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Article

Anti-absorption provisions – A new chapter in trade remedial investigations in India

By Sangam Grover

Introduction

The Union Budget 2021-2022 introduced several amendments to the trade remedial framework in India. One of the changes proposed to be made is the introduction of anti-absorption provisions in the legal framework governing anti-dumping and countervailing duty investigations. Though anti-absorption provisions have been in existence in jurisdictions like the United States and the European Commission, it is the first time that anti-absorption provisions are being introduced in the Indian legal framework.

Before discussing the relevant legislative changes that have been introduced *vide* Union Budget this year, it would be imperative to first introduce the notion of anti-absorption mechanism.

Purpose of anti-absorption provisions

When trade remedial measures such as anti-dumping duty ('ADD') or countervailing duty ('CVD') is imposed on imports of a particular product into a country by the government of the importing country, the purpose is to remove the impact of the unfair trade and create a level playing field between the dumped/subsidized imports and the domestically produced goods.

The level-playing field sought to be created by the imposition of ADD/CVD is effected when the importer clears the subject goods from customs after paying the ADD/CVD, apart from ordinary customs duties in force. Other things remaining the same, this leads to an increase in cost of imported goods as a result of ADD / CVD paid on such goods. This is intended to level the

playing field between the domestically manufactured goods and the imported goods.

There may be a situation when in spite of imposition of ADD / CVD, the price of the imported goods in the Indian domestic market does not increase, thereby giving imported goods a competitive advantage over the domestically manufactured goods. One of the circumstances which may lead to this situation is when the exporters reduce their export price to the extent of ADD / CVD levied on the subject goods. Except when there is a valid reason for such reduced export price, such a practice is called 'absorption' of ADD / CVD by the exporter and leads to the same situation of unfair trade in the Indian domestic market.

For an easier understanding of *absorption*, reference may be made to the example below.

Figure 1: Import of goods without ADD

Exporter	Importer	Customer
A----->	B ----->	C
80	100	120
Net Export Price	Landed Value	Market Price

In the above example, the exporter has invoiced the goods to the importer at US\$ 80 (dumped price) and with the addition of freight, insurance etc. and import duties, the said goods land in India at a price of US\$ 100 (without any ADD). They are re-sold by the importer into the domestic market after adding a markup of US\$ 20 to account for his profit margins and other selling costs.

Let us assume that the fair market price in India of the like goods produced by the domestic industry is US\$140. The government, after investigation, imposes a duty of US\$20 on this import to create a level playing field. After ADD, the following scenario emerges:

Figure 2: Import of goods with ADD

Exporter	Importer	Customer
A----->	B----->	C
80	120 (ADD of 20)	140
Net Export Price	Landed Price	Market Price

In figure 2, the goods are being imported after payment of ADD of US\$ 20 making the landed value and re-sale price go up by the same

amount. The price paid by the end-customer in the domestic market is US\$ 140. Thus, the ADD of US\$ 20 has created a level playing field and the users of subject goods in India will now have a fair choice between imports and domestic product which is also selling at US\$140 in the local market.

Now, let us consider a situation where the exporter has reduced its export price in the following illustration:

Figure 3: Import of goods with ADD not passed on to the customer

Exporter	Importer	Customer
A ----->	B ----->	C
70	110 (ADD of 20)	130
Net Export Price	Landed Price	Market Price

In the above illustration, even though the importer is importing the goods after paying ADD of US\$20, the goods are being resold to the

customers in India at a price which is lower than the fair market price of the US\$140 charged by the domestic industry in India. The exporter's reduction of export price has commercially enabled the importer to resell the imported goods in the domestic market at the same price as in Figure 1 by not including ADD. As a result, the investigating authority's objective of creating a level playing field by the imposition of ADD is negated.

Such a practice is called absorption and may be considered a form of unfair trade practice. In order to counter the same, the investigating authority would need to be empowered to investigate such practices and recommend/enforce the necessary countermeasures.

Relevant changes proposed in the Customs Tariff Act

Anti-absorption provisions have been sought to be introduced into the Indian legal framework by the proposed amendments to the Customs Tariff Act, 1975 by the Finance Bill, 2021. With regard to anti-dumping investigations, Financial Bill, 2021 has proposed to introduce a new sub-section (1B) to Section 9A of the Customs Tariff Act, 1975, which states:

Section 9A (1B)-Where the Central Government, on such inquiry as it may consider necessary, is of the opinion that absorption of anti-dumping duty imposed under sub-section (1) has taken place whereby the anti-dumping duty so imposed is rendered ineffective, it may modify such duty to counter the effect of such absorption, from such date, not earlier than the date of initiation of the inquiry, as the Central Government may, by notification in the Official Gazette, specify.

