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GAHC010007302020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Review.Pet./9/2020

CENTURY PLYBOARDS (I) LIMITED AND ANR
A COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956, HAVING ITS REGISTERED OFFICE AT 6, LYONS RANGE, KOLKATA- 700001 AND FACTORY AT VILLAGE KOKJHAR, PALASBARI, DIST- KAMRUP, ASSAM

2: CENT PLY
A DIVISION OF THE PETITIONER NO.1 COMPANY HAVING ITS FACTORY AT VILLAGE KOKJHAR
MIRZA PALASHBARI ROAD
P.O PALASHBARI
DIST- KAMRUP
ASSA

VERSUS

UNION OF INDIA AND 2 ORS
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, NORTH BLOCK, NEW DELHI- 110011

2:THE UNDER SECRETARY TO THE GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE-TRU
HAVING ITS OFFICE AT NORTH BLOCK
NEW DELHI- 110011

3:DIRECTORATE GENERAL OF ANTI DUMPING DUTIES
(DGAD)
JEEVAN TARA BUILDING
4TH FLOOR
5- PARLLAMENT STREET
NEW DELHI-110001.

4:GUJARAT STATE FERTILIZERS AND CHEMICALS LIMITED

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INTERVENE

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : MR. SC KEYAL,SC, CENTRAL EXCISE CUSTOMS

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

Date : 06-04-2022

JUDGMENT & ORDER

Heard Dr. Ashok Saraf, learned senior counsel for the review petitioner. Also heard Ms. Madhavi Divan, learned senior counsel and Additional Solicitor General of India for the respondents No.1 and 2 being the Finance Department, Government of India as well as the respondent No.3 being the Director General of Anti Dumping Duties (DGAD) and Mr. Pragyan Sharma learned counsel for the intervener, Gujrat State Fertilizers and Chemicals Limited. Also heard MR. SC Keyal, learned counsel.

2. The review petition is instituted in respect of the discussions and conclusions arrived at in the judgment and order dated 26.08.2019 in WP(C)No.6568/2017 in paragraphs 149 to 163 of the judgment as regards the concept 'domestic industry' as defined in Rule 2(b) of the Anti Dumping Rules 1995 (in short ADR 1995), and the discussions and conclusions in paragraphs 164 and 165 of the judgment as regards as to whether the evaluation of the non-injurious price in terms of the United States Dollar (for short, the USD) at the exchange rate as it prevailed in the year 2012 would be acceptable in law or it should be determined in terms of Indian Rupees (INR).

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3. Dr. Ashok Saraf learned senior counsel for the review petitioner at the outset urges upon that although the review had been instituted on several grounds as stated in the review petition, but only two grounds are being insisted upon for the purpose of hearing of this petition.

The first ground urged upon is that even after the successive amendments to the definition of 'domestic industry' under Rule 2(b) of the ADR 1995 it is clear enough to understand that an importer of the like article is expressly excluded from the purview of being included in the definition of 'domestic industry'.

The second ground urged upon is that the non-injurious price would have to be determined in terms of INR and not USD and therefore, the said issue also requires a determination rather than keeping it open for the authorities to decide.

4. By referring to the provisions of Rule 2(b) of the ADR 1995 the learned senior counsel has raised the contention that the definition of 'domestic industry' as provided under Rule 2(b) is clear enough to understand that an importer of the like article is expressly excluded from the purview of being included as a domestic producer and, therefore, there cannot remain any discretion upon the authorities to allow any person who is so excluded to be also included within the definition of 'domestic industry' as defined under Rule 2(b). From such point of view, there is an error apparent on the face of the record in the judgment and order dated 26.08.2019 in WP(C)6568/2017, wherein, by taking the same view as the Madras High Court in Nirma Limited – Vs- Saint Gobain Glass India Limited and Others reported in (2012) SCC Online Mad 1751, the designated authority was allowed the discretion to arrive at its conclusion as to whether the intervener Gujrat State Fertilizers and Chemicals Ltd (for short, GSFC), in the facts and circumstances of the present case, can

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also be construed to be a 'domestic industry' although admittedly certain percentage of their requirement of melanin is imported by them.

5. The other ground urged upon by Dr. Saraf, learned senior counsel for the review petitioner for the purpose of the present review is on the question as to whether the 'non-injurious price' can be determined in terms of USD inasmuch as, 'non-injurious price' is specific to a domestic industry which is to be computed in INR and, therefore, cannot be determined in terms of USD. According to the learned senior counsel, 'non-injurious price' has to be in INR although the 'export price' and the 'normal value' has to be in the exporters currency, but, may be converted to INR by applying the exchange rate prevailing as on the date of the transaction i.e., the date of entry into India. The learned senior counsel further contends that the decision of the Court in the judgment and order dated 26.08.2019 in WP(C)6568/2017 was rendered by referring to Section 9A(1) of the Custom Tariff Act 1975 (for short, Act of 1975) without considering the aspect that Section 9A(1) of the Act of 1975 deals with normal value, margin of dumping etc., and it does not cover non-injurious price.

6. With regard to the contention that the term 'domestic industry' does not include the producers who are related to the exporter or importers of the dumped article or themselves are importers thereof, Dr. Ashok Saraf by referring to the amended Rule 2(b) of the ADR 1995 submits that removal of the word 'only' from the definition has no meaning and it has to be understood that a superfluous word had been removed. A further submission is raised that if the expression 'rest of the producers' in the definition also includes the importers, the exception provided in the definition providing for an exclusion of such producers who are related to the exporters or importers of the dumped article or themselves are importers thereof, would become redundant. It is also a

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submission that the quantity of the dumped article imported by an otherwise 'domestic industry' is not of material consideration and had it been so the definition of the 'domestic industry' itself would have contained such provision.

