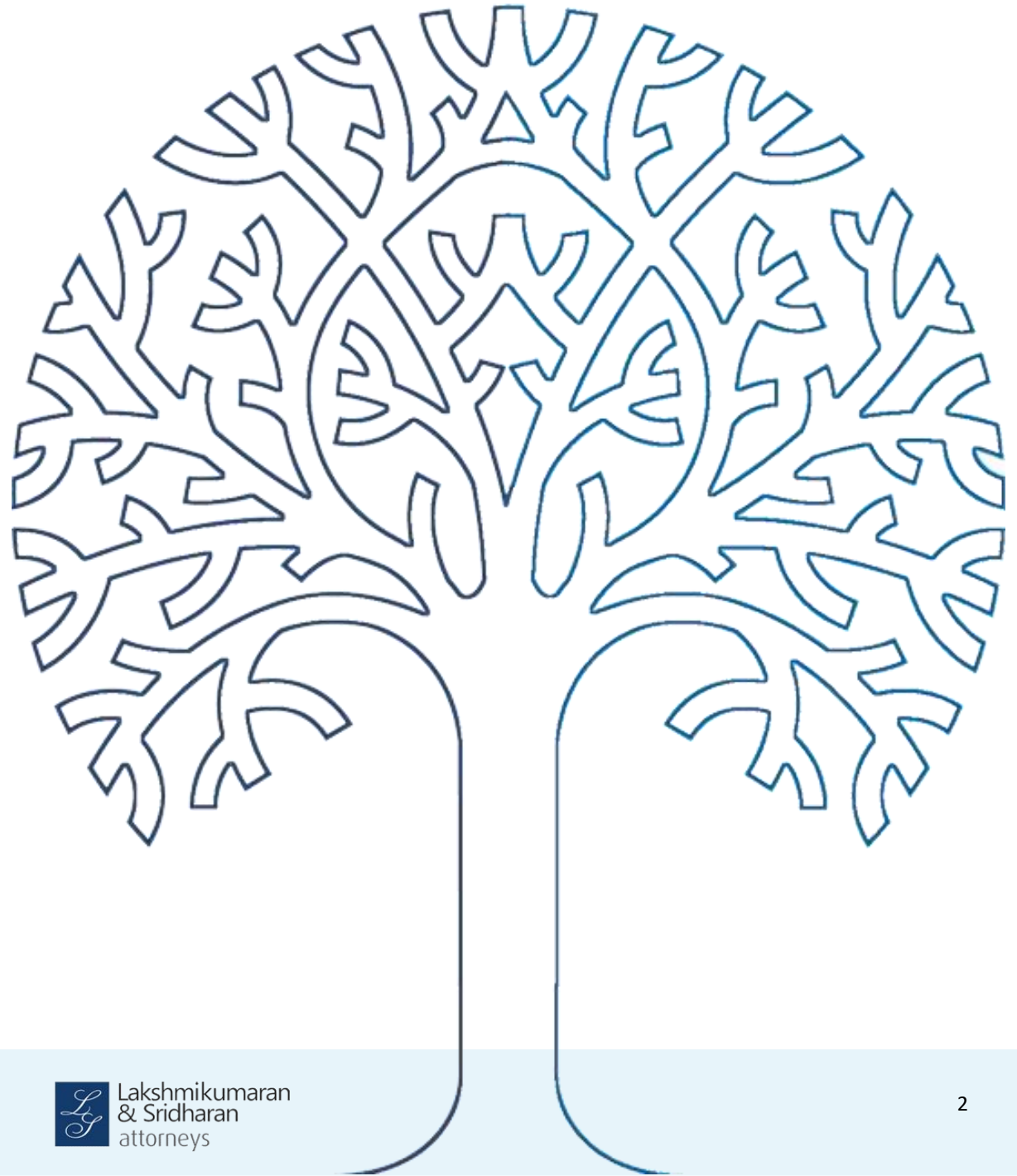


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# Article

## Anti-dumping duty – CESTAT establishes important jurisprudence on commercial quantities

By Ashutosh Arvind Kumar

The article in this issue of International Trade Amicus analyses a recent CESTAT decision relating to the threshold for considering a product within the scope of the product under consideration ('PUC') in anti-dumping investigations. The Hon'ble CESTAT has held that mere production of a product is not enough for it to be included in the scope of the PUC; the domestic industry must show that it has catered to a certain amount of demand for that product for it to be included. The article in this regard notes that Appellant's reliance on the questionnaire response and legal submissions made before the DGTR to stress on the product exclusion played an important role in convincing the CESTAT about the *bona fides* of its product exclusion claims. The article further notes that the CESTAT has also observed that the production and sale quantities during the period of investigation (POI) are only relevant. According to the author, the jurisprudence developed in this case should guide the DGTR in analysing genuine user / importer interests in future investigations.