Explanation. –For the purposes of this sub-section, “absorption of anti-dumping duty” is said to have taken place, -

(a) if there is a decrease in the export price of an article without any commensurate change in the cost of production of such article or export price of such article to countries other than India or resale price in India of such article imported from the exporting country or territory; or

(b) under such other circumstances as may be provided by rules.’

With regard to anti-subsidy investigations, Financial Bill, 2021 has proposed to introduce a new sub-section (1B) to Section 9 of the Customs Tariff Act, 1975, which states:

Section 9 (1B)- *‘Where the Central Government, on such inquiry as it considers necessary, is of the opinion that absorption of Countervailing duty imposed under sub-section (1) has taken place whereby the Countervailing duty so imposed is rendered ineffective, it may modify such duty to counter the effect of such absorption, from such date, not earlier than the date of initiation of the inquiry, as the Central Government may, by notification in the Official Gazette, specify.*

Explanation. –For the purposes of this sub-section, “absorption of countervailing duty” is said to have taken place, –

(a) if there is a decrease in the export price of an article without any commensurate change in the resale price in India of such article imported from the exporting country or territory; or

(b) under such other circumstances as may be provided by rules.’

Though the proposed anti-absorption provisions are largely similar for both ADD and CVD purposes, the statute proposes to have more exceptions in the case of ADD. In case of both ADD/CVD, absorption is said to have taken place if there is a decrease in the export price of an article without any commensurate change in the resale price in India of such article.

However, in the case of ADD, the proposed amendment identifies two additional exceptions when absorption cannot be said to have taken place. These are two legal situations when the reduction in export price is not because of absorption of ADD / CVD by the exporter, but for below reasons:

- When there has been a corresponding reduction in the cost of production of said goods; or
- Sales price to third countries from the subject country has also reduced correspondingly.

It may be noted that the above circumstances are not definitive. The proposed provisions also permit the anti-absorption rules to be made to define other circumstances of absorption.

It is also relevant to note the proposed amendments permit the Central Government to impose anti-absorption measures retrospectively. However, the retrospective imposition cannot be earlier than the date of initiation of the anti-absorption investigation.

Legal framework for anti-absorption investigations in the European Union

After the proposed provisions are enacted by the Parliament, the Directorate General of Trade Remedies (‘DGTR’) is expected to notify the rules to define the framework for the conduct of

anti-absorption investigations. Since anti-absorption provisions are being introduced for the first time in India, the DGTR may look to develop the legal framework governing anti-absorption investigations based on the laws in other jurisdictions such as the United States and the European Union ('EU'). For a better understanding of anti-absorption provisions, certain aspects in the EU's anti-dumping framework are discussed below.

a. Initiation of anti-absorption investigations:

Anti-absorption proceedings in the EU are governed by the provisions of Article 12 of the Basic EU anti-dumping regulation.¹ As per paragraph 1 (of Article 12), anti-absorption investigations may be initiated subsequent to an application filed by the domestic industry or any other party, or even *suo moto* by the investigating authority. Further, such investigations are in the nature of reviews.

As per paragraph 1, the applicant will have to submit sufficient information to show that, after the original investigation period and prior to or following the imposition of measures, export prices have decreased or that there has been no movement, or insufficient movement, in the resale prices or subsequent selling prices of the imported product in the EU.

b. Participation of exporters and importers:

As per paragraph 2 (of Article 12), in an anti-absorption investigation, producers/exporters from the subject

country and importers in the EU are provided an opportunity to clarify whether the non-movement of domestic selling prices subsequent to imposition of ADD is due to reasons other than absorption.

In order to determine whether the domestic prices have moved sufficiently, the investigating authority may compare the price levels of the subject goods charged during the period of investigation in the anti-absorption investigation with that charged during the period of investigation in the original investigation.²

- c. Nature of anti-absorption measures:** If it is determined that absorption of ADD and lack of movement of resale prices is due to reduction in export prices, then the paragraph 2 of Article 12 empowers the investigating authority to re-determine new dumping margins. The investigating authority also calculates a new injury margin. Based on the lesser duty rule, the investigating authority then revises the applicable rate of ADD with the objective to counter the absorption.