7. As the judgment under review had accepted a discretion to be vested on the designated authority to even include a domestic producer indulging in import of the dumped article to be also included as a 'domestic industry' based upon the decision of the Madras High Court in Nirma Limited (supra), a submission is raised by Dr. Ashok Saraf, learned senior counsel for the petitioner that the Madras High Court had committed a manifest error in law in holding that the term 'domestic industry' has been defined in two folds i.e. the domestic producers who as a whole are engaged in the manufacture of a like article and whose collective output constitutes the major portion of the total domestic production of that article, and the producers who are related to the exporters and importers of the alleged 'domestic industry' or producers who are themselves importers of the dumped article and further that a discretion has been vested with the designated authority to decide whether they form a part of the 'domestic industry'. According to the learned senior counsel the Madras High Court failed to consider that the definition of the term domestic industry in Rule 2(b) of the ADR 1995 is clear and that it nowhere provides that even importers of the dumped article can be included within the meaning of domestic industry if their collective output constitutes a major portion of the total domestic production of that article. It being so, the discretion recognized by the Madras High Court to be vested with the designated authority to decide whether the importers can also be included as 'domestic industry' is unfounded.

8. Dr. Ashok Saraf, learned senior counsel for the review petitioner also refers to the definition of 'domestic industry' in Article 4.1 of the General Agreement

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on Trade and Tarif-Anti Dumping Agreement (in short GATT-ADA) which according to learned senior counsel is pari-materia with that of Rule 2(b) of the ADR 1995 and therefore, Article 4.1 also cannot be understood to mean that importers of the dumped article of any kind can also be included as a domestic industry.

9. According to the learned senior counsel Dr. Ashok Saraf the existence of any domestic producer indulging in import of the dumped article in any manner would exclude such domestic producers from the meaning of domestic industry and as a consequence thereof would be not entitled to the benefits of the anti dumping laws.

10. Ms. Madhavi Divan, learned Additional Solicitor General of India/senior counsel appearing for the respondents in the Union of India, per contra, contends that the evolution of the definition of domestic industry in Rule 2(b) of the ADR 1995 through the successive amendments would make it explicit that even as regards such domestic producers of the dumped article who indulges in an import of the article to certain extent, a discretion is available with the designated authority to include such domestic producers within the meaning of 'domestic industry' under Rule 2(b) of the ADR 1995.

11. To substantiate the contention, Ms. Madhavi Divan learned senior counsel refers to the definition of domestic industry, as it stood earlier. By referring to the earlier definition of 'domestic industry', which for the sake of convenience is referred as the first version, it is the submission of the learned senior counsel Ms. Madhavi Divan that the word 'shall' appearing in the first version definition signifies the absence of any discretion with the authorities to include any producers who are related to the exporters or importers or are themselves importers of the dumped article and further the expression 'be deemed'

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appearing in the first version definition creates a legal fiction whereby the producers who are related to the exporters or the importers or are themselves importers to be automatically excluded from the meaning of 'domestic industry'.

12. Ms. Madhavi Divan, learned senior counsel thereafter refers to the amendment brought in to Rule 2(b) of the ADR 1995 as per Notification No.44/1999 dated 15.07.1999 wherein the expression 'shall' was replaced by the expression 'may'. By referring to the amended definition of domestic industry as per Notification dated 15.07.1999, it is the submission of the learned senior counsel Ms. Madhavi Divan that the amended definition confers a discretion on the authority whether or not to accept the legal fiction that any producers who are related to the exporters or importers or are themselves importers would be excluded from the meaning of 'domestic industry'.

13. Reference, thereafter, is made to the further amendment of the definition of 'domestic industry' by the Notification No.18/2010 dated 27.02.2010. By referring to the subsequent amendment of the definition of domestic industry by the Notification dated 27.02.2010, it is the submission of Ms. Madhavi Divan learned senior counsel that the earlier expression 'deemed' in the definition of domestic industry has been replaced by the expression 'construed'.

14. The definition of 'domestic industry' has been further amended by the Notification No.86/2011 dated 01.12.2011 and by referring to the evolution of the definition of 'domestic industry', it is the submission of Ms. Madhavi Divan learned senior counsel that the intention behind the successive amendments was to bring the definition of 'domestic industry' in Rule 2(b) of the ADR 1995 in consonance with and as close as possible to the definition of 'domestic industry' in Article 4.1.of the GATT-ADA.

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15. Accordingly, reference has been made to the definition of domestic industry as available in Article 4.1. of the GATT-ADA. By referring to the definition in Article 4.1. of the GATT-ADA, it is the submission of Ms. Madhavi Divan learned senior counsel that in the term 'domestic industry' for the domestic producers as a whole of the like products or those whose collective output of the products constitute a major proportion of the total domestic production of such products, the expression 'shall' is used, meaning thereby, that it would be mandatory to refer to such domestic producers as the domestic industry. But, in contradistinction for the producers who are related to the exporters or importers or are themselves are importers of the dumped articles the expression 'may' is used, meaning thereby that a discretion is vested on the authority to interpret or not such producers to be 'domestic industry'.

16. A submission is made that when two different words of import are used in a statute in two consecutive provisions the conclusion thereof would be that the two words would have different connotations and that it would be difficult to maintain that the two different words are used in the same sense. For the purpose reference is made to the pronouncement of the Supreme Court in Rajendra K Bhutta Vs. MHA DA reported in 2020(13) SCC 208. Accordingly, it is the submission that the two expressions 'shall' and 'may' used in the two definitions of 'domestic industry' as per the amendments would have to be understood to carry two different meanings and both can neither be given the same meaning nor can be said to have been used interchangeably.

17. By giving stress to the commonality of the provisions of the term 'domestic industry' under Rule 2(b) of the ADR 1995, as amended, and as provided in Article 4.1. of the GATT-ADA, as regards the discretion vested in the authority to include the domestic producers who are related to the exporters or

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importers or are themselves importers of the dumped articles in the definition of 'domestic industry', it is the further submission of Ms. Madhavi Divan learned senior counsel that the meaning of the term 'domestic industry' under the two different provisions would have to be understood and interpreted in the same manner. In furtherance thereof, reference is made to the interpretation of the definition of 'domestic industry' in Article 4.1. of the GATT-ADA by the World Trade Organization (WTO) Panel in the report of the Panel 'European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners From China'.