# Anti-dumping duty – CESTAT establishes important jurisprudence on commercial quantities

By Ashutosh Arvind Kumar

## Introduction

The starting point of any anti-dumping investigation is the scope of the product under consideration ('**PUC**'). Defining the scope of PUC is crucial in an investigation as the DGTR only assesses standing, dumping, injury, and causality with respect to the PUC. Depending on the nature and type of the product, the scope of PUC may be a very contentious issue in an investigation.

In a recent appeal, *Technova Imaging Systems Pvt. Ltd. v. Designated Authority* (AD/51425/2022), the Hon'ble Customs, Excise and Service Tax Appellate Tribunal ('**CESTAT**') has adjudicated on the threshold for considering a product within the scope of the PUC.

This article presents the brief facts leading to the appeal, issues raised before the Hon'ble CESTAT and the jurisprudence established.

## Brief facts

The appeal was filed by Technova Imaging Systems Pvt. Ltd. ('**Appellant**') against Final Findings dated 7 September 2021 ('**Final Findings**') issued by the Directorate General of Trade Remedies ('**DGTR**') and the subsequent Customs Notification No. 68/2021-Customs (ADD) dated 6 December 2021 in the anti-dumping investigation concerning imports of 'Certain Flat Rolled Products of Aluminium' originating in or exported from China PR.

The PUC in the present case was broadly defined as 'Certain Flat Rolled Products of Aluminium', which included within its scope numerous types of products. One such product is 'lithographic aluminium coils', which are used for manufacturing digital offset printing plates used in the printing industry. The Appellant is a user of lithographic aluminium coils which had participated in the investigation before the DGTR.

Before the DGTR, the Appellant argued for exclusion of lithographic coils above 1150 mm width ('**subject product**') from the product scope since Hindalco Industries Ltd. ('**domestic industry**') was not manufacturing the said coils in commercial quantities to fulfil the demand of user in India. It was evidenced that total demand for such coils was around 10,000 MT per year while domestic industry had supplied some trial quantities amounting to mere 2% of such demand to the user. However, the DGTR did not exclude such coils from the scope of the PUC for the reason that mere demand supply gap does not call for product exclusions.

In its appeal, the Appellant argued that the domestic industry did not commercially manufacture and supply the subject product, and thus it should have been excluded by the DGTR from the scope of the PUC in the Final Findings. As stated above, the Appellant had argued the same before the DGTR. However, the DGTR rejected this argument on the ground that the domestic industry had indeed produced and sold this product type in the period of investigation ('**POI**'), viz., April 2019 to March 2020.

## Decision of the CESTAT

The key argument taken before the CESTAT by the Appellant was that even though the domestic industry had produced and sold the subject product during the POI, the domestic industry simply was unable to produce and sell the same in commercial quantities to the Appellant.

Taking cognizance of the fact that the domestic industry's supplies to the Appellant were only on a trial basis, the Hon'ble CESTAT analyzed the quantities supplied by the domestic industry against the total demand of the subject product. The Hon'ble CESTAT noted that only 2% of the Appellant's requirement of higher width coils were supplied by the domestic industry on trial basis during the POI, out of which 25% were rejected by the Appellant because they did not meet the technical manufacturing requirements of the user. On this basis, the Hon'ble CESTAT held that it cannot be said that the domestic industry manufactured and supplied the subject product in commercial quantities.

In conclusion, the Hon'ble CESTAT held that mere production of a product is not enough for a product to be included in the scope of the PUC; the domestic industry must show that it has catered to a certain amount of demand for that product for it to be included. Otherwise, the product should be excluded from the scope of the PUC.

## Importance of User Participation in the Investigation

One of the key reasons the Appellant succeeded before the CESTAT was that the grounds urged by it before the CESTAT had been urged before the DGTR and relevant data of demand and

supply by the domestic industry for subject product was placed on record before the DGTR which remained uncontroverted by the domestic industry. It is a general principle that grounds of appeal presented before the CESTAT must be those that are urged before the DGTR.