Conclusion

The proposed introduction of anti-absorption provisions in the ADD/CVD framework is a continuation of the measures taken by the Central Government in the previous Budget 2020-21 towards strengthening the protection

¹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union

² See Council Regulation (EC) No 236/2004 of 10 February 2004 amending Regulation (EC) No 1339/2002 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of sulphonic acid originating in the People's Republic of China and India

available to the domestic industry. The proposed introduction of anti-absorption provisions tightens the mechanism for countering unfair trade practices and closes the loopholes for unscrupulous practice of reducing the export prices to nullify the effects of ADD/CVD in force.

It is relevant to note that the participation of the importer, related or unrelated, is very

important, especially to understand the movement of domestic prices post the imposition of ADD/CVD.

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Statute Update

Circumvention of anti-dumping and countervailing duties – Retrospective and provisional anti-circumvention measures

The Union Budget 2021 has proposed some significant changes in the provisions relating to anti-circumvention measures under the anti-dumping and countervailing duties law. As per changes proposed by clauses 93 and 94 of the Finance Bill, 2021 in Sections 9 and 9A of the Customs Tariff Act, 1975, anti-dumping and countervailing duties after anti-circumvention investigation cannot be imposed for the period before the date of initiation of the anti-circumvention investigation. It may be noted that Rule 27 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (**'Anti-dumping Rules'**) and Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination Of Injury) Rules, 1995 (**'Anti-countervailing Rules'**) already provide that levy may apply retrospectively from the date of initiation of the investigation.

Further, as per amendments which have come into effect in both the Anti-dumping Rules and the Anti-countervailing Rules, the Central Government can on the recommendation of the designated authority, resort to provisional assessment of the imports of the article alleged to be circumventing an anti-dumping duty or countervailing duty in force and may ask a guarantee from the importer. This provisional assessment can continue until the Central Government concludes the investigation extending the anti-dumping duty or countervailing duty to circumventing products. Sub-rule (4A) has been inserted in Rule 26 of both the above-mentioned rules for this purpose by Notifications Nos. 10 and 11/2021-Cus. (N.T.), both dated 1 February 2021 and effective from 2 February 2021.

Reviews of anti-dumping and countervailing duties to be completed before expiry of levy

Both the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of

Injury) Rules, 1995 and the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 are being amended to provide for completion of reviews before expiry of duties. As per new proviso to Rule 23(2) of the Anti-dumping Rules and to Rule 24(4) of the Anti-countervailing Rules, which will come into effect from 1 July 2021, the review

shall be completed at least three months prior to expiry of the anti-dumping duty/countervailing duty under review. Further, similar time-lines will be introduced, also with effect from 1 July 2021, in respect of anti-circumvention provisions for both anti-dumping duty and countervailing duty. It may be noted that at present the provisions only provide for time-line of 12 months for completion of review extendable by 6 months.

Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
1,1,1,2-Tetrafluoroethane or R-134a	China PR	F. No. 7/1/2021-DGTR	19 February 2021	Anti-dumping sunset review initiated
1-Phenyl-3-Methyl-5-Pyrazolone	China PR	F. No. 6/32/2019-DGTR	28 January 2021	Definitive anti-dumping duty recommended
Aniline	China PR	8/2021-Cus. (ADD)	19 February 2021	Definitive anti-dumping imposed
Flat rolled product of steel, plated or coated with alloy of Aluminium and Zinc	China PR, Vietnam and Republic of Korea	7/2021-Cus. (ADD)	1 February 2021	Anti-dumping duty not to be levied from 2 February 2021 till 30 September 2021
High-Speed Steel of Non-Cobalt Grade	Brazil, China PR and Germany	6/2021-Cus. (ADD)	1 February 2021	Anti-dumping duty not to be levied from 2 February 2021 till 30 September 2021