18. With regard to the contention of the review petitioner that the non-injurious price would have to be determined in terms of INR and not USD, Dr. Ashok Saraf, learned senior counsel for the review petitioner refers to the provisions of Clause 2.4.1 of the Article VI of the GATT-ADA, which provides that when a comparison is required with regard to a domestic industry in respect of conversion of currencies, such conversion should be made using the rate of exchange on the date of the sale, which would be the date of contract, purchase order, order confirmation or invoice whichever establishes the material terms of sale. By referring to the said provision of GATT-ADA it is the submission of the learned senior counsel that even in respect of determination of the non-injurious price, the same would have to be determined in terms of INR and depending upon the sale or the transactions for which purpose the non-injurious price would be a relevant factor, there can be a conversion to USD as per the rate of exchange that may prevail on such date.

19. Reference is also made to the provisions of Annexure III of the ADR 1995 with reference to Rule 17(1) thereof, which provides for the procedure and principles for determination of non-injurious price. By referring to the principles

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for determination, it is the submission of Dr. Ashok Saraf, learned senior counsel that all the parameters provided in the principles for determination of the non-injurious price are parameters which are in INR and therefore, the determination of the non-injurious price would also have to be in terms of INR and not USD. If for determining the ADD, there is a requirement of the non-injurious price being available in terms of USD, the appropriate procedure would be to convert the non-injurious price determined in terms of INR to USD as per the rate of exchange that may be available on the day of the sale or transaction for which the ADD is to be determined.

20. Ms. Madhavi Divan, learned senior counsel for the authorities under the Union of India contends that the authorities follow the principle of lesser duty rule between the margin of dumping and the margin of injury, whichever is lesser. The margin of dumping is the difference between the export price of the dumped article and its normal value in the Country of export. As both the components for determining the margin of dumping are in terms of USD, therefore, the margin of injury is also required to be in terms of USD. As the non-injurious price would be a component for the purpose of arriving at the margin of injury, therefore, the non-injurious price is also required to be determined in terms of USD.

21. Mr. Pragyan Sharma, learned counsel for the intervener GFSC adopts the argument put forth by Ms. Madhavi Divan, learned senior counsel for the respondents and raises the contention that the term 'domestic industry' as per Rule 2(b) of the ADR 1995, in a given circumstance, also includes the producers, who are related to the exporters or importers of the dumped articles or are themselves importers thereof. The learned counsel further contends that the intervener GFSC is primarily a producer of the dumped article, but in order

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to augment its availability to meet the demands of its customers and also in view of the aspect that the intervener GFSC has already undertaken certain expansion activity, they are at times required to import a marginal amount in the article. According to the learned counsel, such act on the part of the intervener GFSC on its own cannot lead to a conclusion that the intervener GFSC is not included in the concept 'domestic industry' under Rule 2(b) of the ADR 1995.

WHETHER PRODUCERS RELATED TO THE EXPORTER OR IMPORTER OF THE DUMPED ARTICLES ARE EXCLUDED FROM THE DEFINTION OF 'DOMSTIC INDUSTRY'

22. The contention of the petitioner in the review is that as per the definition of 'domestic industry' itself as defined in Rule 2(b) of the ADR 1995 from time to time, no discretion is vested upon the designated authority to also include such producers who are related to the exporters or importers of the dumped article or themselves are importers thereof as 'domestic industry' would have to be understood from the definition of the expression 'domestic industry' as provided in the Rules. In the judgment under review, in order to understand the inclusion of such producers within the meaning of 'domestic industry', reliance was placed on the decision of the Madras High Court in Nirma Limited (supra), which according to the petitioner was an incorrect decision as the Madras High Court had failed to take into consideration the definition of the term 'domestic industry'. According to the review petitioner the definition of the term 'domestic industry' in Rule 2(b) of the ADR 1995 is clear and exclusive and that as it nowhere provides that even importers of the dumped article can be included within the meaning of 'domestic industry' if their collective output constitutes a

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major portion of the total domestic production of that article, therefore, the decision of the Madras High Court recognizing the discretion to be vested with the designated authority to decide whether importers can also be included as 'domestic industry', without taking into consideration the clear and exclusive meaning of 'domestic industry' defined under Rule 2(b) of the ADR 1995, as amended, would be unacceptable, and the judgment to be *per-incuriam.* The contention per contra of the respondents in the Union of India being that the evolution of the definition of domestic industry in Rule 2(b) of the ADR 1995 through successive amendments would make it explicit that even such domestic producers of the dumped article who also indulges in an import of the article to certain extent, a discretion is available with the designated authority to include such domestic producers within the meaning of 'domestic industry', we propose to decide the issue by making an endeavour to understand the concept of 'domestic industry' as defined under Rule 2(b) of the ADR 1995, as amended.

23. As submitted by Ms. Madhavi Divan learned senior counsel, the expression 'domestic industry' was defined under Rule 2(b) of the ADR 1995 as follows:

> "*2(b) "domestic industry" means the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers shall be deemed not to form part of 'domestic industry'.*"

By the Notification No.44/1999 dated 15.07.1999, it was amended and defined as follows:

> "*domestic industry" means the domestic producers as a whole engaged in the manufacturer of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the*

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> *alleged dumped article or are themselves importers thereof in which case such producers may be deemed not to form part of 'domestic industry…."*

By the later Notification No.18/2010 dated 27.02.2010 the definition of domestic industry was again amended to be read as follows:

> "*domestic industry" means the domestic producers as a whole engaged in the manufacturer of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in such case the term 'domestic industry' may be constructed as referring to the rest of the producers only"*

By the subsequent Notification No.86/2011 dated 01.12.2011 it was further amended to be read as follows:

> "*domestic industry" means the domestic producers as a whole engaged in the manufacturer of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importer thereof in such case the term 'domestic industry' may be construed as referring to the rest of the producers"*

24. The initial definition of 'domestic industry' by providing for an exception that such producers who are related to the exporters or importers of the alleged dumped article or are themselves importers thereof shall be deemed not to form a part of 'domestic industry', explicitly excludes such producers from being included as a 'domestic industry' and no discretion is vested upon the authority to include such producer. The mandatory nature of the provision for such exclusion flows from the definition itself that such producers can be deemed not to form a part of the 'domestic industry'.

