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Non-Speaking Approach of Central Government on Anti-Dumping Issues

(Right to Appeal ~ A Trending Fallacy?)

Trade Remedies are indeed a vaccination against unfair imports for liberalized countries to maintain the healthy competition in domestic markets. Imposition of Anti-Dumping Duty ('ADD') is the popular way of eradicating unfair trade practices across globe. This is imposed to check unfair imports from a target country and to safeguard domestic industry from the exports which are made at a price lower than home market price of target country.

Quantum of ADD is determined upon an investigation by the Directorate General of Trade Remedies ('DGTR') and involves thorough and thought-through investigative procedure, including examination of submissions made by Domestic Industry and other interested parties. This long journey of investigation generally travels for a period of 9-12 months in India, and which concludes upon issuance of recommendation published by DGTR, namely 'Final Findings'. Such Final Findings can be categorized as - **Positive Final Findings** (i.e. recommending the levy of ADD) or **Negative Final Findings** (i.e. recommending not to levy ADD)[1].

The Final Findings are merely recommendatory in nature and it is the Central Government (through Ministry of Finance) which determines the levy / non-levy of ADD vide its ***'order of determination'***. Ministry of Finance has a discretionary power to levy ADD within 3 months from the date of Final Finding, by issuing a levy notification (customs notification) under the Customs Tariff Act, 1975 ('CTA')[2].

The customary practice was that the Central Government used to levy ADD in all the scenarios of Positive Final Findings. In these cases, a customs notification was issued setting out the reasons for levy of ADD. The same can be inferred from below table:

Year	Number of Positive Final Findings	Number of Duty Notifications
2018	24	24
2019	14	14

But much to our surprise, the wind has now changed its course over the past 2 years, wherein a new pattern has emerged. Since 2020, every Positive Final Finding is not resulting into ADD levy notification.

In many cases, it is observed that the journey of Positive Final Findings continues beyond the stipulated time without an order intimating about levy or non-levy of ADD. However, in certain cases, one gets to know about the non-levy through **'Office Memorandum'** as and when uploaded on DGTR's website[3].

Interestingly, where Positive Final Findings issued by DGTR after 9-12 months of intensive factual examination leads to abrupt rejection, a question begs to asked whether the Central Government is justified ***by just issuing an Office Memorandum in 18 standard words, which states -***

"…to inform that the Central Government has decided not to impose the anti-dumping duty on imports of…originating or exported from…, proposed in the said Final Findings…"

Emergence of such new pattern reflecting Central Government's arbitrary use of discretionary power, is actually diluting the substantial **Right to Appeal under Section 9C of CTA** and a new set of issues are knocking the doors of Domestic Industry.

However, there is no dilution of Right to Appeal if DGTR has given a Negative Final Finding. In this case, the recommendation of DGTR is final and conclusive and appeal may be filed based on such Negative Final Finding. It is, indeed, a determinative opinion or order against which an appeal can be filed[4].

Through this Article, let's uncover the implications on Right to Appeal due to non-issuance of an appropriate order in case of Positive Final Finding.

Situation 1: Positive Final Finding by DGTR but no order / notification issued by Central Government

Section 9C of CTA says:

(1) An appeal against the order of determination or review thereof shall lie to the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962.) (hereinafter referred to as the Appellate Tribunal), in respect of the existence, degree and effect of -

……

It is trite law that an appeal under Section 9C of CTA lies only against an order of determination either imposing or not imposing ADD. Presence of an 'order of determination' is *sine qua* non for filing an appeal[5].
The perusal of emerging data for 2020 and 2021 clearly reveals that post recommendation, no order / notification has been issued by the Central Government in many cases. This has forced the Domestic Industry to helplessly wait and watch for the decision of the Central Government.

Year	Number of Positive Findings	No Order from Central Government
2020	27	6
2021	32	5

In the absence of such order, the Right to Appeal can never be exercised and makes Section 9C of CTA a mirage for Domestic Industry. In such cases, the only alternative for the Domestic Industry will be to knock the doors of the High Court requesting them to direct the Central Government to take requisite action.

All the unnecessary litigations may be avoided if the Central Government takes appropriate timely action to issue an appropriate notification or order. This would allow Domestic Industry to take right steps at right time without hampering its business decisions.

Situation 2: Positive Final Finding and uploading Office Memorandum by DGTR

In certain scenarios of Positive Final Findings issued by DGTR, Central Government as a matter of practice issues Office Memorandum conveying its decision of not levying ADD to DGTR. This Office Memorandum, being an inter-departmental intimation letter, is shared internally and DGTR in many cases uploads the same on its website. Since, there is no mandate on the DGTR to upload such inter-departmental Office Memorandums on the website, sharing of such Office Memorandums on their website is either extremely late or remains pending for upload.

In such scenarios, question arises whether such internal communication i.e. Office Memorandum can be considered as an 'order of determination' against which an appeal could be filed under Section 9C of CTA?

Considering an Office Memorandum as a 'public notice' and resultantly an 'Order of Determination' is indeed a separate and debatable question. Even if one assumes that Office Memorandum constitutes an 'order of determination', another serious issue will arise as to whether such Office Memorandum could be considered in consonance with principles of natural justice, since the same are non-speaking?

The requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. Also, as per the Jurisprudential Doctrine - *Justice should not only be done, but it should also appear to be done.* It is a settled principle that any order effecting the rights of parties (i.e. having civil consequences) must be a speaking order, else it would be considered as a cryptic order.[6] Given the silent nature of the Office Memorandum, it is likely that such orders will be set-aside.

Another crucial issue that pops out is the fact that Section 9C of CTA requires filing of an appeal ***within 90 days of the date of order.*** Wondering, in this scenario, what would be the date of order from which 90 days should be calculated?

Should it be calculated from the date of uploading on DGTR website or can one say that for Central Government, the official website for making an announcement is CBIC? This remains a grey area which demands clarity from the Government's end.

Concluding Remarks:

Issuance of new class of orders in the form of unreasoned Office Memorandums over the past the few years have led to multifarious issues affecting the rights of the Domestic Industry, while at the same time seriously hampering the rights of different stakeholders including exporters at global level as well as Indian parties, to take effective business decisions.

It is a harsh reality that in absence of an 'order of determination' or belated Office Memorandums, pursuant to Positive Final Findings, Domestic Industries will be forced to knock on the doors of the High Courts to seek remedy, which will render Section 9C otiose for the Domestic Industries to seek appropriate relief.

The Central Government should be proactive in its approach and must ensure timely issuance of levy notifications or speaking orders if decides to levy ADD or not to levy ADD respectively, not only to avoid such disputes but will also advance the objective of protecting the Domestic Industries from unfair trade practices.

1. Rule 17 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995

2. Rule 18 of Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995

3. Office Memorandums are simply a method of internal communication, issued by the Central Government to intimate DGTR about its decision of non-levy of ADD.

4. Jindal Poly Film Limited v. Designated Authority [2018 (362) ELT 994 (Del)]

5. Saurashtra Chemicals Limited v. Union of India [2000 (118) ELT 305 (SC)]; Deepak Fertilizers and Petrochem v. Designated Authority [2006 (203) ELT 370 (Del)]

6. Kranti Associates Private Limited and Others v. Masood Ahmed Khan and Others [2011 (273) ELT 345 (SC)]

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