Product	Country	Notification No.	Date of notification	Remarks
Hot Rolled and Cold Rolled Stainless Steel Flat Products	China PR	2/2021-Cus. (CVD)	1 February 2021	Countervailing duty not to be levied from 2 February 2021 till 30 September 2021
Methylene Chloride	China PR	F. No. 354/273/2015-TRU (Pt-1)	5 February 2021	Government decides not to impose anti-dumping duty despite positive recommendation in sunset review
Phenol	Thailand and USA	F. No. 6/3/2020-DGTR	28 January 2021	Definitive anti-dumping duty recommended on imports from Thailand
Plastic Processing Machines	China PR	F. No. 6/54/2020-DGTR	17 February 2021	Anti-dumping investigation initiated
Polytetrafluoro ethylene	Russia	F. No. 7/47/2020-DGTR	12 February 2021	Anti-dumping duty sunset review initiated
Seamless tubes, pipes and hollow profiles of iron, alloy or non-alloy steel	China PR	F. No. 7/43/2020-DGTR	19 February 2021	Anti-dumping sunset review initiated
Steering Knuckles	China PR	4/2021-Cus. (ADD)	30 January 2021	Anti-dumping duty continued after sunset review
Straight Length Bars and Rods of Alloy Steel	China PR	5/2021-Cus. (ADD)	1 February 2021	Anti-dumping duty not to be levied from 2 February 2021 till 30 September 2021
Viscose Staple Fibre	China PR and Indonesia	F. No. 7/03/2021-DGTR	22 February 2021	Anti-dumping duty sunset review initiated
Welded stainless steel pipes and tubes	China PR and Vietnam	F. No. 7/45/2020-DGTR	11 February 2021	Mid-term review initiated to review the product scope of definitive Countervailing duty

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Carbazole Violet Pigment 23	USA	86 FR 8764 [C-533-839]	9 February 2021	CVD – Affirmative sunset review issued
Granular Polytetrafluoro ethylene (PTFE) Resin	USA	86 FR 7876	27 January 2021	Anti-dumping and Countervailing Duty investigations initiated
Preserved mushrooms	USA	US ITC News Release 21-023	16 February 2021	Affirmative ADD sunset review
Stainless steel cold-rolled flat products	EU	2021/C 57/04	17 February 2021	Anti-subsidy proceedings initiated



WTO News

Indonesia's export restrictions and preferential import duty exemption – DSB panel established on request of European Union

WTO's Dispute Settlement Body ('DSB') has agreed for establishment of panel to settle the dispute relating to certain Indonesian measures restricting export of various raw materials, including export prohibition on nickel ore and domestic processing requirements on minerals, in particular nickel ore and iron ore. It may be noted that the request for consultation by the European Union had also included Indonesia's preferential import duty exemption scheme for companies engaged in either the establishment or modernisation of a factory, including an extended duty exemption period conditional upon

certain local content requirements in terms of the use of machinery, installation, appliances or utensils. Violation of Article XI:1 of the GATT 1994 and Article 3.1 b) of the Agreement on Subsidies and Countervailing Measures is alleged. India has reserved its rights to participate as third party in the proceedings.

USA's origin marking requirements on imports from Hong Kong – DSB panel established

The DSB has agreed to the establishment of a panel in a dispute raised by Hong Kong, China regarding USA's origin marking requirements for goods imported from Hong Kong, China. Hong Kong disputes the U.S. Customs and Border Protection's (USCBP) notice that goods produced in Hong Kong must be marked to indicate that

their origin is 'China' for the purposes of the origin marking requirement set forth at Section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304. Hong Kong alleges violation of various provisions of the GATT 1994 and the Agreement on Rules of Origin.

India Trade Policy Review at WTO

In the recently concluded Trade Policy Review for India, the USA has raised concerns regarding the lack of transparency in many aspects of India's trade policy, including a disappointing performance in WTO notifications, and limited notice and comment procedures for domestic and foreign stakeholders. According to USA, while India's enforcement of IP has gradually improved over the years, it has been inconsistent and India remains one of the world's most challenging major economies with respect to protection and enforcement of IP. The European Union flagged the concern regarding the overall direction of

India's trade and investment policies, notably regarding the extent of its trade openness, and how some of the measures taken under the 'Make in India' initiative could run against the initiative's goals.

It may be noted that many of the delegations welcomed the introduction of the nationwide Goods and Services Tax in 2017 to reduce complexity in the indirect tax system. On investment, Members commended India's continuing effort to liberalize its investment policies including raising foreign ownership limits in many sectors. Members also welcomed the streamlining of India's customs procedures and the implementation of trade facilitation measures, leading to a substantial reduction of time and costs of border and document compliances for exports and imports in the last few years. It is stated that India responded to more than 1000 questions from 32 Members.



India Customs & Trade Policy Update

Food Import Entry Points – General Notes in Import Policy revised

New sub paragraph (D) has been added under paragraph 4 of the General Notes regarding Import Policy (Schedule I in ITC(HS) 2017) listing out the Authorised Officers to handle food import clearance at 150 food import entry points for items listed against 1515 HS codes of ITC(HS) 2017. 150 food import entry points cover 27 sea ports, 15 airports, 31 land customs stations and

77 inland customs depots. DGFT Notification No. 57/2015-2020, dated 10 February 2021 has been issued for the purpose.