25. In the amendment incorporated by the Notification No.44/1999 dated

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15.07.1999, the word 'shall' appearing in the initial definition had been replaced by the word 'may' by retaining the earlier definition for all other purpose.

26. In Shyamal Ghosh v. State of West Bengal reported in 2010 (7) SCC 646 in paragraph 71 it had been provided as follows:

> *"If the Legislative intend was to the contra, then the Legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion ....."*

27. The aforesaid proposition laid down by the Supreme Court gives a clear indication that if the Legislature uses the expression 'may' in place of the expression 'shall', the legislative intend would have to be understood to be introducing an element of discretion. In the instant case it is not only a case where the Legislature has used the expression 'may' in place of the expression 'shall', but on the other hand by virtue of the amendment, has replaced the expression 'shall' with the expression 'may'. In such situation it has to be understood that the explicit and mandatory exclusion of the producers who are related to the exporters or importers of the dumped article or themselves are importers from the definition of the expression 'domestic industry' have been done away with and in its place, a discretion is provided to the authority to either exclude or include such producers from the meaning of 'domestic industry'.

28. It is an accepted proposition that the expression 'may' may also be used in the sense of 'shall' or 'must' by the Legislature while conferring power on a high dignitary or when the context shows that a power is coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command. In this respect, reference is made to the proposition laid down by the Supreme Court in Shri Ranga Swami, Textile Corporation & others v. Agar Textile Mills (P) Ltd. and another reported in AIR 1977 SC 1516 wherein

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in paragraph 2 it had been provided as extracted:

> *"2. As held by this Court in State of UP v. Jogendra Singh[1] it is well settled that the word 'may' is capable of meaning 'must' or 'shall' in the light of the context and that where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command."*

29. A reading of the aforesaid proposition laid down by the Supreme Court would make it discernable that if the discretion conferred upon a public authority is coupled with an obligation, such discretion can also be construed to be a mandatory requirement. In the instant case the amendment incorporated by the Notification No. 44/1999 dated 15.07.1999 in the definition of the expression 'domestic industry' do not indicate any element of obligation on the part of the authority to also include the domestic producers related to the exporters or importers of the dumped article or the importers themselves as a 'domestic industry'. In fact by the amendment the earlier obligation as per the initial definition had been withdrawn. In such situation the only interpretation of the expression 'domestic industry' as provided in the Notification No. 44/1999 dated 15.07.1999 would be that a discretion has been vested upon the authorities to also include such producers who are related to the exporters or importers of the dumped article or the importers themselves to be included within the meaning of domestic industry.

30. The definition of domestic industry was again amended by the Government notification No. 18/2010 dated 27.02.2010. The amendment brought in by the notification dated 27.02.2010 has the effect that instead of conferring a discretion upon the authorities to include such producers who are related to the exporters or importers of the dumped article or the importers themselves to be included within the meaning of 'domestic industry', it was

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specifically provided that the 'domestic industry' may be construed as referring to the rest of the producers only. The expression 'rest of the producers' would have to be understood to mean such producers who are not related to the exporters or importers of the dumped article or the importers themselves of the dumped articles. The expression 'rest of the producers' in the definition of 'domestic industry' as per the notification dated 27.02.2010 has been circumscribed by the word 'only' which would give the interpretation that 'domestic industry' includes only such producers who are not related to the exporters or importers of the dumped article or the importers themselves of the dumped articles. It has to be understood, such producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles are specifically excluded from being included within the definition of 'domestic industry'. In other words, the discretion vested in the authorities to also include the exporters or importers of the dumped article or the importers themselves of the dumped articles in the definition of 'domestic industry' as per the notification dated 15.07.1999 had been withdrawn and a specific exclusion thereof had been brought in.

31. The definition of 'domestic industry' was further amended by the notification No. 86/2011 dated 01.12.2011. By the amendment brought in to the definition of 'domestic industry' by the notification of 01.12.2011 the word 'only' appearing after the expression 'rest of the producers' in the definition of 'domestic industry' as per the notification dated 27.02.2010 had been removed.

32. The removal of the word 'only' after the expression 'rest of the producers' would have to be interpreted to mean that the absolute exclusion of the producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles from the meaning of

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domestic industry would now have to be read to be not an absolute exclusion.

33. If the effect of removing the word 'only' in the definition of domestic industry would be that the absolute exclusion of the producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles from being included in the definition of 'domestic industry' is removed, it has to be understood that ordinarily the exclusion of such class of persons would remain but it would no longer be an absolute exclusion. In other words, there may be certain circumstances, exceptional or otherwise, where an inclusion of the producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles in the definition of 'domestic industry' is also contemplated under the law. In other words, the absolute exclusion without leaving any discretion upon the authorities to include such producers within the definition of 'domestic industry', after the amendment by the notification of 01.12.2011, brings back certain circumstantial discretion upon the authorities to also include such producers, although it may not be that such discretion would be an absolute discretion on the authorities to include such producers.

34. We understand that the discretion to include the producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles within the definition of 'domestic industry' as per the definition in the notification dated 01.12.2011 would be a narrower discretion than the discretion that was provided in the definition of 'domestic industry' as per the definition in the notification dated 15.07.1999.

35. As the amendments brought in to the definition of 'domestic industry' by the notifications dated 15.07.1999, 27.02.2010 and 01.12.2011 were only in respect of the changes that were brought in on the question of the existence of

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a discretion, or the degree thereof, on the authorities to include the producers who are related to the exporters or importers of the dumped article or the importers themselves of the dumped articles within the meaning of 'domestic industry', we have to understand the intentions of the legislature in bringing the amendments by giving a strict interpretation and meaning to the effects of the changes that were brought in by the successive amendments.