In this regard, it may be pointed out that the Appellant's reliance on the questionnaire response and legal submissions made before the DGTR to stress on the product exclusion played an important role in convincing the CESTAT about the *bona fides* of its product exclusion claims and the DGTR's errors in rejecting the Appellant's claims.

This highlights the importance of user participation in any investigation and the importance of carefully crafting the questionnaire response and the legal submissions before the DGTR for product exclusion purposes.

## Conclusion

Defining the scope of the PUC is the most crucial part in an anti-dumping investigation because it is with regard to the PUC that the DGTR examines critical aspects such as dumping, injury being faced by the domestic industry, etc., and in respect of which anti-dumping duty is eventually recommended by the DGTR.

If a product type which is not produced by the domestic industry is included within the scope of the PUC, this subjects the domestic users / importers to extreme hardships. Thus, it is important for the DGTR to examine whether the domestic industry produced and sold the product type during the POI defined for the investigation.

However, it is not sufficient if the domestic industry produced and sold the product type in any quantity. The domestic industry should have produced and sold the product type in commercial

quantities during the POI. Of course, what constitutes 'commercial quantity' cannot be uniform in all investigations and will vary from case-to-case. In the facts of this case, a supply of around 200 MT of subject product to the users was not considered 'commercial' in view of the total demand of 10,000 MT in India.

Another important observation of the Hon'ble CESTAT in this case was the production and sale quantities *during the POI* were only relevant. This observation came in view of submissions made by the domestic industry's counsel that they are in the process of setting up a new facility at Hirakut for manufacture of the subject product.

The Hon'ble CESTAT has made important observations concerning the subject matter and has affirmed an important threshold relevant for product scope exclusions. The jurisprudence developed in this case should guide the DGTR in analysing genuine user / importer interests in future investigations.

**[The author is an Associate in WTO and International Trade Division in Lakshmikumaran & Sridharan Attorneys, New Delhi. He was involved in appearing on behalf of the Appellant in the appeal under discussion before the Hon'ble CESTAT.]**

# Trade Remedy

## News



- Boltless steel shelving units prepackaged for sale from India – USA initiates anti-dumping and countervailing duty investigations
- Brass rod from India – USA initiates anti-dumping and countervailing duty investigations
- Circular welded pipe and tube from India – USA issues notice for proceeding with full review of revocation of anti-dumping duty
- Cold-drawn mechanical tubing from India – USA issues notice for review of revocation of anti-dumping and countervailing duty
- Cold-drawn mechanical tubing of carbon and alloy steel from India – USA issues affirmative sunset review of countervailing duty
- Easy open ends of tin plate, including electrolytic tin plate (ETP), measuring 401 Diameter (99MM) and 300 Diameter (73MM) in dimension from China PR – India initiates anti-dumping investigation
- Fishing net from China PR – India extends anti-dumping duty till 9 September 2023
- Flax yarn of below 70 Lea Count from China PR – India initiates sunset review of anti-dumping duty
- Grinding media balls excluding forged grinding media balls from China PR and Thailand – Indian DGTR recommends continuation of anti-dumping duty, after sunset review, only on imports from Thailand
- High Tenacity Polyester Yarn from China PR – Indian DGTR recommends continuation of anti-dumping duty after sunset review
- Hot rolled and cold rolled stainless steel flat products from China PR – Indian DGTR recommends continuation of countervailing duty after sunset review
- Lined paper products from India – USA determines that Cellpage Ventures P. Ltd. made sales at prices below normal value, while Navneet Education Ltd. did not, during 1 September 2020 and 31 August 2021
- LPG steel cylinders – Philippines initiates preliminary safeguard investigation
- Non-refillable steel cylinders from India – USA initiates anti-dumping and countervailing duty investigations
- Pneumatic off-the-road tires from India – USA issues affirmative determination in sunset review of anti-dumping duty and countervailing duty
- Sodium Cyanide from China PR, European Union, Japan and Korea RP – India initiates anti-dumping duty
- Stainless steel flanges from India – USA initiates sunset review of anti-dumping duty and countervailing duty
- Sulphur black from China PR – India terminates anti-dumping duty
- Ursodeoxycholic Acid (UDCA) from China PR and Korea RP – India imposes definitive anti-dumping duty
- Vinyl tiles, other than in roll or sheet form, from China PR and Taiwan – India imposes definitive anti-dumping duty
- Welded carbon steel standard pipes and tubes from India – USA issues preliminary determination that imports of goods completed in Vietnam, using hot-rolled steel (HRS) produced in India, are circumventing anti-dumping duty



## Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Easy open ends of tin plate, including electrolytic tin plate (ETP), measuring 401 Diameter (99MM) and 300 Diameter (73MM) in dimension	China PR	F. No. 6/1/2023-DGTR	31 March 2023	Anti-dumping investigation initiated
Fishing net	China PR	3/2023-Cus. (ADD)	6 April 2023	Anti-dumping duty extended till 9 September 2023
Flax yarn of below 70 Lea Count	China PR	F. No. 7/03/2023-DGTR	31 March 2023	Sunset review of anti-dumping duty initiated
Grinding Media Balls excluding Forged Grinding Media Balls	China PR and Thailand	F. No. 7/13/2022-DGTR	12 April 2023	Anti-dumping duty recommended to be continued, after sunset review, only on imports from Thailand
High Tenacity Polyester Yarn	China PR	F. No. 7/21/2022-DGTR	6 April 2023	Sunset review of anti-dumping duty recommends continuation of duty
Hot Rolled and Cold Rolled Stainless Steel Flat Products	China PR	F. No. 7/21/2021-DGTR	6 April 2023	Sunset review of countervailing duty recommends continuation of duty
Sodium Cyanide	China PR, European Union, Japan and Korea RP	F. No. 6/03/2023-DGTR	31 March 2023	Anti-dumping investigation initiated
Sulphur Black	China PR	F. No. 06/09/2022-DGTR	21 April 2023	Anti-dumping investigation terminated



Product	Country	Notification No.	Date of notification	Remarks
Ursodeoxycholic Acid (UDCA)	China PR and Korea RP	4/2023-Cus. (ADD)	10 April 2023	Definitive anti-dumping duty imposed
Vinyl Tiles, other than in roll or sheet form	China PR and Taiwan	5/2023-Cus. (ADD)	19 April 2023	Definitive anti-dumping duty imposed

## Trade remedy measures against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Boltless Steel Shelving Units Prepackaged for Sale	USA	Investigation Nos. 731-TA-1607-1611 (Preliminary)	25 April 2023	Institution of anti-dumping and countervailing duty investigations and scheduling of preliminary phase investigations
Brass Rod	USA	Investigation Nos. 701-TA-686-688 and 731-TA-1612-1617 (Preliminary)	27 April 2023	Institution of anti-dumping and countervailing duty investigations and scheduling of preliminary phase investigations
Circular Welded Pipe and Tube	USA	FR Doc No: 2023-08159	18 April 2023	Notice issued for proceeding with full review of revocation of anti-dumping duty
Cold-Drawn Mechanical Tubing	USA	FR Doc No: 2023-08348	20 April 2023	Notice issued for review of revocation of anti-dumping and countervailing duty
Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel	USA	FR Doc No: 2023-08365	20 April 2023	Affirmative sunset review of countervailing duty

Product	Investigating Country	Document No.	Date of Document	Remarks
Lined Paper Products	USA	FR Doc No: 2023-07623	12 April 2023	Determination that Cellpage Ventures P. Ltd. made sales at prices below normal value, while Navneet Education Ltd. did not, during 1 September 2020 and 31 August 2021
LPG Steel Cylinders	Philippines	G/SG/N/6/PHL/20	4 April 2023	Preliminary safeguard investigation initiated
New Pneumatic Off-the-Road Tires	USA	FR Doc No: 2023-07086	5 April 2023	Preliminary determination that countervailable subsidies were provided during the period 1 January 2021 and 31 December 2021.
New Pneumatic Off-the-Road Tires	USA	FR Doc No: 2023-07249	6 April 2023	Preliminary determination of sales at less than normal value (NV) during 1 March 2021 and 28 February 2022
Non-Refillable Steel Cylinders	USA	Investigation Nos. 701-TA-689 and 731-TA-1618 (Preliminary)	27 April 2023	Institution of anti-dumping and countervailing duty investigations and scheduling of preliminary phase investigations
Pneumatic Off-the-Road Tires from India	USA	Investigation Nos. 701-TA-552 and 731-TA-1308 (Review)	27 April 2023	Affirmative determination in sunset review of anti-dumping duty and countervailing duty
Stainless Steel Flanges	USA	88 FR 26592	25 April 2023	Sunset review of anti-dumping duty and countervailing duty initiated
Welded Carbon Steel Standard Pipes and Tubes	USA	FR Doc No: 2023-07710	12 April 2023	Preliminary determination that imports of goods completed in Vietnam, using hot-rolled steel (HRS) produced in India, are circumventing anti-dumping duty