SEZ – Inspection of duty-free goods on de-bonding and filing of B/E on DTA clearance of imported goods

The Ministry of Commerce & Industry, Department of Commerce, SEZ Division has clarified that the IT/ITES SEZ Unit which want to de-bond can opt for simple payment of duty

without inspection of duty-free goods subject to the condition that they produce all relevant import and other documents of goods to establish their identity and to avoid requirement of physical inspection of such goods. NASSCOM's suggestion that considering the short shelf life and high depreciation value for IT assets, the government should consider one-time waiver of custom duty, seems to have been rejected. Further, as per SEZ Instruction No. 105, dated 5 February 2021, Bill of Entry is required to be filed in case where an IT/ITES units wishes to clear in DTA goods earlier imported into SEZ after paying applicable duty.

IEC provisions under Chapters 1 and 2 of Foreign Trade Policy revised

The updation in the Import Export Code ('IEC'), in addition to the existing application process for IEC, will now be done online. An IEC holder must ensure that the details in IEC is updated electronically every year during the April-June period. Even in case there are no changes, the same also needs to be confirmed online. According to the revised provisions, an IEC shall be de-activated, if it is not updated within the prescribed time. However, a deactivated IEC can be activated on its successful updation. This would however be without prejudice to any other action taken for violation of any other provisions of the Foreign Trade Policy. An IEC may also be flagged for scrutiny. IEC holder(s) are required to ensure that any risks flagged by the system is timely addressed, failing which the IEC shall be deactivated. DGFT Notification No. 58/2015-2020, dated 12 February 2021 amends specified

paragraphs of Chapters 1 and 2 of Foreign Trade Policy 2015-20 for this purpose.

Job work and out-sourcing for manufacture on job work allowed on goods imported under IGCR Rules, 2017

Central Board of Indirect Taxes ('CBIC') has issued Notification 9/2021-Cus. (N.T.), dated 1 February 2021 to give effect to the draft amendment of May 2019 to the Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 ('IGCR Rules, 2017'). The amended Rules allow job work activity on imported goods and out-sourcing for manufacture of goods on job-work. Rule 6A has been inserted explaining procedure for allowing job work on imported goods. The maximum period for which the goods can be sent to the job-worker is six months from the challan date. Further, imported capital goods can now be cleared after being used for the specified purpose on payment of duty, along with interest, on the depreciated value, following the straight-line method, at the specified rates.

High Speed Rail Projects to be covered under Project Imports

An amendment has been made in Notification No. 42/1996-Cus. to include high speed rail projects under Project Import Scheme. Consequentially imports for high speed rail projects will attract 5% Basic Customs Duty. Further, Project Import Regulations, 1986 have been amended to nominate National High-Speed Rail Corporation Ltd. as the sponsoring authority for high speed rail projects. Notifications Nos. 9/2021-Cus. and 10/2021-Cus., both dated 1 February 2021 have been issued for the purpose.



Ratio Decidendi

Correction of mistake or error in self-assessed bill of entry is permissible

The Bombay High Court has held that amendment in the self-assessed bill of entry is permissible under Section 149 read with Section 154 of the Customs Act, 1962 which deals with amendment of bill of entry and correction of clerical or arithmetical mistakes, respectively. According to the Court, the only condition in such scenario was that the amendment shall be allowed only on the basis of the documentary evidence which was in existence at the time of clearance of the goods. The High Court noted that the Supreme Court in the case of *ITC Ltd. v. Commissioner* had stated that in case any person is aggrieved by any order, including an order of self-assessment, he must get the order modified under Section 128 or 'under other relevant provisions of the Customs Act'. [*Dimension Data India Pvt. Ltd. v. Commissioner* – 2021 TIOL 224 HC MUM CUS]

Demurrage charges not payable when goods seized/detained by Customs authorities

Differing from the dictum of the Delhi High Court in the case *Trip Communication Pvt. Ltd. v. UOI* [2014 (302) ELT 321], the Madras High Court has held that an assessee is not liable to pay rent or demurrage charges when the goods are seized or detained by the Customs department. The Court was of the view that such charges should not be charged for the period of departmental proceedings in terms of Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009. The Customs department was also directed to issue detention certificate. It observed that it was the practice of the authority to issue certificate when the circumstances warrant and when directed by the Court. [*MGG Trading Pvt. Ltd. v. Addl. Commissioner* – 2021 (2) TMI 311-MAD HC]

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