36. In Oxford dictionary of English the word 'only' is given the meaning to be ''*Adverb 1 and no one or nothing more beside".* Another meaning of the word 'only' is '*alone of its or their kind'*. The meaning of the word 'only' as indicated above shows the presence of the element of exclusion from what is specifically included. In other words, a sentence or a provision containing the word 'only' would give the meaning that apart from whatever is included in such sentence or provision, everything else is excluded.

37. In paragraph 27 of its pronouncement in Bhatia International –vs- Bulk Trading SA reported in (2002) 4 SCC 105 the Supreme Court had the occasion to examine the implication of omission of the word ' only' from a given provision. Paragraph 27 of Bhatia International (supra) is extracted is below:

> "***27.*** *Mr Sen had also relied upon Article 1(2) of the UNCITRAL Model Law and had submitted that India has purposely not adopted this article. He had submitted that the fact that India had not provided (like in the UNCITRAL Model Law) that Section 9 would apply to arbitral proceedings which take place out of India, indicated the intention of the legislature not to apply Section 9 to such arbitrations. We are unable to accept this submission. Article 1(2) of the UNCITRAL Model Law reads as follows:*
>
> > "*(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."*
>
> *(emphasis supplied)*
>
> *Thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State. Significantly, in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only"*

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in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India. Thus there was no necessity of separately providing that Section 9 would apply."

38. Article 1(2) of the UNCITRAL Model Law provides as extracted:-

"*(2) The provision of this law, except Articles 8, 9, 35 and 36, apply* only *if the place of arbitration is in the territory of this State."*

39. In the circumstance, the Supreme Court interpreted that the word 'only' was to emphasis that the provisions of that law are to apply if the place of arbitration is in the territory of that State, but the omission of the word 'only' changes the whole complexion of the sentence and indicates that the Sub-section is only an inclusive and clarificatory provision.

40. In Ramesh Rout –vs- Rabindranath Rout reported in 2012 1 SCC 762, the Supreme Court had the occasion to examine the meaning and purport of the word 'only' in a given provision. Paragraphs 43 44 and 45 are extracted as below:

"*43. In Concise Oxford English Dictionary (19th Edn.,Revised), the word 'only' is explained:*

"*only adv. 1 and no one or nothing more besides ….. adj. alone of its or their kind; single or solitary."*

44. In Webster Comprehensive Dictionary, International Edn (Vol.2), the word "only" is defined thus;

Only (on'lij) adv … 2 In one manner or for one purpose alone … 4 Solely; merely; exclusively: limiting a statement to a single defined person, thing, or number. – adj. 1 Alone in its class; having no fellow or mate; sole; single; solitary:

45. The word "only" is ordinarily used as an exclusionary term. In the American case Towne v. Eisner (US at p.425), the Court said: (L Ed p. 376)

"*… A cord is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."*

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41. A reading of the meaning given to the word 'only' by the Supreme Court goes to show that the word 'only' is used as an exclusionary term. As the word 'only' brings in an element of exclusion in a given provision where the word 'only' is used, an omission of the word 'only' in such provision by means of an amendment would also remove the element of exclusion in such provision.

42. In the instant case, by the amendment brought in by the Notification dated 01.12.2011, by omitting the word 'only', the element of exclusion of the producers related to the exporters or importers of the dumped article or the importers themselves of the dumped article, brought in by the word 'only' in the pre-amended definition of domestic industry, stands removed. In other words, the permissibility to even include producers related to the exporters or importers of the dumped article or the importers themselves of the dumped article, is now being brought in.

43. Further it is the stand of Ms. Madhavi Divan learned senior counsel that the interpretation of Article 4.1 of the GATT-ADA by the WTO Panel in the report of the Panel 'European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners From China', had also been adopted in bringing in the amendment by the Notification dated 01.12.2011. In the report of the WTO Panel in Clause 7.242, 7.243 and 7.244 it has been provided as extracted:

> "*7.242. Finally, we turn to China's allegation that the European Union acted inconsistently with Articles 4.1 and 3.1 of the AD Agreement by including in the domestic industry and in the sample producers that were related to the exporters or importers or were themselves importers of the allegedly dumped product. We recall the language of Article 4.1(i), which provides that:*
>
> > "*when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the*

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producers" (footnote deleted, emphasis added).

China recognizes that Article 4.1 does not require the exclusion of related producers or importing producers. Nonetheless, China submits that investigating authorities do not have unlimited discretion in determining whether or not to exclude such producers, that the "objective examination" and "positive evidence" requirements of Article 3.1 apply to the decision of investigating authority in such cases, and asserts that the basis of the EU investigating authority's decision not to exclude related producers or importing producers is not supported by the evidence in the record of the investigation."

"*7.243. It is clear to us, as China acknowledges, that the use of the term "may" in Article 4.1 makes it clear that investigating authorities are not required to exclude related producers or importing producers. There is nothing in the text of Article 4.1(i) that would establish any criteria that might be relevant to an investigating authority's decision in this regard. In this case, the European Union explained its reasons for not excluding certain related producers in the definitive Regulation, at recitals 115-117. China does not suggest that the bases cited by the European Union are irrelevant, but rather asserts that the evidence contradicts the conclusion reached.*

7.244. We are not persuaded by China's view that Article 3.1 of the AD Agreement applies to the decision whether to exclude related or importing domestic producers in the manner proposed by China. The European Union suggests that the reason Article 4.1. allows the exclusion of related producers is because such producers may be less representative of the interests of the domestic industry, and may be benefiting from the dumped imports themselves. Thus, the European Union argues that, if anything, the exclusion of such related producers is in the exporting country's interest, which undermines the assertion that the failure to exclude them in this case is an abuse of the discretion provided for in Article 4.1. In our view, there is nothing in Article 3.1, or in Article 4.1, that limits the discretion of investigating authorities to exclude, or not, related or importing domestic producers. Moreover, even assuming we considered it necessary to review the European Union's decision not to exclude related producers in this case, we fail to see the relevance of the factual basis for China's argument. The fact that two of the exporters to which EU producers were related stated that they produce principally for export, rather than for sale in the domestic Chinese market is in our view irrelevant to a decision whether to exclude the

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related EU producers from the domestic industry. In the absence of any criteria in the AD Agreement against which the decision not to exclude related producers might be assessed, we reject China's assertion that the European Union acted inconsistently with Article 3.1 and 4.1 of the AD Agreement by failing to exclude related producers from the domestic industry."

