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INDIAN ANTI-DUMPING LAW | INDUCTION OF ANTI-ABSORPTION REVIEWS

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Introduction

The Customs Tariff Act, 1975 (Act) was amended vide the Budget 2021 for the introduction of anti-absorption provisions with respect to anti-dumping (AD) and anti-subsidy (CVD) duties by inserting Section 9A (1B) and Section 9 (1B) respectively into the Act. The Ministry of Finance (MoF) on 27 October 2021 notified rules and procedures for Anti-Absorption Reviews by amending 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 the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 (CVD Rules) vide Notification No 84/2021-Customs (NT) and Notification No 83/2021-Customs (NT) respectively.

Absorption of Trade Remedial Duties and Anti-Absorption Provisions

AD / CVD duties are generally imposed for a period of 5 years from the date of imposition unless revoked earlier. However, often, despite the imposition of AD / CVD duties, the price of the imported goods in the domestic market does not increase and the impact of the AD / CVD duty is 'absorbed' by the exporters or importers, thereby rendering the protection afforded to the domestic industry redundant. By the introduction of aforesaid amendments into the Act and the AD Rules and CVD Rules, 'absorption' actions by exporters and importers are sought to be remedied.

Salient Provisions

Rule 29 reinforces the provision of the Act under sub-section (9A)(1B) and stipulates that an AD duty imposed under Section 9A of the Act is considered to be 'absorbed' when the export price of an article from the exporting country or countries, decreases *post imposition of the anti-dumping duty without any commensurate change in*:

i. cost of production of such article; or

ii. export prices of such to countries other than India; or

iii. resale price of such article in India.

Similarly, with respect to CVD, a CVD duty may be considered to be 'absorbed' *only* where the export price of an article from the exporting country or countries decreases post imposition of the CVD duty without any significant change in the resale price of such article in India.

An application for an anti-absorption investigation can be filed by the domestic industry or any other interested party, within 2 years from the date of imposition of definitive AD or CVD duty. The Designated Authority (DA) also has the discretion to accept such an application after the expiry of 2 years in special circumstances. However, no such application can be accepted in cases where less than 12 months are remaining for the duty to expire.

The said application must contain 'sufficient evidence' as regards the existence of circumstances considered as absorption of duties to justify initiation.

The DA can recommend provisional assessment of the imports alleged to be absorbing the duty in force, pursuant to which the MoF may notify provisional assessment and also demand a guarantee from the importer.

The rules prescribed for the conduct of original and review investigations under the AD and the CVD Rules are also made applicable to anti-absorption reviews. The DA must conclude the investigation within 6 months from the date of initiation, which is extendable by an additional 3 months by the MoF in special circumstances.

Impact of Anti-absorption Reviews

Upon determination that absorption of anti-dumping duty exists, the DA may recommend modification of the form or basis of the anti-dumping duty, or the quantum of anti-dumping duty, or both and such modification will generally be applicable from the date of the notification by the MoF. However, the DA may recommend retrospective modification from the date of initiation of the anti-absorption review.

The determinations of the DA are recommendatory, the MoF will ultimately decide whether or not to enforce the anti-absorption measures recommended by the DA. However, unlike the limitation of 3 months applicable to imposition of original and review investigations, there is no time limit prescribed for the MoF to accept and apply the recommendation of the DA.

Relevant Considerations

The legal threshold under the review provisions requires the establishment of absorption and that the existing duty is rendered or may be rendered ineffective. Therefore, the DA will have to include a detailed determination on the ineffectiveness of the duty. This exercise may likely require some or all of the injury parameters to be re-examined or even new factors or econometric parameters being considered by the DA.

The manner in which the period of investigation for determination of absorption is affixed will also be an important aspect of the investigation. Given that the anti-absorption review will be limited to re-computation of dumping and injury margin as the existence of injury and a causal link has already been determined in the original investigation, as an outcome of the review, the DA may apply the reassessed dumping margin and injury margin and make appropriate changes in previously determined rates on an exporter-wide and/or country-wide basis, making participation critical for all interested parties. The DGTR is likely to issue a detailed questionnaire format which may clarify the evidentiary requirements and shed light on the procedural aspects in such reviews.

Comments

Overall, the induction of anti-absorption provisions will strengthen the trade remedial regime and provide an additional avenue to ensure a level playing field to the domestic industry to ensure that absorption does not render the imposition of duties redundant. The provisions will be more effective in countering absorption than relying upon a change in circumstances under mid-term reviews. It will be even more important for exporters and importers to participate in the absorption reviews so as to ensure avoidance of any negative effects on supply chains and continue benefits of individual margins to their exports.

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