# WTO News

- WTO dispute panels issue reports regarding Indian tech tariffs
- United States formally accepts Agreement on Fisheries Subsidies

## WTO dispute panels issue reports regarding Indian tech tariffs

On 17 April, the WTO released three panel reports related to cases filed by the European Union, Japan, and Chinese Taipei against India. The cases were titled "*India - Tariff Treatment on Certain Goods in the Information and Communications Technology (ICT) Sector*" (DS582), "*India - Tariff Treatment on Certain Goods*" (DS584), and "*India - Tariff Treatment on Certain Goods in the Information and Communications Technology (ICT) Sector*" (DS588), respectively.

In all the three cases, the European Union, Japan and Chinese Taipei challenged India's tariff treatment for certain ICT products falling under specific tariff items, claiming that it violates Articles II:1(a) and (b) of the GATT 1994. India argued that its binding tariff commitments are set forth in the ITA and that the errors in its WTO Schedule are of a formal nature and can be rectified. However, the Panel rejected these assertions and found that India's WTO tariff commitments are not

static and must be set forth in its WTO Schedule for purposes of applying Articles II:1(a) and (b) of the GATT 1994. The Panel also found that India's tariff treatment of certain products was inconsistent with these articles.

## United States formally accepts Agreement on Fisheries Subsidies

The United States has become the fourth member of the World Trade Organization (WTO) and the first among the major fishing nations to deposit its instrument of acceptance for the Agreement on Fisheries Subsidies on 11 April. This move is a significant milestone for the agreement's impending entry into force, as two-thirds of WTO members need to accept it. The Agreement on Fisheries Subsidies aims to promote ocean sustainability by limiting harmful subsidies that contribute to overfishing and depletion of fish stocks.

# India Customs & Trade Policy Update



- Amnesty Scheme for settlement of default in export obligation under Advance authorisation and EPCG scheme – Customs notifications amended
- Plastic waste management – Registration of importers – Clearance of imports based on proof of submission of registration application
- Rice in husk (paddy or rough), of seed quality, exempted from export duty



## Amnesty Scheme for settlement of default in export obligation under Advance authorisation and EPCG scheme – Customs notifications amended

The Ministry of Finance has amended some 13 Customs notifications under Advance authorisation scheme and under EPCG scheme, issued during the earlier Foreign Trade Policies. This was required to be done to incorporate the changes as made by the new Foreign Trade Policy 2023, providing for an amnesty scheme to regularise the EO default under the Advance Authorisation (AA) Scheme and the Export Promotion Capital Goods (EPCG) Scheme. According to the changes being made by Notification No. 32/2023-Cus., dated 26 April 2023, the amount of interest to be paid by the importer shall be payable as specified in the DGFT Public Notice dated the 1 April 2023. It may be noted that according to the Public Notice, all pending cases of default in meeting the export obligation (EO) under AA and EPCG authorisations can be regularized by payment of all duties of Customs (including CVD / SAD/ ADD etc.) that were exempted in proportion to the unfulfilled EO and interest capped at the rate of 100% of such duties exempted. Interest however is not payable on the additional customs duty and special additional customs duty.

## Plastic waste management – Registration of importers – Clearance of imports based on proof of submission of registration application

The Central Board of Indirect Taxes and Customs has directed its field formations to allow clearance of imports of plastic packaging product or products with plastic packaging or carry bags or multi-layered packaging or plastic sheets or like, based on the proof of submission of application for registration on the centralized EPR Portal of the Central Pollution Control Board. Importers of plastic packaging product or products with plastic packaging or carry bags or multi-layered packaging or plastic sheets or like require registration with CPCB/SPCB/PCC at the time of clearance. The Instruction No. 14/2023-Cus. issued in this regard notes that difficulties are being faced by several importers, as their consignment is held up, as the registration on Centralised EPR portal is still under process.