44. Article 4.1. of the GATT-ADA is extracted as below:

> "*4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:*
>
> *(i) when producers are related[11] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;"*

45. The view of the WTO panel is also that there is nothing in Article 4.1 of the GATT-ADA that limits the discretion of the investigating authorities to exclude or not the related or importing domestic producers. The said view of the WTO panel was formed after taking into consideration the arguments of the European Union that such discretion exists and the counter argument of People's Republic of China that such discretion would not be available within the meaning of 'domestic industry'.

46. Although it is the stand of Ms. Madhavi Divan, learned senior counsel that the interpretation of Article 4.1 of the GATT-ADA by the WTO panel had also been adopted in bringing in the amendment by the notification dated 01.12.2011, but it may not be acceptable as such that the interpretation of the WTO panel had been adopted in the definition of domestic industry as per the notification dated 01.12.2011. The language of Article 4.1(i) of the GATT-ADA provides that "when producers are related to the exporters or importers or are

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themselves importers of the alleged dumped article, the term "domestic industry" may be interpreted as referring to the rest of the producers" (footnote deleted, emphasis added)." We notice that as per Article 4.1(i) the producers who are related to the exporters or the importers or are themselves importers of the alleged dumped article may be interpreted as referring to the rest of the producers. In other words, the correlation is governed by the expression 'may', which itself is an indication of it being a matter of discretion. But in the meaning of the expression 'domestic industry' in the notification dated 01.12.2011 the expression 'may' is absent to govern the correlation, and from such point of view, it may not be acceptable that the same interpretation as given to Article 401 would also have to be accepted in respect of the meaning of 'domestic industry' as per notification dated 01.12.2011.

47. But at the same time, we also notice that in the definition of 'domestic industry' as it originally stood, the correlation was governed by the word 'shall', creating a legal fiction to exclude the producers who are related to the exporters or the importers or are themselves importers of the alleged dumped article. But the amended definition as per notification dated 05.07.1999 replaced the word 'shall' with the word 'may' by giving it a meaning that the earlier exclusion stood withdrawn.

48. The further amendment by the notification dated 27.02.2010 by introduction of the word 'only' again brings back the exclusion and the discretion introduced by the word 'may' in the earlier definition stood withdrawn. But the subsequent amendment by the notification dated 01.12.2011 by omitting the word 'only' again gives the effect of the exclusion being withdrawn, meaning thereby the reintroduction of discretion.

49. From the said point of view, i.e. taking note of the effects of the

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successive amendments, it cannot be said that stand of Ms. Madhavi Divan, learned senior counsel that the interpretation given by the WTO Panel to Article 4.1 of the GATT-ADA was adopted in bringing in the amendment by the notification dated 01.12.2011 to be wholly unacceptable.

50. One of the concepts of interpreting a statute or an amendment thereof is to arrive at the intention of the legislature in bringing in such statute or amendment to the statute. In page-12 footnote 48 of the "Principles of Statutory Interpretation" by Justice G P Singh a school of thought that the traditional methodology of interpreting a statute with reference to 'intention of the legislature' should now be replaced by a new methodology of 'attribution of purpose' is provided. The footnote 48 at page-12 is extracted as below:

> "*There is a school of thought that the traditional methodology of interpreting a statute with reference to 'intention of the Legislature' should now, be replaced by a new methodology of 'attribution of purpose'. The following extract from an article in (1970) 33 Modern Law Review, pp. 199, 200 by HARRY BLOOM, explains the new idea: 'In time however, somebody will have to tackle the basic question how long can we sustain the fiction that when the Legislature prescribes for a problem, it provides a complete set of answers; and that the court, when confronted with a difficult stature merely uses the techniques of construction to wring an innate meaning out of the words. Professor HART and SACHS of Harvard University have expressed ideas on this which seem to be highly attractive. They argue that interpretation should not be regarded as a search for the purpose of the Legislature or even for the purpose of the statute, but as one of 'attribution of purpose'. The Court, by asking 'what purpose do we attribute to the statute?' allows an inquiry into how best the statute can be interpreted and applied, or related to other legislation. What this means is explained by PROFESSOR ROBERT E. KEETON, also of Harvard, in the book 'Venturing to do justice': I do not understand HART and SACKS to imply that the purpose to be attributed to the statute need be one that was or even could have been consciously formulated at the time the statute was enacted. I understand them to choose this formulation for the very reason that they wish to free the court from the handicaps of dealing with the fiction that*

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> *the statute contains within it an answer to every question that might arise in its application'. This theory known as the 'Legal Process Theory' is discussed by WILLIAM N ESKRIDGE, JR.,in Chapter V of 'Dynamic Statutory Interpretation' (First Indian Reprint, 2000) and is said to be 'the first systematically developed American theory of Dynamic Statutory Interpretation' (p.143)."*

51. As formulated in the aforesaid propositions, it also allows the Court to make an enquiry into how best the statute can be interpreted and applied by asking '*what purpose we do attribute to the statute*?' in order to arrive at the intention of the legislature. In the instant case it is already taken note that the definition of 'domestic industry' in Rule 2(b) of the ADR 1995 had been amended thrice over the original provision. The original definition of' domestic industry' under Rule 2(b) of the ADR 1995 provided for an exclusion of the producers related to the exporters or importers of the dumped article or the importers themselves, whereas the first amendment by the notification dated 15.07.1999 had withdrawn the exclusion by providing some discretion to the authorities to include such producers. Again the amendment brought in by the notification dated 27.02.2010 brought in the exclusion of such producers from the purview of being included in the meaning of 'domestic industry', but the later notification of 01.12.2011 by removing the word 'only' again withdraws the exclusion and brings back some kind of discretion to include such producers in the meaning of 'domestic industry' by having the effect of withdrawing the exclusion. From the sequence of such amendments and its effect, it is discernable that a purpose can be attributed to the successive amendments to arrive at that the intention of the legislature is to bring back the inclusion of the exporters or importers of the dumped article or the producers related to the importers themselves within the meaning of 'domestic industry' by providing some discretion to the authorities for the purpose.

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52. Although it is the submission of the learned senior counsel Dr. Ashok Saraf that the removal of the word 'only' by the notification dated 01.12.2011 would have to be construed to be a superfluous word being removed, but a word can be understood to be superfluous only when inclusion thereof may lead to an absurdity or anomaly or unless material — intrinsic or external—is available to permit it to be considered to be superfluous. In this respect reference is made to the proposition laid down by the Supreme Court in paragraph 7 of Harbhan Singh vs. Press Council of India reported in (2002) 3 SCC 722, which is extracted as below:

> "*The legislature does not waste its words. Ordinary, grammatical and full meaning is to be assigned to the words used while interpreting a provision to honour the rule —the legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material — intrinsic or external — is available to permit a departure from the rule.*"

53. In the instant case it cannot be understood that inclusion of the word 'only' in the definition of 'domestic industry' as per the notification dated 27.02.2010 had led to an *absurdity or anomaly or unless material — intrinsic or external — is available to* consider it to be superfluous. The word 'only' gave a definite meaning to exclude the producers related to the exporters or importers of the dumped article or the importers themselves from the purview of 'domestic industry'. A removal of the word 'only' by the amendment contained in the notification dated 01.12.2011 would therefore have to be construed that such removal had withdrawn the effect of exclusion of such producers and therefore, it cannot be understood that a superfluous word had been removed.

54. In view of the above, it is the considered view of the Court that the amendment brought in to the definition of 'domestic industry' by the notification

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dated 01.12.2011 in Rule 2(b) of the ADR 1995 do bring in a discretion upon the authorities to include the producers related to the exporters or importers of the dumped article or the importers themselves in the concept of 'domestic industry'. But again because of the nature and implications of the successive amendments, we have to understand that such discretion may not be an absolute discretion but would be a circumstantial discretion to be determined on case to case basis.

WHETHER NON INJURIOUS PRICE IS TO BE DETERMINED IN TERMS OF INR OR USD:

55. To substantiate the contention that the non-injurious price would have to be determined in terms of INR and not USD, Dr. Ashok Saraf, learned senior counsel for the review petitioner refers to the provisions of clause 2.4.1 of Article VI of the GATT-ADA and submits that whenever any comparison requires a conversion of currencies such conversion should be made using the rate of exchange on the date of the sale or the transaction. Accordingly, in the instant case for determining the non-injurious price, if there is a requirement of conversion of currency, the same accordingly would have to be on the basis of the rate of exchange when the transaction involving the non-injurious price would be undertaken and not on the basis of the rate of exchange as prevailed when the non-injurious price was determined.

56. Clause 2.4.1 of Article VI of the GATT-ADA is extracted below:-

> "*2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow*

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exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation."

57. It is the further submission of Dr. A Saraf, learned senior counsel that Rule 17 (1) of the ADR 1995 provides for determination of non-injurious price and Annexure-III thereof provides for the procedure and principles to be adopted for determining the non-injurious price. As all the parameters to be taken into consideration for determining the non-injurious price as per the procedure and principles provided in Annexure-III to the ADR 1995 is in terms of INR, therefore, the determination thereof would also have to be in terms of INR.

58. Ms. Madhavi Divan, learned senior counsel for the respondents in the Union of India raises the counter contention that the authorities follow the principle of lesser duty rule between the margin of dumping and margin of injury and that the ADD cannot exceed the margin of dumping. As the principle of lesser duty rule is followed the margin of dumping is also a relevant factor that is taken into consideration. By referring to the principle that the lesser duty rule is followed and where the margin of dumping in relation to an article means the difference between its export price and its normal value where export price in relation to an article means the price of the article exported from the exporting country or territory or where the export price is unreliable the compensatory arrangement between the exporter and the importer of a third party and where normal value in relation to an article means the comparable representative price of the like article when exported from the exporting country or territory or the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general cost, and for profits, it is the submission that as all the input elements for determining the export price and the normal value are in terms of USD, therefore even the non-

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injurious price be determined in terms of the USD.

59. The concept of non-injurious price is with reference to Rule 17(1)(b) of the ADR 1995 which provides for the designated authority to submit a final finding to the Central Government recommending the amount of duty, which, if levied, would remove the injuries where applicable to the domestic industry. As the non-injurious price would be directly relatable to the ADD that may be levied and the ADD not to exceed the margin of dumping where margin of dumping is the difference between export price and its normal price and where both export price and normal value are ordinarily in terms of USD, therefore, it cannot be but accepted that for the purpose for which the non-injurious price is determined the same would have to be in terms of USD. From the said point of view, we are in agreement with Ms. Madhavi Divan learned senior counsel for the Union of India.

60. But on a reading of the provisions of Section 9 A(5) of the Act of 1975 which provides that the ADD which may be imposed, unless revoked earlier, shall cease to have its effect on the expiry of 5 years from the date of such imposition, conjointly with the provisions of 9A(1) which provides for imposition of ADD in the event an article is imported to India at a value less than its normal value in the exporting country, makes it discernible that an ADD if levied and not revoked earlier would have its effect for a period of five years. In other words, there may not be any change in the determination of the ADD to be levied for a period of five years and in such event it is immaterial that the non-injurious price had been determined in terms of USD, inasmuch as, there would be no requirement for any successive determination of the ADD which may require the non-injurious price to be as per the rate of exchange that may prevail as on such successive determinations.

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61. But again Section 9A(6) of the Act of 1975 provides that the margin of dumping referred under Sub-Sections 1 or 2 of Section 9A shall, from time to time, be ascertained and determined by the Central Government after such enquiry as it may consider necessary. If the Central Government considers it necessary to ascertain and determine the margin of dumping from time to time, and the levy of ADD is relatable to such determination of the margin of dumping, any such succeeding levy of the ADD pursuant to such ascertaining and determination of the margin of dumping by the Central Government from time to time, would have to be examined from the point of view as to whether the non-injurious price once determined in terms of USD would be continued to be relied upon even for such succeeding levy of ADD.