## Rice in husk (paddy or rough), of seed quality, exempted from export duty

The Finance Ministry has exempted rice in husk (paddy or rough), of seed quality, from export duty leviable under the second schedule of the Customs Tariff Act, 1975. Amendments have been made in Notification No. 55/2022-Cus. by Notification No. 30/2023-Cus., dated 10 April 2023. The change is effective from 11 April 2023.



# Ratio

# Decidendi

- Anti-dumping duty on flat rolled products of aluminium – ‘Clad with compatible non-clad aluminium foil’ to be excluded as not sold by domestic industry in commercial quantities – CESTAT
- Classification of goods – ‘Pull in’ Note to be narrowly construed when goods excluded by different Note from particular Chapter – Supreme Court
- Valuation – LME prices cannot be a benchmark when manufacturer certifies that goods produced from scrap – CESTAT Kolkata

## Anti-dumping duty on flat rolled products of aluminium – ‘Clad with compatible non-clad aluminium foil’ to be excluded as not sold by domestic industry in commercial quantities

The Anti-dumping Bench of the CESTAT has allowed exclusion of ‘clad with compatible non-clad aluminium foil’ from the scope of the product - certain flat rolled products of aluminium, in a dispute involving imposition of anti-dumping duty on flat rolled products of aluminium.

The CESTAT in this regard relied upon Article 3.10 of the Manual of Standard Operating Practices for Trade Remedy Investigations issued by the Directorate General of Trade Remedies, Department of Commerce, Government of India, according to which mere competence without any production or merchant sales may not be sufficient, to include an item in the definition of the product under consideration. The Tribunal hence held that an item which has not been sold by the domestic industry in commercial quantities should not be included in the scope of the product under consideration by the domestic industry. It noted that the domestic industry also failed to substantiate that it had made commercial supplies of clad with compatible non-clad aluminium foil during the period of investigation.

Allowing importer’s appeal, the Tribunal also observed that a clad coil or clad with compatible non-clad aluminium foil is not a simplicior flat rolled product of aluminium, but it is a coil which has been manufactured out of three flat rolled products of aluminium, and that

the present investigation was only on certain flat rolled products of aluminium and not on products that are manufactured out of flat rolled products of aluminium. [*Mahle Anand Thermal Systems Private Limited v. Designated Authority – Final Order No. 50470/2023, dated 13 April 2023 in Anti dumping Appeal No. 51485 of 2022, CESTAT*]

## Classification of goods – ‘Pull in’ Note to be narrowly construed when goods excluded by different Note from particular Chapter

The Supreme Court of India has observed that when goods are excluded from a particular chapter, the ‘pull in’ through a note has to be narrowly construed, as otherwise, the basis of exclusion would be defeated, and the earlier note (of exclusion) rendered redundant. In the dispute involving classification of LCD panels, the Court upheld the CESTAT decisions classifying the goods under more specific Tariff Item 9013 80 10 of the Customs Tariff Act, 1975. Department’s view of classification under Heading 8529 as parts of goods falling under Heading 8528 [Televisions] and under Heading 8519 or 8555 in case of car audio or video players, was thus rejected by the Apex Court while it relied upon Note 1(m) of Chapter 85 [exclusion note] along with General Note 3(a) of the General Rules of Interpretation. The Court noted that Revenue’s contention that by virtue of Note 2(b) to Chapter 85, the goods are to be classified based on their principal or sole use, was insubstantial, because of the clear mandate of Note 1(m), which excludes Chapter 90 goods. [*Commissioner v. Videocon Industries Ltd. – Judgement dated 29 March 2023 in Civil Appeal Nos. 5622 of 2009 and 8026 of 2022, Supreme Court*]



## Valuation – LME prices cannot be a benchmark when manufacturer certifies that goods produced from scrap

The CESTAT Kolkata has held that the Department's contention of taking London Metal Exchange (LME) prices as the benchmark price is not on a sound footing when the foreign manufacturers had given a

certification that the import goods were produced out of scrap. The Tribunal held that in view of the manufacturers certification provided at the time of import and with no claim to doubt the veracity of the said contention, the test results as offered by the CRCL and the Sriram Institute for Industrial Research, New Delhi, the Department's claim of disputing the description and valuation of the import goods was bereft of any merit. [*Karan International v. Commissioner* – 2023 VIL 286 CESTAT KOL CU]

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