62. As already noticed, the principles for determination of the non injurious price is provided in Annexure-III pertaining to Rule 17(1) of the ADR 1995. Clause-1 of Annexure-III provides that the designated authority is required to recommend the amount of ADD which if levied would remove the injury where applicable to the domestic industry. Clause-2 provides that for the purpose of making the recommendation the designated authority shall determine the fair selling notional price or non-injurious price of the like domestic product by taking into account the principles specified thereunder. Clause-3 provides that the non-injurious price is required to be determined by considering the information or data relating to the cost of production for the period of investigation in respect of the producers constituting the domestic industries and that detail analysis or examination and reconciliation of the financial and cost records maintained by the constituents of the domestic industry are to be carried out for the purpose. Clause-4 provides for the elements of cost of production that are required to be examined for working out the non injurious

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price, which includes:

(i) The best utilization of raw materials by the constituents of the domestic industry over the past three year period and the period of investigation to nullify any injuries if caused by inefficient utilization of raw materials.

(ii) The best utilization of utilities by the constituents of the domestic industry for the same period to nullify any injury if caused by inefficient utilization of utilities.

(iii) The best utilization of production capacities by the constituents of the domestic industry for the same period to nullify any injury if caused by inefficient utilization of production capacities.

(iv) The propriety of all expenses grouped and charged to the cost of production may be examined and any extra ordinary or non recurring expenses shall not be charged to the cost of production and the salary and wages paid to the employees may also be reviewed and reconciled with the financial and cost records of the company.

(v) To ensure the reasonableness of the amount of depreciation charged to the cost of production, it may be examined that the facilities not deployed for production of the subject goods be identified and excluded.

(vi) The expenses identified to be directly allocated and common expenses or overheads may be examined and scrutinized by comparing with the corresponding amounts in the immediate preceding year.

(vii) The following expenses shall not be considered while assessing

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non injurious price.

(a) Research and Development unless it is product specific research.

(b) Since non injurious price is determined ex-factory level post manufacturing expenses such as commissions, discounts, price etc.

(c) Excise duties, sales tax and other levies.

(d) Expenses on job works done for other units.

(e) Royalty unless related to the technical no how for the products.

(f) Trading activity of the product.

(g) Other non cost items like bad debts, donations, loss on sale of assets, loss due to fire, flood etc.

(viii) A reasonable return on average capital employee for the product may be allowed for recovery of interest, corporate tax and profit.

(ix) Reasonableness of interest cost may be examined to ensure that no abnormal expenditure on account of interest has been incurred.

(x) In case of more than one domestic producer, the weighted averages of non injurious price of individual domestic producers are to be considered.

63. A look at the principles for determination of the non-injurious price makes it discernible that the input parameters for determining the non injurious price in

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respect of the domestic producers are all calculated and maintained in INR. The output of such exercise by taking into account the input parameters resulting in the non injurious price would therefore also have to be in terms of INR. Once the non injurious price upon undertaking the aforesaid exercise is arrived at, and the same is in INR, whenever the authorities are required to utilize the non injurious price arrived at for the purpose of determining the margin of dumping as well as to arrive at the ADD to be levied, the same can always be done by converting the determination made in INR to USD or the basis of the prevailing rate of exchange. Such methods would take care of the apprehension of the respondents that as all other parameters required to be taken into consideration for arriving at the ADD are in terms of USD, therefore, the non injurious price to be determined would also have to be determined in terms of USD.

64. If the contrary is accepted that as all other parameters are required to be taken into consideration for arriving at the ADD are in terms of USD, therefore, non injurious price would also have to be determined in terms of USD, the purpose of having the non injurious price as one of the parameters for determining the ADD may be served, but it may not be the appropriate and correct reflection of the non-injurious price.

If the non-injurious price is determined in terms of USD and is used as a parameter for determining the ADD at any time during the next five years, the variations in the exchange rate that may take place during the intervening five years may bring about a change in the non-injurious price in its absolute value in terms of INR.

65. If due to the change in exchange rate, there is also a corresponding change in the absolute value of the non injurious price in terms of INR as because it had been determined in terms of USD, and the determination of the non-

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injurious price is based upon input parameters which are in terms of INR as per the principles provided in Annexure-III to the ADR 1995, any such change in the absolute value of the non-injurious price in terms of INR due to change in the exchange rate, would also have the effect of a deemed change in the input parameters for determining the non-injurious price. In other words, a legal fiction of a deemed change would take place in the input parameters but in reality, there would be no such change in the input parameters. Such a situation would also have to be understood to be inconsistent with the principles for determination of the non-injurious price as provided in Annexure-III to the ADR 1995.

66. Considering the aspect in its entirety, it would be more appropriate to have the non-injurious price determined in terms of INR by following the procedure and principles for determination provided in Annexure-III to the ADR 1995 and thereupon convert it to USD by applying the rate of exchange prevailing on the date when the non-injurious price so determined is required to be acted upon by the authorities for arriving at the ADD that may be levied. Such a procedure adopted would also be consistent with the provisions of Article 2.4.1 of the GATT-ADA which had already been referred hereinabove.

67. As no other grounds had been urged upon in the review petition at the time of hearing, we are not going into any other ground that may have been taken in the review petition as well as the counter reply which had also been provided by the respondents through their affidavits. Accordingly, the discussions and conclusions arrived at in paragraphs 149 to 163 in respect of the concept ‘domestic industry’ as defined in Rule 2(b) of the ADR 1995 and in paragraphs 164 and 165 in respect of whether the determination of non-injurious price be made in terms of USD, in the judgment and order dated 26.08.2019 in WP(C)

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No. 6568/2017 stands recalled and modified in the manner as provided hereinabove. The other aspects of the judgment and order dated 26.08.2019 in WP(C) No. 6568/2017 remains in the same terms as it exists in the said judgment.

The review petition No. 09/2020 is given a final consideration as indicated above.

JUDGE

Comparing Assistant

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